

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Thursday, June 16, 2011  
9:00 a.m. – 12:30 p.m.  
North Sister Room  
Seventh Mountain Resort  
Bend, Oregon 97301

**AGENDA**

1. **Action Item:** Approval of the Minutes of PDSC's May 5, 2011 Meeting (*Attachment 1*) Barnes Ellis
2. Presentations on Public Defense Delivery In Deschutes County (*Attachment 2*) Invited guests and others
3. **Action Item:** Approval of Service Delivery Plan for Lincoln County (*Attachment 3*) Barnes Ellis  
Commissioners
4. PDSC 2011-13 Budget Update (*Handout*) Ingrid Swenson  
Kathryn Aylward
5. Contractor Recommendations for PDSC Contracting Priorities (*Attachment 4*) Contractor representatives  
Lane Borg, Gordon Mallon
6. OPDS Monthly Report OPDS management team
7. **Executive Session\*** PDSC Initial Review of 2012-13 Contract Proposals Commissioners  
OPDS Staff
8. **Action Item:** Approval of Priorities for Statewide Contracting Plan for Contracts Beginning 1/1/12 Barnes Ellis

9. **Executive Session\*\***: Review of  
Executive Director Candidates and  
Selection Process

Commissioners

***Please note: Lunch will be provided for Commission members at 12:00 p.m.***

***\*The Executive Session will be held at approximately 10:30 a.m. pursuant to ORS 192.660 (2)(f).***

***\*\*The Executive Session will be held at approximately 11:30 a.m. pursuant to ORS 192.660(2)(a).***

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

***(503) 378-3349.***

***Next meeting: The next meeting of the Commission is scheduled for July 28, 2011 from 10am to 2pm at the OPDS Office in Salem.***

# Attachment 1

# PUBLIC DEFENSE SERVICES COMMISSION

## OFFICIAL MINUTES

Thursday, May 5, 2011  
10:00 a.m. to 2:00 p.m.  
Office of Public Defense Services  
1175 Court St., NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Janet Stevens (by phone)  
Honorable Elizabeth Welch

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

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The meeting was called to order at 10:05 a.m.

### **Agenda Item No. 2**

### **Commission Discussion of Service Delivery Plan for Lincoln County**

Ingrid Swenson noted some corrections to the Lincoln County report provided to Commissioners for the May 5, 2011 meeting.

Guy Greco reported that he had completed the attorney performance review that had been undertaken before the Commission's March 2011 meeting in Lincoln County. He said that he had met with all of the judges and discussed the information that they provided and identified three attorneys in the consortium about whom concerns had been expressed. He had observed a significant change in the judges' willingness to bring performance issues to his attention. Judges were now informing him about attorney performance in individual trials. He said that in the future the attorney who appears at arraignment will not necessarily be the attorney to whom the case is assigned. Cases will now be assigned based on the qualifications of the particular attorney. There are two or three attorneys who should not be handling Measure 11 cases. Even without these attorneys, however, there is a sufficient number of qualified lawyers to handle the Measure 11 caseload. He said that in response to PDSC's next request for proposals the current group of providers would organize as a non-profit corporation that would have written agreements with each lawyer who would be accepting cases under the contract, and that it would not be contracting with the firms. The corporation would be governed by a board with two outside directors appointed by the Lincoln County Bar Association. The board would have the authority to terminate its agreement with any attorney, even if the attorney were an associate in a law firm. The Administrator would be able to monitor the caseload of each participating attorney. The agreement would not prohibit a law firm associate who handled public defense cases from leaving the law firm. The consortium administrator would oversee training, supervision, mentoring and

monitoring of the attorneys, including those employed by law firms. Although he could not control the amount of compensation paid to an associate he could control the number and type of public defense cases assigned to that attorney.

Chair Ellis said he was looking for a way to work with the local legal community. There needs to be a structure. There is a problem in a consortium that includes law firm members when the firm partners do not participate in the work. From the testimony provided in March, it did not appear that either the consortium or its members were providing training, mentoring or quality review. He said that it appeared that now there was an effort to address these needs. He said that one possible model for Lincoln County would include both a consortium and a public defender office. He asked whether there had been any discussion of a public defender office. Guy Greco responded that monthly lunch meetings had been instituted and would be mandatory in the future. None of the attorneys with whom he spoke expressed an interest in being part of a public defender office because they all preferred to be able to accept private cases. If PDSC wanted to create a public defender office it would have to recruit lawyers from outside the area.

Chair Ellis asked how Mr. Greco recommended the commission proceed. Mr. Greco said that the Commission could refuse to fund the associates. He said "Salem" used to determine who received cases. That has changed and PDSC now wants the provider to be doing this. He said that the consortium would make the changes that PDSC required it to make. Compliance might demand a lot of the administrator's time. He said that if PDSC didn't want the firms to participate in the consortium it could prohibit them from doing so. Commissioner Potter asked whether the board of the non-profit would hire and fire the administrator. Guy Greco said that that is what is provided in the bylaws. The non-profit will be incorporated by the time it responds to the RFP. There are some tax issues that need to be resolved relating to whether the administrator is an employee and whether the group's retained earnings are taxable income. Ingrid Swenson asked if it wouldn't address the Commission's concerns if the consortium were to contract directly with individual attorneys rather than with law firms, so that even though associates in law firms might be handling public defense cases, it would be the consortium, rather than the firm, that selected attorney members, assigned cases and oversaw the quality of representation. Chair Ellis asked whether the consortium's contract would be with the individual attorneys rather than with the law firm. Mr. Greco said that was correct and the consortium board would have to approve the addition of any new lawyers.

Chair Ellis said that the formation of a public defender office would not be an easy thing to do. It took a lot of effort in Marion County and the Chief Justice had been instrumental in recruiting the initial board of directors there. He said the Commission was not anxious to rush down that track but PDSC could go that direction in the future if needed. Guy Greco said that a public defender model could work in the future but that current providers value their freedom to engage in private practice. He said there would be changes in the operation of the consortium because there would be an administrator overseeing the attorneys' work.

Chair Ellis said he was encouraged by what the consortium was doing and that it had made a good faith effort to respond to the Commission's concerns. Guy Greco said that in addition to the changes already described he was creating a trial form to gather information about the cases tried and those pled and the outcomes so that he would have information in addition to the impressions of the trial judges about the work of the lawyers.

Commissioner Potter said that he applauded the consortium for initiating changes and advised Mr. Greco of the June 16, 2011 RFP response date. Commissioner Welch said that she was pleased with the changes that were being implemented. Chair Ellis said that assuming the consortium was the successful bidder for the public defense contract in Lincoln County for the period beginning January 1, 2012, the Commission should review the performance of the reorganized group in

approximately one year. A draft service delivery plan for the county will be considered at the June 2011 meeting.

**Agenda Item No. 1**

**Approval of the Minutes of PDSC's March 9, 2011 Meeting**

**MOTION:** John Potter moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 4-0.**

**Agenda Item No. 3**

**PDSC Budget Presentation Report**

Ingrid Swenson summarized the opening remarks made by the Chief Justice and the agency's presentation on its budget proposal at the public hearing before the Public Safety Subcommittee of the Joint Ways and Means Committee on March 30, 2011. Included in the presentation was an outline of three funding options for the legislature: to fund the agency at its current service level, to take legislative action to reduce the number and seriousness of the cases in which there is a right to court appointed counsel, or to fund at less than the current service level which could result in the agency having to cease providing representation at some date prior to the end of the biennium.

Kathryn Aylward reviewed the written materials provided to legislators about the agency's budget proposal and noted that there was a \$32 million difference between the amount included in the Governor's Recommended budget and PDSC's expected expenditures for the next biennium. The committee received a document showing caseload changes over the years. She said that she is trying to move away from expressing the agency's budgetary needs in terms of caseload and prefers to talk about case expenditures since the cost per case can increase even if the caseload declines. A breakdown of costs for death penalty cases, compared to other cases was also provided to legislators.

Chair Ellis said that the atmosphere at the hearing was very cordial, although the budget shortfall was clearly on members' minds.

With respect to the 2009-11 budget, Kathryn Aylward advised Commissioners that 2009 court fee bill (HB 2287) was scheduled to sunset on July 1 so that the legislature would need to make a special appropriation to PDSC of its portion of the revenue from court fees that had been collected but not yet credited to PDSC's account as of July 1. With respect to the agency's budget request for 2011-13 no decision on the final appropriation has been made yet. There will probably be reductions in the agency's mandated caseload adjustment and, as with other agencies, no increase for inflation. PDSC is unlikely to take the cut that other agencies are taking in services and supplies since most of PDSC's funding is expended for services and supplies. There may also be a fund sweep of Application and Contribution Program funds. Some of the criminal measures under consideration could result in reductions to PDSC's costs. PDSC's contractors would be affected by those kinds of reductions since there would be fewer cases. Greg Hazarabedian said that he would rather have fewer, reasonably well paid attorneys than more attorneys who weren't well paid. Kathryn Aylward said that the current plan is to allocate 54% of each agency's biennial budget for use in the first year in the hope that funding can be increased in the second year. If that doesn't occur, however, agencies will have to take bigger cuts in the second year. The result will be similar to what happened to Executive Branch agencies this biennium with the allotment cuts imposed during the second year of the biennium. PDSC tends to conserve resources in the first year of the biennium until the outlook for the full biennium is known.

Steve Gorham inquired whether there would be a repetition of the BRAC approach imposed in 2003 to reduce public defense costs. Chair Ellis said that he had not heard that the Judicial Department was considering such an approach. Ingrid Swenson said that the Commission had previously decided that it would follow a

different path and would expend available funds until they were exhausted instead of prioritizing some cases over others. The Commission's plan would probably provide for advising the court that it would be unable to pay for representation in future cases when all of its remaining resources were needed to pay for completion of cases in which counsel had already been appointed.

Kathryn Aylward said that the Governor's Recommended Budget for PDSC was \$32 million less than was needed but that there were some adjustments to the agency's request budget that could be made, leaving a shortage of \$23 or 24 million. Ingrid Swenson said that in addition an amount corresponding to the \$12 million received from the court fee bill in 2009-11 might also be forthcoming. This was an amount that was not accounted for in the Governor's Recommended Budget.

#### **Agenda Item No. 4**

#### **PDSC Review and Approval of Request for Proposals**

Kathryn Aylward presented a draft request for proposals for Commission review. She said that it was probably time to review and revise the entire document. In the meantime, however, some changes are being proposed for this contract cycle. Contract applicants will be required to submit their applications electronically and will have to agree to accept payments under the contract by direct deposit. She said that the draft document included reference to the one-week notice of intent to award a contract. Chair Ellis inquired what action could be taken by an unsuccessful applicant at that point. Kathryn Aylward said that the list of contracts recommended for Commission approval would be released one week in advance and an unsuccessful applicant would have an opportunity to persuade the Commission that its proposal should be approved. She said that in accordance with the Commission's direction, successful contractors would be required to have a board of directors or have appropriate alternative systems in place. Contractors will also be required to respond to surveys initiated by OPDS and to verify compliance with CLE requirements in their contracts. She said the RFP for mitigation specialists was the same as last year's.

Chair Ellis inquired whether law firms would be required to have boards of directors and Ingrid Swenson said that they would probably all choose to have alternative systems in place. Chair Ellis asked whether there shouldn't be an alternative dispute resolution provision in the event of a contract dispute. He recommended that Kathryn Aylward and Paul Levy explore the addition of such a provision. He then proposed adding a clause to agency contracts that would provide that when conflicts were not discovered in a timely way only one credit would be awarded for the case. Kathryn Aylward said that the conflict issue had been dealt with in past contracts and that the agency had calculated the "fallout rate" and had paid contractors for fewer than all of the case credits they reported to account for conflicts. Later, case credits were given for all cases but at a discounted rate. Greg Hazarabedian reminded Commissioners of the report on conflicts prepared by Ann Christian in 2004 or 2005. Chair Ellis inquired about the indemnification clause in the model contract. Kathryn Aylward said that the clause might have come from a Department of Justice model contract. Chair Ellis said he would like it removed from the contract unless it appears in the Department of Justice model. He also recommended removal of the provision requiring PDSC to make legislative efforts if funding fell short of the amount needed to meet contractual obligations. Greg Hazarabedian said that provisions such as this one may have been added to reassure contractors in the early days of this model contract. Commissioner Potter said that he agreed with the chair that whether required to do so or not the Commission would probably seek additional funds if they were needed but he has no strong feelings on the issue. Commissioner Stevens agreed that the provision could be removed. Chair Ellis said that on the whole he was impressed with the quality of the material and the level of professional competence in the documents.

Commissioner Potter recommended several editorial changes that were approved by other Commissioners.

Ingrid Swenson asked whether an alternative dispute resolution requirement should be added. Commissioner Welch said she was concerned that such a requirement would have a fiscal impact on the parties to the litigation. She asked what an acceptable form of alternative dispute resolution would be.

Paul Levy said that staff had not conducted a thorough review of the model contract but were aware that there were a number of terms and provisions that needed reviewed and he recommended that a major update be scheduled. He noted, however, that the RFP for this contract cycle needed to be issued within the next several days.

Chair Ellis proposed that an alternative dispute resolution provision be considered for future contracts but that the indemnification clause be removed from this contract unless it is found to be a standard clause in all state contracts.

**MOTION:** Honorable Elizabeth Welch moved to approve the documents presented with the changes that had been agreed upon. Commissioner Potter seconded the motion.

**VOTE:** Without objection, the motion carried: **4-0.**

Kathryn Aylward said that she hoped to issue the RFP on May 6. The deadline for responses is June 13 and she and the contract analysts intend to meet on June 14 – 16 to review all of the responses and will be prepared to inform the Commission at its June 16 meeting of issues on which Commission input will be required. At the July meeting a statewide contracting plan will be presented and additional direction from the Commission will be provided. It is hoped that final contract approvals can be obtained in September.

## **Agenda Item No. 5**

### **OPDS Monthly Report**

Ingrid Swenson reported on House Bill 3104 that would reduce the crime seriousness level of some controlled substance offenses and could reduce public defense costs. She said that the bill had been narrowed so that potential savings had been reduced. She said there was also a legislative proposal that would reduce some non-person misdemeanors to violations, eliminating the requirement for appointed counsel and potentially saving public defense funds.

[Recess]

Kathryn Aylward reported on the presentation that she and Chair Ellis had made to the Senate Judiciary Committee on the number and cost of death penalty cases.

[Commissioner Steven rejoined the meeting by telephone.]

Regarding a series of proposals for amending the death penalty statutes, she said she had advised the legislature that there could be savings of \$5 to \$10 million to public defense.

Chair Ellis said that the information he provided to the committee came from three hearings held by PDSC relating to the remarkable differences between Washington and Oregon in the number of death penalty cases and the stage at which cases are settled. He said that if the timing of the decision on the death penalty could be changed in Oregon to allow mitigation evidence to be presented before a decision was made by the state about seeking a death sentence, much of the expense could be avoided.

Ingrid Swenson said that one bill came out of the committee, SB 369A, that would require the district attorney to file a notice of intent to seek the death penalty and

would create a death penalty review panel for cases on appeal and in post conviction proceedings in which a death sentence had been imposed. The bill had been sent to the Ways and Means Committee in light of possible savings to public defense.

Ingrid Swenson reported that there had been a joint meeting of the Contractor Advisory Group and the Quality Assurance Task Force on April 26. Topics of discussion were the new board requirement, the commission's role in the review and approval of contracts, the review of investigator billings, transitioning to paperless processes, and the Criminal Justice Commission's Measure 11 report. She said that as a result of the discussion of investigator billing, PDSC would begin requiring investigators to provide attorneys with copies of their billings. Regarding the Measure 11 report she said that the group had reviewed a law review article on the results of a similar study in Colorado which tentatively concluded that at least one explanation for the fact that defendants with retained attorneys had better outcomes was that marginally indigent defendants retained counsel in cases where the charges were serious and where either they were innocent or the state's case was weak. In other words, they found that public defenders had less defensible cases and defendants were self-selecting for guilt. With regard to the Oregon study, after reviewing additional data, the Criminal Justice Commission reported that Measure 11 defendants with public defense attorneys were convicted of Measure 11 offenses 45% of the time; those who were eligible for public defense lawyers but who nevertheless had retained counsel were convicted of Measure 11 offenses 37% of the time; and those with private attorneys were convicted of Measure 11 offenses 28% of the time. Those with more resources had better outcomes. Chair Ellis said that if the explanation is, "In our system he with the resources gets off," that is a bad outcome. Ingrid Swenson said that provision of appointed counsel does not necessarily address all the inherent inequities between privileged and unprivileged people. Kathryn Aylward said that the OPDS contract analysts had looked up individual cases and found some anomalies and that was why the Criminal Justice Commission was asked to compare outcomes in all cases, including those in which defendants eligible for court appointed representation had nevertheless retained counsel.

Peter Gartlan said that the Appellate Division had been involved in five recent Supreme Court arguments in cases raising important legal questions relating to mental states, character evidence, the scope of appellate review in guilty plea cases, and jury instructions regarding natural and probable consequences. The division's legislative proposal addressing the "mailbox rule" is progressing through the legislative process. He said that the juvenile appellate unit had been working with the legislature and continued to help shape Oregon law through its work on dependency cases in the Court of Appeals. Appellate Division briefs are now being made available to the trial bar. The division's spring CLE event is planned for May 26.

Paul Levy described the diversity seminar sponsored by OPDS and noted the presentations made by the keynote speaker, by ex-convict Dave Dahl of Dave's Killer Bread, by two Iraq/Afghanistan war veterans and by an immigrant from Vietnam. Peter Gartlan said that the veterans' presentation was particularly interesting because after being trained to kill combat veterans can be potential time bombs in the community when confronted. They recommended that law enforcement officers be trained to deal with returning veterans.

Paul Levy summarized the commission's previous reviews of representation in post conviction relief cases and said that OPDS would be doing a review of the work of the special PCR attorney group and of other PCR practitioners as well. He said that the Judicial Department is implementing a new system for scheduling these cases, primarily before Plan B judges. He participated in a workgroup that prepared practice guidelines for these cases. The same group will be preparing guidelines for capital cases which will also be heard by Plan B judges. Commissioner Welch asked whether Plan B judges were being disparaged by the workgroup members. Paul

Levy said that it appeared to the workgroup that the Judicial Department was planning to accelerate the processing of these cases by having Plan B judges hear and decide them in a single day but that the judges themselves were held in high regard.

**Agenda Item No. 6**

**Executive Director Recruitment Plan**

Chair Ellis said that the job description and application instructions were issued as planned and the deadline for responses was May 15. He said he would see that all interested commissioners were provided with copies of the applications received and he would then schedule a telephone conference call to narrow the group of applicants to be interviewed. In the telephone call, commissioners will also decide how to obtain input from applicants' references, from senior OPDS staff and from contractors. Kathryn Aylward proposed that contractors be asked to provide input on the kinds of skills they saw as essential for the executive director to possess. Chair Ellis noted that some applicants might want to submit their applications confidentially. Persons who want to have input could email the chair. Greg Hazarabedian asked whether a contractor could be included in the selection committee and the Chair said that the statute would not permit it but other types of input would be welcomed. He said commissioners would discuss how to obtain input in the telephone conference call that was being scheduled. He said that it would be more important to get the right person than to meet an arbitrary timeline. He said that he would like to get face to face input from senior staff at the June meeting.

Commissioner Welch asked whether there had been any recent developments on the waiver of counsel issue in juvenile delinquency cases. Mark McKechnie said that the two cases that were being considered for appellate review on this issue did not appear to be good vehicles for a challenge because the error may not have been preserved. Ingrid Swenson said that she had received anecdotal information that appointments were occurring more often in some counties but that it might be difficult to obtain statewide data. She reported that there had been a strong opinion issued by Judge Collins in Yamhill County on the shackling of juveniles. She said she would schedule a meeting with Commissioner Welch to discuss next steps related to the waiver issue.

**MOTION:** John Potter moved to adjourn the meeting; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE: 4-0.**

[Meeting Adjourned at 1:20]

PUBLIC DEFENSE SERVICES COMMISSION  
UNOFFICIAL EDITED TRANSCRIPT

Thursday, May 5, 2011  
10:00 a.m. to 2:00 p.m.  
Office of Public Defense Services  
1175 Court St., NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Janet Stevens (by phone)  
Honorable Elizabeth Welch

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

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The meeting was called to order at 10:05 a.m.

0:24 Chair Ellis We can call the meeting to order. We are expecting Commissioner Stevens to call in shortly, so we will defer approval of the minutes until she does that. Why don't we start with the discussion on Lincoln County?

**Agenda Item No. 2 Commission Discussion of Service Delivery Plan for Lincoln County**

0:50 I. Swenson Good morning, Mr. Chair and members. Guy Greco is here and has some additional information for the Commission, but before we hear from him I have a few additions or corrections to the report. I am talking about the updated draft report on Lincoln County that is Attachment No. 2. I realize what happened was that when I prepared this updated draft, unfortunately I used an earlier draft than the one I intended to start with. The report that you received last time had information that this one does not. Let me just quickly tell you what those pieces are. On page three there were some corrections that were made by the district attorney, Rob Bovett, about the number of his deputies and the number of positions lost. The information in this report is incorrect. I will correct it in the next version you see. On page five of this version, regarding the domestic violence court, I also neglected to include a comment that Guy Greco had submitted by email, noting that the domestic violence court was not operating as efficiently as I indicated it was, and that was because they were not getting timely discovery in his opinion. If he has some update on that today he can tell us about it. On page six of the report the second full paragraph there relates to representation of youth in probation violation hearings. That information should be corrected. Judge Sanders informed me that they had changed their policy about a year ago, so that when a youth comes into court on a probation violation the attorney who handled the original delinquency proceeding is appointed to represent the youth. On page seven of the report, and this is just an update, I mentioned that the juvenile court community in Lincoln County had expressed a concern about the lack of involvement of the Siletz Tribe and the fact that the tribe does have a social services

agency and does have staff people who would be able to work with parents and families, and that they rarely intervened in cases. They rarely transferred cases to the tribal court. I had attempted to contact the tribe several times before I prepared the original report to confirm the information that I was hearing from other people, but afterwards I did speak to tribal counsel, Cathern Tufts, and she advised me, "I think what you are dealing with in Lincoln County is more of a perception than the actual picture of the level of our involvement." She said that was probably because the tribe declined to participate in the model court program and if you are not part of the model court program you don't necessarily get involved in all the discussions that take place about the system. She said, "We have very good services available to families. We rarely transfer cases, but we always get involved in cases that involve Indian families." She said that she would take upon herself the responsibility to contract the local providers and the court and the Department of Human Services to let them know what services they have available. On page 10 of the report there is a comment about associates in the firms being underpaid. I had received, but had not forwarded to you previously, a comment from Jeff Pridgeon whom you heard from last time, saying that his firm had never lost a lawyer on the grounds that he or she was underpaid, that new lawyers make a "lean but adequate salary" and that the firm provides an excellent health care plan. On page 11 of the report, one thing that I forgot to include in that section was some of the options that the Commission could consider in Lincoln County. Guy Greco had indicated in some earlier correspondence that if the consortium were lawyer-specific in its members, that is, not including firms as such but just individual lawyers, and if he were given the authority to determine caseloads, he thinks things would improve. That was a comment that he had made and I had not included in the original report. With that said, I have no further corrections to the report.

6:25 Chair Ellis

Do you want to share with us what has happened since our meeting?

6:34 G. Greco

Lots of different things have happened. I think I mentioned to you in March that I was undertaking a performance review of all the lawyers providing services and we were in the middle of it. We were in the process of getting the survey to the judges. We pirated it from the Marion County questionnaire that had been formulated. I think plagiarism is great in this business.

7:10 Chair Ellis

Remember that imitation is the sincerest form of flattery.

7:16 G. Greco

What I did was I graded them in kind of an unscientific way. I was able to identify, shall we say the few lawyers, and they are a minority, where the most concerns arose. I then sat down with all four judges and myself so that I could communicate – they gave me comments and I wanted them to be more specific. I questioned them, "If this is a problem do you have any suggestions on how to fix it?" I took some copious notes. We identified three people that needed to be contacted by me. Yesterday I just finished contacting the third one with the minimum of an hour with each one. Each of the three lawyers has different issues. They are not the same. They are completely different issues, but why do I bring that up? The next request for proposals that you will see coming out of Lincoln County will be an entity that will be a non-profit corporation. We have drafted some bylaws. We cleaned them up on Monday a little bit. I forwarded those to Ingrid. We are not deaf. The corporation will enter into separate agreements with individual lawyers. The firms will not be basically contractors.

8:50 Chair Ellis

What is your structure going to be in terms of a board and who picks the board?

8:55 G. Greco

Exactly like we are required to do. What we have done is we have taken a senior member of every office. We have a majority of sole practitioners, but one representative from each office, with the exception of me, would be our initial board of directors. If I am going to be the administrator – this is a work in progress - I probably don't want to be on the board. I want to be able to slice and dice and make the hard recommendations that people may or may not like and then not have to vote

on them. I would be sort of the executive director role. Then we will have two members that are not affiliated with and do not provide services.

9:45 Chair Ellis                    Let's pause. Will your initial board then be the appointing source for the additional board members? Who will be the appointing source?

9:57 G. Greco                        You got ahead of me. My first thought was that perhaps the Board of County Commissioners might be willing to do that and they declined. Their suggestion was the Lincoln County Bar Association. We are all members of the bar association, but I would expect that you might even narrow it down to the president of the bar association or a special committee of the bar association, because it will not be any participant who is providing services. We know by January 1, 2012 that is the way it has to be so that is the way it will be. There will be non-members and they will be appointed by someone outside of us. Again, plagiarism. What I did is I went and reviewed a lot of the materials. I spent an entire day drafting bylaws. I picked and chose what I thought were the best things that the various counties had.

10:53 Chair Ellis                    Were you working with Paul at all?

10:53 G. Greco                        Paul had sent me the CLE materials from when they had the practice management thing. There were a number of examples of bylaws. Again, I picked and chose what I wanted to have. Part of that same day was, and I don't know if you have reviewed it, but we have created an agreement between each individual attorney and the corporation. It sets forth what the expectations are. It will set forth what the compensation will be, things like having to carry malpractice insurance, expectations for client contact, how soon you have to see your in-custody clients, that you have to personally attend initial hearings and, of course, I would like you to pay particular attention to Section 10 because it provides for numerous ways in which a lawyer can be terminated by the board of directors if their performance isn't up to par. So, for example, if Joe Associate is underperforming the board of directors would have the authority to terminate his providing indigent defense services. If his employer in the firm wants to keep Joe Associate on that is fine. They are not going to have the say as to whether or not that associate is providing indigent defense services. It is going to be central. I learned a lot in the evaluation process. You mentioned underpayment and that was something that was really ringing in my ears yesterday. We have one fellow who is probably doing too many cases and he is not being paid hardly anything. He is just a trooper and just wants to work real hard.

12:46 Chair Ellis                    Is he one of the two associates in the Hollen firm?

12:53 G. Greco                        That is just not going to happen anymore. One of the things that I have discovered is that there has been a real seismic change in the relationship between the judges and me, not the relationship – I have the same relationship - but they are talking to me now. What has happened in the last month is that I am getting debriefed on specific trials when they never did that before. They had a robbery case and the trial judge was disappointed in the performance of the lawyer who worked the case. She called me up and said, "Can you come over and meet with me?" We spent an hour and a half talking about what went on in that trial and where she thought there were problems in the performance. They didn't do that before. Just yesterday I was on the phone for 30 minutes with another judge. Again, we were talking about specific objections that weren't being made and that type of thing. Now I can connect that you need to improve this or you are going to have trouble. One of the lawyers - it is interesting - all of the judges say his cross-examination is horrid. Across the board they all say the guy doesn't know how to cross-examine. When I met with him I said to him, "Have you ever been to a CLE on the art of cross-examination? No? Well, that is where you are going, to go a CLE on the art of cross-examination." I used to spend all day with Irving Younger.

14:23 Chair Ellis                    I attended Younger's lectures.

14:26 G. Greco                    Yeah, they were a joy. He is not around anymore.

14:26 Chair Ellis                He is on tape.

14:30 G. Greco                    When I get back to Newport, I am going to go online and I am going to find a cross-examination seminar and he is going to attend it. That is the kind of hands on that you are going to get from me and hopefully whoever succeeds me. We are going to pierce the office walls. But the other thing is, but I am going to have to talk to the judges, sometimes you have to be careful what you wish for. They have had it really easy. They always have a lawyer on call. Whenever there is an appointment, whether it is a shelter hearing or in custody arraignments, they know who it is. They don't have to worry about assigning the cases because it is a lottery. If you are on call that day you get those cases, which, of course, has created problems because we have got some lawyers overworked. We have some lawyers handling the Measure 11 cases who shouldn't be handling them. We have got to go to a more selective case assignment. We have got to assign the cases according to the abilities of the lawyers. We can do that if we centrally run this. For example, there are probably two who shouldn't be doing Measure 11 cases. I think, Judge Welch, you were concerned about whether there are enough lawyers to do Measure 11 cases. Yeah, there are enough lawyers to do Measure 11 cases. We just have to assign them differently. I have got to quit doing Class B misdemeanors and Class A misdemeanors and take on more Measure 11 work. If I cut down my volume down, on the cases that I take, I can handle them. Measure 11 cases are not necessarily harder because they are also very ripe for negotiation, okay, because of the hammer. There is another lawyer who the judges say doesn't file motions or try cases, so let's get him a caseload where he is doing drug cases and maybe DUII. You have to try those cases and you have an active motion practice. We have just got to readjust and it has got to come from a central location. Again, with the random assignment that we have you have no control over that. To a certain degree it is going to inconvenience the judges a little bit. What is going to happen is we will probably still have an on call lawyer who will be there for the arraignment, but that lawyer will not necessarily get that case. We will have a system in place depending on what type of case it is, "Your Honor that case is going to go Ms. So and So." Or, "Because of the type of case it is going to go to Mr. Greco." That will inconvenience them to a degree but I am sure it is something that is solvable. I think that is what we really have to do is get the right lawyers doing the right cases. We also have to monitor and control the number of cases. I was talking to Paul. I know the standards for full-time equivalence are old, but we have got to come to grips with what an FTE is and then it is, "If you are doing .7 FTE that is this much work. Are you doing 100% FTE? Well it is this much of these types of cases but no more." That is how we have to approach compensating the people. That is very doable.

18:03 Chair Ellis                A couple of comments. First of all I am very happy to hear what you are doing. I think you are making some correct moves and we appreciate that. I think you stayed for the whole meeting or maybe you missed the part where we talking....

18:24 G. Greco                    I said earlier that I read the minutes after I left. We left at lunch time.

18:32 Chair Ellis                You probably recall that in those minutes Commissioner Ozanne, who once held Ingrid's job as executive director, had been in Lincoln County, and he didn't put a date on it, but my memory is it being 2003, and had a lot of questions about the structure or absence of structure, supervision, absence of supervision, etc. He expressed the view that not much had changed in eight years.

19:07 G. Greco                    I read that.

19:05 Chair Ellis                He was not happy about that. Hi Janet.

[Commissioner Stevens joined the meeting by telephone.]

19:10 J. Stevens Hi Barnes. How are you this morning?

19:12 Chair Ellis I am in good shape. It is nice to hear your voice.

19:15 J. Stevens I am sorry I had to do it this way. We are just having some issues over here.

19:20 Chair Ellis That is fine. We are on Item No. 2 of the agenda relating to Lincoln County. Guy Greco has been here and has talked to us about some changes there they are in the course of making, including incorporating as a non-profit and moving to a board with outside representation and a much stronger structure in terms of his role as administrator and evaluation and review of the lawyers. That is where we are. I was just dialoguing with him on the meeting we had in Lincoln County that I think you attended by phone.

20:08 J. Stevens Right.

20:13 Chair Ellis One of the things that I am sure came through was a concern that several commissioners had that within your consortium you have the two law firms, and within the law firms, at least the Hollen firm, the partners don't play much of a role in indigent defense but two associates do. The worry is when you have a law firm as a consortium member there is very little visibility of what is happening because you have got the entity as the participant. Within the entity decisions are made as to who is going to be doing the work and in that case it was – I don't want to be judgmental yet – but it was different than what we have seen elsewhere in the state, that the partners played almost no role. What was your reaction to all that?

21:20 G. Greco I agree with you.

21:20 Chair Ellis What do you suggest we try to do? Let me just comment. I have no criticism of the partners. They are good people. We are just trying to find the right structure here. Go ahead.

21:42 G. Greco I don't know that I can control what the lawyers are going to be compensated. What if I am an associate in a large firm and Safeway wants me to do all of their corporate work. They want to sign an agreement with me to pay me \$10,000 a month to do their corporate work.

22:05 Chair Ellis In my law firm they couldn't do that.

22:06 G. Greco I am assuming that a law firm could say that you are going to sign this agreement with them, or they are going to agree to give you the work but you are not going to get to keep all the \$10,000. I don't know that I can say that every penny - here is where Hollen would come in and say, "I am providing overhead for these folks. I am providing the secretarial. I am providing their malpractice insurance." I don't know how we can ever control what the associate's relationship is with the firm with regard to money, but I think we can control what the associate does in terms of the cases that the associate is going to handle and how many and what kind. I think that this structure would give the organization final say on how much work they did and what kind of work they did.

22:58 Chair Ellis I don't know the two individuals, the associates, but would it be possible for them to think in terms of going independent of the law firm?

23:14 G. Greco I think that is on their minds. I don't know whether that could be prevented. I can only kind of walk through a scenario. They feel that if they get the revenue on the cases they are assigned in their agreement that they would have enough for them to open up an office. So they tell their employer that they are going to leave and I guess it would be something that the board of directors would have to discuss as to whether or not this would be terminated because of that. I would anticipate that the Ouderkirk representative on the board would have to recuse himself from voting on

that. Then the board of directors would have to decide whether they would be allowed to do that. There is going to be no restriction in the contractor agreement. There is nothing in the agreement that is going to preclude someone from leaving the firm. It may be that the natural consequence will be that that firm won't be able to do that work anymore. I don't know. That remains to be seen.

24:30 Chair Ellis

It looks to me like a troubling relationship. I am not, as I said, critical of the partners. They evolved the way they have.

24:37 G. Greco

And I think the difficulty we have is that we only now have two firms. We had far more sole practitioners in the county doing the work than we did before, but at least the Pridgeon firm, even though Judge Branford has some resentment, all those lawyers are pretty much doing an equal amount of cases. Their case counts are roughly equivalent. There is a little bit of difference but the partners have rolled up their sleeves and they are doing the work too. Hollen is the only office where they virtually do zero. The two partners do zero.

25:17 Chair Ellis

He was candid about it.

25:23 G. Greco

I can ask you a question. I wouldn't think that we would want the non-profit corporation to insist that they divest themselves of associates. Is that what you would want to see?

25:35 Chair Ellis

I am trying to find a way to work together and not have a collision, but I do want to end up with a structure that actually has a structure, which I don't think we had previously, and I am concerned that we are kind of dealing with a black hole. The contract or the relationship you have is with a firm. Then there is this layer that is not participating in defense. You have two people down the chain doing all the work. From our point of view that just strikes me as not a very healthy relationship. Let me ask you about another area. At several points in the discussion in March we raised the issue that the structure as we then understood it, and this is before the improvements that you are talking about, didn't seem to have much in the way of training, supervision, mentoring, and quality review. You're addressing some of that in what you have told us already and I heard that and appreciate that. One model that we have talked about, without saying we are definitely going to this way, would be to have a consortium and a public defender where you would have a non-profit with two or three full-time lawyers. Has there been discussion among consortium members about their reaction to that since our meeting?

27:37 G. Greco

No. None of the lawyers that are currently providing services wants to volunteer to be in that office.

27:43 Chair Ellis

If you know that then there has been discussion.

27:47 G. Greco

We have now started and will continue monthly lunch meetings with everybody. Everybody has to attend and so there will be mini CLEs. The consensus that I have gotten from every single lawyer that is participating and providing services is they don't want to be that office. So if you are going to get that office, you are going to be recruiting somebody from outside the current service providers.

28:22 Chair Ellis

They don't want to be in it because - what is the thinking?

28:27 G. Greco

They would rather engage in the private practice of law.

28:33 Chair Ellis

Okay.

28:37 G. Greco

I know that there are at least four people and they are the associates who probably are at 95 to 100%, but even those associates are able to take retained clients whether they are in the criminal law area or not. I am not going to do that. Indigent defense is half of my work. I have got a burgeoning practice with other things. Again, I

think Scholl and Benfield have actually moved more to a 100% situation. But I have gone to people and asked if they want to be the public defender. They unanimously say, "No." They don't want to do it.

29:21 Chair Ellis

What do you suggest we do to get away from this situation that I think I have accurately described where we are dealing with partners in a law firm.

29:33 G. Greco

Tell us not to fund the associates. Tell us it is not acceptable and you are not going to give us any money to give to them for that. That is the only thing I can say. Turn the money faucet off.

29:45 Chair Ellis

And then what do you think happens? Do the associates find a way to become independent?

29:48 G. Greco

I have some confidential things that I know that I can't discuss about what is going to happen.

29:57 Chair Ellis

Whatever you say here stays here. You know that.

29:58 G. Greco

Well I am being recorded. If you want to talk off the record let's go to the men's room.

30:10 Chair Ellis

I think that violates the public meeting law.

30:13 G. Greco

ORS 192.804(3). We go into executive session all the time with the PLF. I think that at least one of those associates would probably hook up with somebody else and then be a firm of two people providing indigent services. This is where I got into the cultural and historical thing in March. I have probably been working for you, I think, for 16 years. I went back through my computer and that is how old my files are that I have been coordinating this consortium. But prior to that we looked to Salem to – we were all competitors. Then Judge Huckleberry used to be very proactive and if he thought somebody wasn't doing the job he would tell Ann Christian and they wouldn't get as much work. It was Salem that was dictating who was getting the compensation and who was not. We were all just little beavers competing with one another. What you've done, and I don't begrudge this, you have taken that level of administration and you want to move it down to the county level. You want us to be doing that kind of administering. You are getting us to move, why? Because you are threatening to put us out of business. Peter Ozanne did not sit my office in 2003 and say, "If you don't do it my way it is the highway." It is nine years later and we are still running along on the interstate. The point is that we are going to make these changes because you are telling us we need to make these changes. I can see the validity. I am not going to be a rebel and say it is all invalid. There are advantages to what you want to see happen. My concern for me is is it going to reduce my revenue? Am I going to work so hard running this show that it is going to cut into my other income? That is what I have got to think about. You are pushing us to do this because you are waving the public defender's office and that doesn't frighten me. It frightens the more marginal practitioners out there. I am going to be fine if you have a public defender's office, but some people won't be. Again, getting back to the Hollen/Ouderkirk situation, you have just got to say, "No." I can't tell them not to have associates. I am never going to be invested with that kind of authority but you do. You can cut off the spigot and say, "We will not let you fund those associates." I doubt that Mr. Ouderkirk or Mr. Hollen are going to be willing to become even 50% FTE providers.

33:26 Chair Ellis

I doubt that too.

33:31 G. Greco

The other side of the coin is Jeff and Jeff go to work and do some indigent cases here and then PDSC would be more comfortable funding this. They are my competitors. I am not in a position to say, "By the way you can't get any of this money anymore." But you can do that.

- 33:51 Chair Ellis John or Betsy, any comments?
- 33:52 J. Potter Go back to your original comment when you were talking about this new structure. I think you used the word “if” I am the administrator of this. It sounds like that is the assumption going forward. You would not be part of the board of directors. Would that mean that the board has hiring and firing capabilities for you as the administrator?
- 34:15 G. Greco Yes. That has basically been the status as it is. I volunteered for it so everybody acceded to that. No one has even for a moment considered getting rid of me because nobody wants to do it. I think I do a pretty good job. See, one of the things that is rolling through my mind, and we will be incorporated by the time the RFPs are going to come out - the RFP would be submitted by the entity - there are tax issues that are here. We have talked to Marion County and we have talked to Benton County. We talked to their administrators and they shrug their shoulders and say, “The accountant takes care of that.” I usually tell my accountant what to do. It’s not my accountant telling me what to do. I have got to make sure that as an administrator we are not going to be on the hook for paying payroll taxes. I don’t want to be an employee of the non-profit generating some taxes. I think a lot of people don’t consider those issues but they are out there. We try to create an independent contractor relationship with the attorneys. You can put it down on paper but what is really happening is what the IRS considers.
- 35:42 Chair Ellis It would blow a hole through a lot of things if consortium participants where the structure is a non-profit ...
- 35:55 G. Greco I don’t think that is as much a problem as it is with being the administrator. I fully intend to still be an independent contractor. That may mean that we need to tweak this a little. Then we have an issue with retained earnings because we keep money in the bank because historically in Lincoln County the assignment numbers are all over the board. Last time we paid back \$136,000. Even now we keep money in the bank. We probably have \$125,000 sitting in the bank. When you cross the tax line what do you call that money? Is that income? Do we have to pay taxes on it, or have we created a trust relationship? We just want to make sure that whatever kind of non-profit that we use, and we are looking at two, that we don’t have to deal with that. We will be formed probably within the next 30 to 60 days top. I don’t know what to tell you about the Ouderkirk and Hollen thing. I wish I had a better answer for you. To me it is intractable where you are coming from and if you are concerned about it then I would invite you to act.
- 37:11 Chair Ellis I think I hear you saying that you understand why we would be concerned.
- 37:19 G. Greco Yeah. They are skimming the cream off the top.
- 37:20 Chair Ellis We don’t know.
- 37:24 G. Greco I know. I know what their associates are paid. This is interesting because I went back yesterday to talk to this one associate and they conveniently, in the RFP, didn’t put that down this time around. In other years they did and I didn’t pick up on the fact that they just put N/A. The question to me is that I just simply don’t know if the amount of money over the salaries is genuinely overhead or not. I have no way of knowing what their overhead is.
- 37:54 I. Swenson A question arises in my mind, Mr. Chair. Maybe everybody understands this better than I do. If you had a system, which is what is proposed here, of the new corporation identifying the lawyers it wants to participate with this contract, whether they are associates or partners, but the people who are going to do the work. If those individuals are subject to the control and quality oversight and everything else by this board of directors, isn’t it safer to leave the relationship between the associate

and the partner up to them? For example, if you work for a firm and you say, "I want to do public defense work." You go to your partners, and you say, "How does that work in your firm? Would that be okay if I do this? What is the split between you and me if I get part of this contract?" Then they either decide that it will work for them or not. Doesn't that accomplish what the Commission wants to accomplish, which is quality oversight and selection of participants? They can get rid of that associate anytime.

- 39:06 Chair Ellis           The consortium can.
- 39:09 I. Swenson           Yes. I am not so sure that if it is their preference, for whatever reason, to work in this set of circumstances and to permit the partners to take some portions of their earnings, that that is not okay as long as it doesn't affect quality, caseload, performance, and as soon as it does this group has the ability to say...
- 39:33 G. Greco            Another corollary to that would be this - I foresee there is going to be a vacancy in associates. I don't think that the firm should be authorized to independently interview and select another person who may be doing the indigent defense work that the other associate was doing. I would anticipate that the qualifications and approval of the board of directors would be required before a new associate would be allowed to work there and do the work.
- 40:10 Chair Ellis           What I think you are really coming to is a structure where you form the entity and the entity contracts with providers. Your contract wouldn't be with the law firm it would be with the associate.
- 40:28 G. Greco            That is the paradigm that we are going to be operating under. This is very close to what Benton has. We have made some tweaks to conform to our local practice that are different. I think the board of directors would have to approve any new associates.
- 40:42 Chair Ellis           I think so too.
- 40:43 G. Greco            They could do the interviewing but the board of directors would have to okay it before that lawyer would be permitted to provide the work.
- 40:53 Chair Ellis           Let me comment. This is just a statement for the record. On the concept of forming a public defender, it is not an easy thing to do. We have done that in Marion County. You don't just pick an executive director. You really want the community to form an entity in the community. Then that entity selects the executive director. That doesn't just happen overnight. In Marion County it was a lot of effort and frankly the chief was very instrumental in helping us get a board that really was a quality board that we could relate to. I am personally not anxious to rush down that track if there isn't support within the community to do it. We can try to stimulate that support at some point if we really think that is essential.
- 41:59 G. Greco            I think in a county like Marion or the larger counties that is a very good model. I guess you did describe that Coos might be a similar community where they have done that. I think everybody just wonders whether given our population it would be a workable model. You are just going to end up with a PD and then you still have to have a consortium. There are two entities now instead of one. I don't reject that as a potential model. You asked me the question if the current practitioners are interested in doing it. I think they like the freedom that they have. A sole practitioner has a whole lot more freedom than if you are working in a more structured environment.
- 42:49 Chair Ellis           That is true.
- 42:50 G. Greco            It is just a better lifestyle for the current participants to do it the way we are doing it. There are going to be some changes, of course, in their lifestyles because there is

going to be an administrator that is going to be breathing down their necks. They are going to have a boss who is the administrator.

- 43:13 Chair Ellis I am encouraged by what you are doing. I want to express my appreciation. As you say you have been listening. You are not deaf to the concerns that we have had. I could well see us saying that you guys are making a good faith effort to respond to the concerns we have expressed, and you are making some moves, the key ones being forming the non-profit, bringing in the outside board, making you a much stronger position as administrator than I think you have had to this point, and structuring your relationship with the law firms so that you retain the power to review and approve the lawyers that do the work. If they happen to be associates in a firm, so be it, but you still have a direct supervisory role over those lawyers.
- 44:12 G. Greco And we are already on that road. With these three people it wasn't just sitting them down and reading them the riot act and telling them what the problem was. I am going to mentor. We are now going to go and meet again. I am going to meet with these people at least once a month and question what they are doing to fix this. "These were the issues. I heard this from the judge about your last trial. This is stuff you need to work on." I am not going to let it go and make it a one time thing. Another thing I am going to do, and it is sort of in our own defense, is I am going to create a trial form where if you try a case you have got to report it to me. The kind of case it was - a jury trial, bench trial - and the type of charge, what the best offer was that you got out of the district attorney and what the result was. In some of the evaluative process with the judges there are personality issues that you have got to factor in there. They don't like that person and yet that person is winning their trials. And then they said that so and so isn't trying any cases. I want to see how many cases people are trying. I want them to honestly tell me the results of those cases. That is going to be good for me to debrief the lawyers. It is also going to help me interrelate with the judges if in fact lawyers are doing a better job than they think.
- 45:43 Chair Ellis Janet, you have been quiet on the other end. I haven't heard any barking for a few minutes.
- 45:50 J. Stevens I apologize. I have a poodle now and he is noisy and young.
- 45:56 Chair Ellis Did you have questions for Guy?
- 45:55 J. Stevens Not right now. It sounds interesting.
- 45:58 Chair Ellis Other comments or questions?
- 46:00 J. Potter I too applaud you for jumpstarting this effort. You mentioned that you will have something together in more or less final form in 30 to 60 days. Are you aware that this draft RFP that we are going to look at today has a June 13 deadline to submit?
- 46:12 G. Greco Did not know that.
- 46:13 J. Potter Would you be able to submit something by then?
- 46:18 G. Greco Are there any extensions granted?
- 46:22 J. Potter You would have to talk to the executive director.
- 46:24 G. Greco I think so. We have the articles of incorporation ready to go and drop into Salem. The big problem we have is the accountant we have selected and want to talk to just got through with April 15 and vanished for two weeks. We can get it together.
- 46:41 Chair Ellis Two weeks is over.

- 46:47 G. Greco I know. Guess who I am going to call this afternoon? I thought that too. I didn't know it was going to be that soon, but I'll make it. Maybe if we could get a two week extension. I don't think it would be anything beyond that.
- 47:00 Chair Ellis Don't count on the extension.
- 47:02 K. Aylward What we normally do is we would rather have somebody submit something by the deadline and if the application is not complete then we review it and we say, "Wait a minute where is this, this, and this?" You say, "Well, I can get it to you in 30 days." We can do something like that. Rather than not have something come in by the deadline, I would rather ...
- 47:27 G. Greco We can get incorporated. The attorney agreements and the bylaws are all done. What I want to do is make sure the new board is up and running before 1/1/12. We are going to change how we are going to distribute cases and that type of thing. I want to make sure that we are up and running. That doesn't mean we can't get you the RFP. The RFP is a pretty simple thing and we will have the entity in existence.
- 47:55 Chair Ellis I think 1/1/12 is the date we put for having the outside ...
- 47:58 G. Greco No, no, we will have it done before that. I want to have this board up and running because it is going to have decisions to make that are going to come into play when the 1/1/12 contract starts. Those decisions are going to have to be made before 1/1/12, so we need to be up and functioning no later than September. We are going to have to have at least a couple of months of board meetings. There are changes that I am going to be making to how we are going to be assigning cases. It will be a radical change in how we are going to distribute cases. I can guarantee you that, for the better with matching the skills with the kinds of cases. No more lottery. We are not going to do it like a lottery. We are going to match the skills with the case types. We have to figure out an adequate way of making sure the compensation melds with that.
- 48:54 Hon. Elizabeth Welch I just want to say that I am very pleased about what you have accomplished in a very short time. I am curious; this is not really a question to Mr. Greco, the part of it that I think that I am impressed with is this contract between the lawyer who is a participant in the consortium and the terms relating to meeting one's professional obligations and getting adequate training and the oversight that that imposes upon the consortium director to see to it that they comply. I am curious because I don't believe that I have heard about anything like that in any of the counties or courts that we have looked at in recent memory. I am just wondering to what extent that is common practice? It sounds like something that we need to be talking about on a broader range.
- 49:43 G. Greco Ingrid and I were talking about the aspirational standards, but I did not see in any of my materials hard MCLE requirements. I have a lot of them. I am a mediator. I probably should take about 50 CLE credits a year because of all of the different things that I have got to satisfy. I think it is really important that we have certain minimum CLE requirements. I want to make it so that I am more proactive in directing – with all due respect to you Mr. Potter, I am not a real huge fan of a lot of the OCDLA seminars. Particularly in our situation I don't think we have enough focus on trial skill work, trial practice. I was talking to someone the other day and it is a lot of substantive law. I need to get these people to go to cross-examination seminars, to voir dire seminars, so I want to have a minimum MCLE requirement. Then I am going to be putting my two cents in as to directing them not just willy nilly. That is what they do now, just get their 15 credits a year and I don't have any say over it. When a lawyer has a deficit area then we have got to get them some training in the area they are deficient in.

51:00 Chair Ellis            You remember the Irving Younger speech on cross-examination? I went to this years ago and a whole lot of lawyers showed up. They were all excited and he said, "You know there are only three things you need to be a really great cross-examiner." They all got kind of excited. "First, you need complete mastery of the facts of your case, but you can get that with hard work. Second, you need complete mastery of the law applicable to the facts in your case, but you can get that with hard work. There is only one other thing you need. Talent, and very few of you will have it."

51:44 G. Greco                I remember from his seminars that that is what you hear almost the entire day, is everybody is laughing as they are learning.

51:55 Chair Ellis             Here is where I would be inclined to go. I think you have been forthcoming and we are happy with the way you responded to our concerns. I would like to kind of calendar Lincoln County a year from now.

52:10 G. Greco                I think that is a good idea.

52:13 Chair Ellis             Let's see how the changes that you are making look a year from now. There are more severe steps that we could be pushing you to take, but I think when we get someone who is responding to our concerns, we ought to give you time to work on them.

52:31 G. Greco                I drove for two hours to get here and was thinking about what we were going to discuss. I was thinking, "Give us at least one more contract cycle to see if we can satisfy some of your concerns." As you say, it is going to take awhile to try another model in Lincoln. I think if you could give us another contract cycle, I think we can impress you.

52:58 Chair Ellis             A cycle can be a one, two or three year cycle.

53:01 G. Greco                We have historically done two.

53:02 K. Aylward             The RFP says that we will award contracts in one year, two year, or even four year terms. It is up to the Commission in the individual situation. I think we should clarify. I know it is a remote possibility but we might get another bid. We might get somebody responding to this RFP. I think at this point it is premature to do any promising.

53:28 Chair Ellis             What I have in mind, assuming that you end up forming the entity, assuming the entity submits the RFP and response, and assuming you end up with a contract, I would like to think in terms of a year from now let's take a look and see how we are doing.

53:53 I. Swenson             Mr. Chair, could I make a comment in response to Commissioner's Welch's inquiry? These are best practices that have been promulgated by our Quality Assurance Task Force in terms of what consortium administrators as well public defender administrators and other types of contractors require of the participants who do the public defense work. Do all of our contractors follow those? Certainly not but we encourage it and whenever we do this kind of a review or a quality assurance task force evaluation, we certainly look for those things, comment on them and encourage, at the very least, our providers to follow them. To some extent their contracts require the same kind of oversight as well. So it is part of the system.

54:52 Chair Ellis             Any other thoughts? I don't know that this requires a formal motion.

55:00 I. Swenson             At some point to approve a service delivery plan, but you can postpone that if you wish until your annual review. That would mean that the current plan would continue to apply.

55:18 Chair Ellis I think that sounds a little too distant. Why don't we have you revise the report to include today's discussion. Then we will vote on that with the revised report in hand at the June meeting.

55:37 I. Swenson Very good.

55:37 Chair Ellis Thank you, Guy. We appreciate you coming over.

55:42 G. Greco You're welcome. I hope you see some progress.

55:47 Chair Ellis So do we.

55:48 G. Greco I said I hope you see some progress.

**Agenda Item No. 1 Approval of the Minutes of PDSC's March 9, 2011 Meeting**

55:51 Chair Ellis Okay. Minutes of the March 10 meeting. Are there any additions or corrections? I have a few typos if nobody else does. Page five that second full paragraph on the third line from the bottom. I am sure it meant to say "A lot of conflicts and," instead of "conflict sand." Then on page nine about 10 lines from the bottom. It says, "Paul Levy said that the full Commission process had not be," and it should be "been." On page 10, "Kathryn Aylward said that OPDS analysts were reviewing the data and that OPDS would ask the Criminal Justice Commission to look more closely at some issues such as how many of the person." There should be an "s" on that. Otherwise I was okay. Any other additions or corrections? Are my typo corrections okay with everybody? Is there a motion to approve the minutes as corrected?

**MOTION:** John Potter moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 4-0.**

**Agenda Item No. 3 PDSC Budget Presentation Report**

57:34 Chair Ellis I think the next one is the budget presentation report.

57:40 I. Swenson That is correct, Mr. Chair. I envisioned a little bit of information from Commissioners who were present for the budget hearings about what occurred there. Then we can talk about where we are now. Our chair participated in those hearings. They started on March 30. This was the public hearing on our budget proposal. On March 30 the Chief Justice, as he is required to do by statute, introduced our budget to the legislature. He had some opening comments. He said that justice is not self-executing. An accused must have a voice in the process. He said the budget for the criminal justice system must be seen as a whole and funded in balance. He acknowledged the special role that court appointed lawyers have played in protecting our liberty interests and added that they go the extra mile without adequate compensation. We then opened our presentation with a discussion of how our agency is different from other state agencies. We thought that was appropriate since this particular subcommittee will be hearing other budget proposals. We wanted to highlight the fact that most of our budget goes for services and supplies, which are our contract payments. We are not like agencies that primarily employ full-time state employees. We talked about the demands on our contractors. We talked about the volume of cases that come through the system and the lack of control we have over that volume. Then we essentially told them that they had three options with respect to funding our agency. One was to fund us at our current service level which would simply be a reflection of the caseload times the cost to our contractors of providing representation in those cases. Or they could take legislative action to reduce the demand for public defense services by either lowering the crime seriousness level or the volume of the cases that are processed through the courts. And finally they could do what they did indirectly in 2003, which was simply to underfund us – not fund us for the full amount for the biennium. We told them that by the end of the biennium, if they chose that route, at some point we would have to

cease providing representation. We also talked in that hearing about some of the reduction options that were under consideration by substantive law legislative committees including changes to the death penalty statutes - we will talk about that a bit later. Again, our chair participated in a legislative hearing on some potential changes to the death penalty laws. Another issue, which is under discussion, is in drug cases the criminal defense lawyers association was supporting some changes to the drug laws which would have lowered the crime seriousness level of some possession offenses and those changes would have a positive impact on the demand for public defense services. Then there was some discussion that still continues about potential violation treatment for some minor non-person misdemeanors, and the fact that we don't have to pay for representation in violation cases. That would be another area in which they could save money. I then told them about our Commission and our commissioners and the work that you do. Then Kathryn talked about the Contract and Business Services Division and the work that they do. Peter Gartlan talked about the Appellate Division. We finished our first day with a presentation by one of the lawyers from Youth Rights and Justice, Christa Obold-Eshleman, who appeared with the father of one of her clients and talked about a case that she handled in which the father had been an inappropriate resource for his son for many reasons for a number of years. When that changed unfortunately the other parties in the case were not able to see him as a potential resource for his son and insisted that the client be adopted by a stranger. Ms. Eshleman was successful over a lengthy period of time in persuading both the court and the other parties that the father was the more appropriate option. Several years have now passed and the placement has been very successful. The father has remained in recovery for that period of time. It was an example of the kind of hard work that some public defense lawyers do and the importance of the work that they do in particular cases. Then we came back on the second day and our chair was there. He introduced the public members who were making a presentation that day including our contractors and two of the district attorneys, Mike Shrunk and Walt Beglau who both testified in support of adequate funding for public defense. Kathryn completed her presentation on the Contract and Business Services Division and the development of our budget. For today I thought it would be helpful for you to see the materials that we provided to the committee at our public hearing. These were the visual aids that they had in front of them as we went through our presentation. Kathryn, maybe you can talk about the financial piece and the presentation you made about the development of our budget.

1:04:09 K. Aylward

If you look at page 11 of the handout materials, I think that we wanted to emphasize that we were pretty far from the Governor's budget. Our current service level was going to be about \$32 million short. We wanted to try to explain the fact that we have been taking reductions as and when we can.

1:04:32 Chair Ellis

You said 32. I thought it was 13.2?

1:04:43 K. Aylward

It is 13.2 less than our actual expenditures this biennium. What we need next biennium it is \$32 million short. We wanted to give examples throughout the biennium. We have returned money to the General Fund as and when we could, to make the case that not only do we not control the work flow, but we will tell you if we need more money and if we need less we give it back. With a lot of state agencies whatever money you give them ...

1:05:14 Chair Ellis

The use it or lose it syndrome.

1:05:18 K. Aylward

Exactly. We don't. I also cautioned them that they probably shouldn't expect this again next biennium, especially if we are already starting in the hole. We are not going to come back every so often and say, "Okay, you can disappropriate a million." On the next page we included caseload to give them an indication that since we started keeping track we have always seen increases year after year after year, until just recently. That is why we were able to send money back again. But in fact it is picking up again. I am trying to move away from discussions of caseloads as much as I can because a better predictor is actual expenditures. Yes, there is a

strong correlation between caseload and expenditures, but you can have a flat caseload but your expenditures go up for a variety of reasons. Some of the examples that we have talked about is if there are quality control initiatives or site reviews that say, "Wow, you really need to get psych evaluations on mom in a dependency or you need to investigate this case." Then they start doing it and that drives our costs up. Even though caseload could be flat you could see expenditures going up. So, anyway, I tried to move away from talking about caseload. I gave them some information about how the breakdown of our current service level goes in terms of what portion we spend on death penalty and what portion we spend on administration. We only got a couple of questions. We had a question about our security. We talked about, as we often do, our move to go paperless. That always makes people ask, "If that is all in the computer, how secure is your computer?" We told them that it is handled by the Judicial Department, whose security needs are probably higher than ours. Most of what is in our case files is something that either is with the court or it is copies of things. There was another question but it was ...

- 1:08:05 Chair Ellis I would describe the atmosphere as very cordial. Eight or 10 years ago I did not have that same feeling. I think the two of you in particular have done a great job of working with the legislature and the staff and committee. They seemed to me to have a high level of confidence that we are doing a good job – we are good stewards. I also had the feeling that there is a budget shortfall that is out there. They know it and we know it.
- 1:08:40 I. Swenson Mr. Chair, we hear quite often and I think I have passed this on to you but maybe not to other commissioners, how impressed people are with this Commission and the hard work it does and the quality of work it does. In the one of the pending bills you are held up as the model for another agency that is forming a commission. The bill directs that the new commission should be like the Public Defense Services Commission.
- 1:09:10 Chair Ellis When it comes to being really good stewards it is you guys that really do it. I am gratified by what I sensed was a very good relationship and the respect that they have.
- 1:09:23 K. Aylward Can I talk a little bit about where we are now and what we know?
- 1:09:28 I. Swenson If you are ready to move to that, yes.
- 1:09:30 K. Aylward First I just want to mention, because Commissioner Potter at the last meeting said, "Good job. We got through 09-11. We are finished." I woke up in the middle of the night in a cold sweat two nights ago and thought, "Uh, oh. The fee bill money that is coming in under House Bill 2287 is ordered and collected by the Judicial Department. They, in the following month, then send it to the Department of Revenue which then, in the following month, disperses it 65% and 35%. Because the surcharges and fees are sunseting on June 30, there is draft legislation to revise the fee structure to replace the funding that is going to disappear, and as part of that legislation there is a little clause in there, a section that says that on the effective date of this bill or July 1, 2011, the Department of Revenue's account will be closed and any money in it will revert to the General Fund." So I am realizing that the money ordered in June doesn't have anywhere to go on July 1 and my first thought was, "I am going to call Revenue and say, 'You'd better do your last dispersement before midnight June 30, otherwise that money is going to disappear.'" But it is the two month lag money that we are missing also. We notified LFO and I think the solution is that our budget bill for next biennium will have a section added to it that says, "And by the way, please appropriate a million dollars to Public Defense Services for the 2009-11 biennium." The beauty of this is that we can say to the legislature, "It is not like you have to find a million dollars in order to do this. You will get it because that other fund money is now going to revert to the General Fund, and it is not anything that has been accounted for already and is part of General Fund." It may work. We are not really ever done with a biennium. As far as 2011-13 goes, I don't

believe actual decisions have been made yet. It is not that decisions have been made and we just don't know. I think that they are still working on it. I think what is likely to happen is that either LFO's recommendation or the Co-Chair's decision will involve us losing the amount that we put in mandated caseload for inflation. I think it is safe to say they are taking inflation out of all state agencies and operating budgets. Some of the other things that they are doing is they are reducing services and supplies across the board by 6.5%. Sort of early on we heard, "Oh they are going to reduce personal services by a certain amount and services and supplies by" – it was like 5% and 3%, 1% or something like that. Of course most agencies were horrified at the thought that they would have to cut from their personal services budget because that is 85% of their budget. Then the next decision was to cut services and supplies by 6.5%. That is 12 million from us. They are aware that some of these across the board decisions – they are doing them because they want to have the same impact across the board – but they need to understand, and I think they do, if they are trying to have the same impact then they need to do it differently for us. I think the inflation would go and there is something in mandated caseload that is the personal services adjustment which isn't inflation, but it is in there to reflect the fact that even though it is called services and supplies, we are buying personal services. I think that is likely to not be funded. They have also come back and asked for any fund sweeps that we can do out of the Application and Contribution Program. A couple of weeks ago I said that maybe \$500,000 could come out of there. I have revised that to \$750,000. Then I think what we will probably end up with is some kind of combination that hopefully the reduction – these drug bills look like they might be passing. They have a definition of "user quantity" and it is kind of complicated. I don't know how it will look in its final form. That could reduce our expenditures by a million, million and a half, some number in there. But, again, that sort of solves the problem for us but what it really means for our contractors is the same. It doesn't matter whether the work is not there so you have to downsize your agency, or the money is not there so you have to downsize your agency. It is still downsizing for them.

- 1:15:02 G. Hazarabedian I guess I would add that it does matter in the sense that I would rather have fewer, reasonably well paid people than a larger amount of severely underpaid people. With that said I don't disagree with what you are saying.
- 1:15:19 I. Swenson Well, if your payments are reduced because you have fewer cases that is a better situation.
- 1:15:28 K. Aylward They also are looking at some kind of split plan for agencies in general, where they are hoping that in the second year of the biennium the revenue will pick up. What they are saying is, "We are going to set you up so that 54% of your budget is used up in the first year, and then we are hoping in the second year that we can increase your funding. If not, you will just have to take a bigger cut in just the second year."
- 1:16:08 Chair Ellis Any questions now that we have Kathryn able to speak again?
- 1:16:14 I. Swenson We will know something by the end of this month about initial figures. I think the problem will be that until the gavel comes down changes will be happening, money will get moved around and final budget decisions won't be made until then. It is going to be very late before we know.
- 1:16:33 Chair Ellis That 54% in year one sounds a little dangerous to me. What if the economy remains stagnant and you overspend the first year of the biennium?
- 1:16:47 K. Aylward That is basically what happened this biennium for agencies. They did what they called "allotment" reductions where an agency thinks they have this much money and they merrily moved along and employed people. Life goes on and then suddenly in the last six or 10 months of the biennium someone says, "Oh, you know, the money that you are used to getting, now I am going to cut it." Now suddenly they had to absorb all that. I tend to be the ant. I am very cautious about spending

because I don't want to go through that. We try in terms of our operating budget to spend as little as possible in the first year so that once we know we are in the clear we can make decisions based on that.

- 1:17:44 Chair Ellis Steve?
- 1:17:43 S. Gorham I am not sure if this is a question for Kathryn or you all. If we don't get money - basically another BRAC, or have another BRAC - is that the position of the Commission?
- 1:18:01 Chair Ellis I don't think the Commission gets to decide that. I think the chief is the one that has to deal with that. I have not heard from him that he is thinking in those terms at all.
- 1:18:14 S. Gorham I might be wrong but it might be up to the Commission in the sense if you don't get enough money to fund enough cases then we are not going to take cases. That is really the question that I have.
- 1:18:25 Chair Ellis This is deja vu all over again. In '03 my memory is we just kept on chugging until we got to the point that we had to tell people, "There isn't going to be money. There isn't going to be defense counsel. What are you going to do about it?" Chief Justice Carson, to his great credit said, "I am not going to put the screws on you to find a way to deliver the services for less cost. I'm going to do" what he did which was to decide that the lower end cases weren't going to get processed.
- 1:19:03 I Swenson Mr. Chair, I should add that the Commission has had some discussions on this issue with respect to previous budgets. Certainly this Commission has said in the past that it would follow a pattern of paying for the services until we didn't have money to pay for them. And because you don't have the authority that the Chief Justice has to prioritize cases, it would cover all case types this time around. Now the Chief Justice could make decisions for the Judicial Department about cases they don't intend to pursue because of their own budget limitations, but I don't believe the Chief would make any determination about when and under what circumstances we would decide that we could no longer provide counsel. We would inform the courts of that in advance and of any plans you made for dealing with cases that were already filed and on which the lawyers were already appointed and how you would handle those, and the date and time when you had determined that we could no longer provide those services.
- 1:20:29 S. Gorham What I hear now is we are basically 12 million short?
- 1:20:38 K. Aylward Thirty-two million short.
- 1:20:40 S. Gorham So if it doesn't change we are in trouble?
- 1:20:48 K. Aylward Well, there are some adjustments to that \$32 million. Like I said inflation - whatever that was. Depending on what you think it is okay to cut, and my opinion isn't the same as maybe LFO's. I don't think it is okay to cut the personal services adjustment. I don't think it is okay to cut inflation. You can cut the money but that doesn't change the fact that you are still facing those inflationary costs. I am looking again at a longer term picture. You can't stay in business very long if you are losing money. Nobody can. I don't want to sign contracts with people that will cause them to go out of business. That is not what we are here for. I think if you took off... I don't know we might be down to \$23 or 24 million short, maybe.
- 1:21:51 I. Swenson And that number assumes no money from court fees. That is an unresolved issue. The Governor wasn't aware that we had other funds in this cycle. His budget didn't reflect that number. It is our expectation, frankly, that some of that funding or some offset for that funding would fill part of this.
- 1:22:22 K. Aylward Right. If that money were replaced then maybe we would be \$12 million short.

1:22:31 I. Swenson And caseload continues to fluctuate. It is pretty flat. Going into the next biennium it might look different. District attorneys may react differently to budget limitations. There are some unknown factors. The legislature could address these issues in the future. They might underfund us at this point recognizing that the next legislature or the emergency board would have to address ...

1:22:59 Chair Ellis Don't they meet every year now?

1:23:00 I. Swenson They do. That is right.

1:23:07 Chair Ellis Anything else on this?

**Agenda Item No. 4 PDSC Review and Approval of Request for Proposals**

1:23:12 Chair Ellis Next is Item 4, the review and approval of the RFP. This is Attachments 3 and 4. Kathryn, is this something you want to start us off with?

1:23:29 K. Aylward In looking at this, both the RFP and the model contract, I think we all decided that at some point maybe we would look at a rewrite. We did it with the Contractor Advisory Group a long time ago, probably in about 2000, I think, '99 or 2000. There were lots of meetings and we changed a lot in the model contract. I think a lot of it just needs to be looked at again and reworked. Hopefully between now and two years from now, we will get a group together and look at restructuring some of it. Some of the things that we wanted to add, some of them are little things like we are going to require people who have a contract to receive their payments by direct deposit. There are still people who have asked for checks and checks get lost and it causes a lot of problems. So if you want to have a contract with us you have got to have direct deposit. Also, the RFP, if you want to submit an RFP I do not want to see this stuff [indicating paper].

1:24:39 Chair Ellis It has got to be electronic.

1:24:39 K. Aylward It has got to be electronic. I will not accept it by fax, paper or anything. Some of these are just small irritants. Why can't we make contractors do A, B, or C? We are now just saying, "Sorry. It is time. You just need to do this stuff." So those are little changes. Obviously some of these are the things that Paul talked about at the previous meeting, you know the process, notification a week in advance of the intent to award contracts.

1:25:12 Chair Ellis I had a question on the margin on that. This is on page two, that seven day period. What is it that contractors can do at that point? We send a notice of intent to award. Is there some appeal or challenge?

1:25:29 K. Aylward This is what we imagined happening. What I try to do is when I am ready with this list of contracts for the Commission to approve, it goes in the materials for that Commission meeting and those materials go out a week in advance. So basically, "On September 15, I am going to ask the Commission to approve all these contracts. If there is something you don't like about that you show up on the 15<sup>th</sup> and complain about me."

1:26:02 Chair Ellis The thought is the Commission approval hasn't yet occurred and they get one last shot.

1:26:12 K. Aylward That is correct.

1:26:09 Chair Ellis Do you have more you want to say? I did have five or six things in here that struck me as I read it.

- 1:26:18 K. Aylward Sure. The high point is there is no board requirement specified in here. In the Application, on page 5, we have asked them to describe the structure of their board of directors. If they don't have a board of directors, then they need to provide the information here that would satisfy us that the alternative is in place. We added some things. We changed the model contract in a few places. One of the things we wanted to do last year – or was it more than a year now - we did a diversity survey of our contractors and we didn't get a really good response from them. We thought we could make it part of the RFP, but we want some flexibility to do it more often than when the RFP is issued. So we put in the contract a term that says, "If we ask you to take a survey you will take a survey." It is now in the model contract. We have also asked them to provide information regarding the CLE hours. You may recall that in the model contract two years ago, we added a clause that said, "If you take juvenile cases you will have 16 hours of CLE credits specifically geared to juvenile representation." So as part of this RFP we have said, "Okay, that requirement was in your contract last time, give us a list of all your attorneys and show us all their CLE hours. We want to confirm that you actually did do what the contract required you to do." The second one is the mitigation RFP which is not really any different than the one that was issued last year.
- 1:28:04 I. Swenson We did receive some amendments from Commissioner Potter that looked to me like suggestions for editing the document.
- 1:28:13 Chair Ellis I had a few questions. In the Application at page five, paragraph nine - I think it is the second document in the packet. It is talking about boards of directors. It says, "Contractors shall be governed," and I had thought contractor was a term that included law firms and that we have not gotten to the point of saying law firms have to have a board of directors.
- 1:28:48 I. Swenson Well, I think the understanding, Mr. Chair, was that all of the law firms would use the alternative. There is an alternative for all contractors which says, "In lieu of a board you have to have in place financial oversight and quality assurance mechanisms." So they are not going to have a board.
- 1:29:16 Chair Ellis Okay. That satisfies me. When we get to the general terms, I had a question on 1.2 and that is, do we want to put in some kind of ADR provision before things go to court?
- 1:29:58 K. Aylward That is a lawyer question.
- 1:29:58 Chair Ellis It is a lawyer and policy question. I think we will ask that you and Paul think about it. On page five, 4.2, did we really want that also to apply to public defenders? It didn't feel like it should.
- 1:31:20 K. Aylward My understanding of what 4.2 does is, it basically says, well...
- 1:31:36 Chair Ellis My related question and this may not be the right place, but one of the things that we learned in some counties is you end up with this identification of conflicts after a lot of work has been done and we end up paying twice, and I could see considering putting a clause in that says, "Where that happens, we would like a review of why the conflict wasn't identified sooner." If it turns out that it is the contractor's fault we shouldn't have to double pay. They should absorb it. Is that too hard?
- 1:32:16 K. Aylward It is not that it is too hard, it is the PERS pickup argument. What happened – I would have to look it up to see when it was - but it is referred to as "the fallout rate." It used to be that we didn't pay for conflicts, but we couldn't keep track and we wouldn't know that a conflict occurred until months later. So what we said to contractors – it sounds like a shell, but – "Instead of taking 100 cases right now you take 106 cases and we only end up paying you for 100 because six are conflicts and you lose those credits. So now what we are going to do is let you keep the credits but we are going to pay you \$94 per case instead of \$100. But since you get to take

the credit for those you are actually better off.” Allowing them to keep the credit was in lieu of an increase in their contract rates. Now if we come back and say, “Well, that is not fair, you can’t keep that credit,” I think that we are undoing what we intended to do and I don’t know whether you recall this, Commissioner Potter. Do you remember the fallout rate? Our office went to a lot of work to calculate everybody’s fallout rates.

- 1:33:48 G. Hazarabedian I will remind the Commission that the Commission hired Ann Christian to run a conflicts workgroup. I think this discussion was after the report from the group, which I happened to serve on. This was perhaps taking place in 2004 or 2005. It was mainly a look at Multnomah County.
- 1:34:12 Chair Ellis It was when we had the hearing in Multnomah that we were hearing a lot of this substitution discussion, and it has seemed to me that there were substitutions that took place because of a late emerging conflict that could have been detected sooner. That is the issue that I am trying to get at.
- 1:34:36 K. Aylward You could certainly ask contractors to provide our office information. We wouldn’t really have a way to verify it. Unless we look up every case we don’t know that they got off. We don’t necessarily know when they got off.
- 1:34:59 Chair Ellis Some of this is me just identifying issues you might want to think about going forward. On 6.1, this did trouble me. It would have the Commission indemnifying contractors for – I can’t imagine what it would be, but do we have to have that?
- 1:35:24 K. Aylward I think a lot of these clauses were in here from day one based on some sort of model AG contract for state agencies to use. I don’t even know what a lot of these clauses mean.
- 1:35:40 Chair Ellis Well this one, unless somebody has a good reason otherwise, I would like to take it out. Maybe there is liability we have but this a contractual assumption of liability.
- 1:35:54 I. Swenson Mr. Chair, we do periodically compare our contract to the state’s model contract. Paul may not have looked at this issue specifically, but we should look at that. This may be one of the provisions that is in the state’s model contract, “You protect your contractors against your liability.”
- 1:36:11 Chair Ellis If we end up liable for something, I really have trouble figuring out what that would be, so be it, but this is a contractual liability that we are taking on. I would rather not do it.
- 1:36:33 K. Aylward Is it okay if we check the AG’s requirement? If it has to be in there we will leave it in. If it doesn’t have to be in there we will take it out.
- 1:36:37 Chair Ellis Perfect, perfect. Then similarly on 6.3.1, it troubled me that we would have a contractual obligation to make legislative efforts, and I thought our standard contract always had a clause in it that said in it, “If funding is short that is a risk to the contractor.”
- 1:37:12 K. Aylward That is still in here.
- 1:37:19 Chair Ellis Then I looked at this language and I said to myself words like “if possible” are pretty vague, and words that commit us to seek additional funds. I would like that clause out. I don’t feel comfortable contractually committing to what we will do legislatively.
- 1:37:43 I. Swenson I don’t think these terms were ever negotiated. I suppose in some contracts when you contract away the provider’s ability to collect if there are no funds, you sort of reassure them by saying, “But don’t worry we will try to get some more funds.”

1:38:04 Chair Ellis It is highly likely that we would do all that is contemplated here, but I just don't like having a contractual obligation.

1:38:09 K. Aylward Maybe in the old days they didn't trust us to go after it. Maybe they just thought we would say, "We are cutting your contract. I don't have anymore money and I am too lazy to ask for more."

1:38:17 Chair Ellis My strong recommendation is that we take that clause out.

1:38:24 G. Hazarabedian If you will remember, Mr. Chair, when this Commission was formed there were many of us in OCDLA that doubted this was a good model compared to the previous model. We are all now well convinced that this is a good model, but that may well have been in there to assuage some of those fears in the early days.

1:38:43 Chair Ellis It may have been. Unless there is a good reason that I am not seeing, I would like it out.

1:38:45 J. Potter My feelings aren't as strong as yours, Mr. Chair. I think you are right. I am sure we would go to the legislature and seek additional funds if it wasn't sufficient, so leaving it in doesn't bother me. I have no strong feelings.

1:39:08 Hon. Elizabeth Welch I don't have anything on this.

1:39:14 Chair Ellis Janet, where do you come out on this? Are you okay to take that clause out?

1:39:17 J. Stevens Yes.

1:39:20 Chair Ellis Alright. I think it is an out. Let me comment generally as I did informally to Kathryn before the meeting. I was very impressed by all of this material. I thought it had a level of professional competence to it that was terrific. I think those are my questions. Anyone else have questions or issues?

1:40:21 J. Potter As Ingrid mentioned I did submit a couple of changes to the first paragraphs under section 1.1, which was basically just reordering a couple of sentences to make it two paragraphs, and to insert words that mirrored language later in the contract.

1:40:47 Chair Ellis Ingrid is handing us a document called "Suggested amendments." Do you want to explain what you are doing here? Janet is on the phone.

1:40:56 J. Potter Sure, Janet, this is in section 1.1 Request for Proposals. It is taking that first paragraph and making it into two paragraphs and inserting in the first sentence of the paragraph the words "effective" and "efficient" - to provide effective and efficient legal services.

1:41:20 J. Stevens That sounds about right.

1:41:20 J. Potter And that is the language that is used in Section 3.3(a) later on in the contract.

1:41:29 J. Stevens Okay.

1:41:29 J. Potter The rest of the sentence remains the same. Then I have inserted a sentence that says, "Proposals must demonstrate that the legal services meet constitutional, statutory and other legally mandated standards." That is language that also appears in Section 3.3(a). I have put that sentence right after the first sentence and then put in a new paragraph that says, "PDSC is accepting proposals for all categories of cases," and that is just a minor change from case categories. It is language that mirrors Section 2.9 of the RFP. The second sentence there, contracts awarded, that remains the same. Then I remove entirely the last sentence, which I believe is the last sentence of the first paragraph now but reworked.

1:42:24 J. Stevens           Okay. Seems reasonable.

1:42:25 Chair Ellis           I am fine with that. Commissioner Welch is nodding.

1:42:34 I. Swenson           Mr. Chair, could I ask one question? The substantive change which you have recommended to us today, on page one of the general terms, has to do with a potential arbitration and mediation in lieu of legal action.

1:42:54 Chair Ellis           It wouldn't be in lieu of but would precede legal action.

1:42:55 I. Swenson           Shall we be guided by the model code, or shall we just insert a provision at the request of the Commission?

1:43:08 Chair Ellis           I think it is good practice to make parties negotiate before going to court. That is my view. Unless there is a good reason not to do that I would like to see us include that.

1:43:28 Hon. Elizabeth  
                                  Welch                   I am concerned there is a fiscal impact. There certainly could be, and what is an acceptable form of ADR in this context? In other words I assume Multnomah County is still doing what they were doing before I retired. The chief judge has – I don't even remember what they call it anymore, but a meeting with everyone and tries to twist arms and so forth. What is acceptable? My experience is in a different context. My attitude about ADR is that it increases the cost to parties of having a lawsuit.

1:44:11 Chair Ellis           That is politically incorrect.

1:44:12 Hon. Elizabeth  
                                  Welch                   I know. In family law and probate it makes the process more expensive. Now here we are paying the bill. The issue is what is an acceptable form of ADR and are we going to put something like that in here?

1:44:38 P. Levy               As Kathryn indicated at the beginning of this presentation, we have not conducted a thorough review of this stuff – the model contract. Over the years I have been noting language like “impossible” and terms along those lines that clearly should not be in there. It needs a major update. We need to get the RFP out within the next couple of days. I would think unless this is a matter of the highest priority that this be part of our review going forward.

1:45:15 Chair Ellis           I am fine with that. It is not a deal breaker for me. It is just a suggestion of things we should think about.

1:45:26 P. Levy               And I think I have heard you say that was fine as well for the indemnification provision as well. It may take us a while to resolve the question of why the heck that is in there.

1:45:37 I. Swenson           Unless it is in the model contract and then we are supposed to go forward, I think.

1:45:40 Chair Ellis           I don't really like the indemnity clause. I would like it out.

1:45:46 P. Levy               I don't know why it is there.

1:45:47 Chair Ellis           Why don't we compromise. The ADR you can put on the to be thought about as you do the review list. The indemnity if we can, let's just take it out. I don't know of anything that could require us to have it there.

1:46:07 I. Swenson           My suggestion was that we review the model contract, and if it is in all state contracts then maybe at least for now we would leave it in there, but if it is not there

then we will just take it out of this contract if that is acceptable. That is what I understood you to be telling the commissioners.

1:46:22 Chair Ellis                    Alright. With that said, we need a motion to approve these.

**MOTION:** Honorable Elizabeth Welch moved to approve the documents that were presented today be approved.

1:46:35 J. Potter                        With the changes?

1:46:35 Hon. Elizabeth  
                  Welch                                Yes.

1:45:35 J. Potter                        I'll second the motion.

**VOTE:** Without objection, the motion carried: **4-0.**

1:46:54 K. Aylward                    Just so that you are aware of what is going on in this timeline; it is a really tight timeline. It is now tighter because we lost a week by moving the Commission meeting. I do want to try to get it issued tomorrow. The reason the deadline is June 13th is that the analysts are going to meet the 14<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> to go through everything and look at all the issues. Then we can use the June meeting to come and say, "Here are some preliminary things we need some guidance on before we move forward." Then at the July meeting we will be able to come and say, "Okay, here is how we see everything playing out." That is your opportunity to give us further guidance. Then hopefully everything is done by September 15. That is what I was hoping to do. I think in this case they are probably going to be pretty straightforward negotiations, because usually what the Commission is grappling with is if there is additional funding how does it get ...

1:47:59 Chair Ellis                    We are not going to have that problem.

1:48:03 K. Aylward                    No. It is going to be "take it or leave it."

**Agenda Item No. 5                    OPDS Monthly Report**

1:48:14 Chair Ellis                    OPDS Monthly Report. I am assuming, by the way, that people are okay to go seven more minutes and then we will recess so that Commissioner Welch can take her phone call and the rest of us will eat lunch. Then we will resume when your call is over.

1:48:32 I. Swenson                    Very good. Mr. Chair, the first item has to do with the legislative hearings on the death penalty. I was hoping you and Kathryn would talk about the testimony you provided to the Senate Judiciary Committee on death penalty bills.

1:48:54 Chair Ellis                    Okay.

1:48:52 K. Aylward                    I thought I would have a break to run and get my stuff. I don't have the papers in front of me. I can run and get it or you can talk about it.

1:49:05 Chair Ellis                    We are going to get up to 12:00 without it.

1:49:11 I. Swenson                    We could talk about the drug cases. We already mentioned the situation with those. Currently there is a bill under consideration. It is House Bill 3104 which would treat some possession of controlled substance offenses as misdemeanors that are now either C or B felonies, if there is less than a substantial quantity and – actually, I'm sorry - if there is a user quantity of less than one-tenth of what is a substantial quantity for purposes of the penalty provisions of these possession offenses. That matter is still under consideration. The estimated savings were initially somewhat

higher than they are now because the bill was limited in some ways. I think we are estimating at this point an annual savings potential of ...

- 1:50:20 K. Aylward I thought it was biennial and it was \$1.3, but I can't do anything without it being written down. It got really complicated too. It was a first offense but "less than this and more than this." It is complicated.
- 1:50:40 I. Swenson It is and we had originally anticipated that there could be some significant savings from the original form of the bill, but it has, as I mentioned, been narrowed throughout the process. There are fewer cases that would be subject to misdemeanor treatment under the bill. Let's just say that it is not going to solve our budget problem, but in the sense that everything helps it is still in the mix. It is still a possible way of reducing the cost of public defense. In addition there is a proposal about reducing a number of misdemeanors to violations. Kathryn had prepared from Judicial Department records a list of all the class A, B, and C non-person misdemeanors that were prosecuted in 2010. There were thousands of these cases which were filed as A misdemeanors, B misdemeanors, and C misdemeanors. Under consideration initially was a proposal to treat all of those non-person misdemeanors as violations. Were that to happen and were we no longer required to pay for representation in those cases, there was a potential for approximately \$12 million in savings over the biennium, which would have been a significant portion of our budget deficit. However, first A misdemeanors were eliminated. Then B misdemeanors were eliminated. They are now talking about select Class C misdemeanors that might be treated as violations. So depending on where the discussion ends up and if anything is ultimately approved, there could be some savings there as well. Then the third area is with the death penalty. We can postpone that discussion until Kathryn has some numbers to look at.
- 1:52:50 Chair Ellis Do you want to do your call? Why don't we recess for half an hour.
- 1:52:59 Hon. Elizabeth Welch I hope it will be less than that.
- [Recess]
- 1:53:22 Chair Ellis You were in the course of the OPDS monthly report.
- 1:53:32 I. Swenson I was. One of the items was the testimony that you and Kathryn provided to the Senate Judiciary Committee. I thought maybe you could summarize that for the other commissioners.
- 1:53:41 Chair Ellis Okay.
- 1:53:46 K. Aylward I have my paper now. We did go through the facts and figures. The Commission was presented with similar information about the number of aggravated murder charges and how many actually result in a sentence of death, how many we have pending, to set the stage for the kind of ramping up of costs that we see and we all understand. I gave you a list of what happened on all these cases.
- [Commissioner Steven rejoined the meeting by telephone.]
- 1:54:17 Chair Ellis Hi, Janet. We are just starting up after lunch. Kathryn is reporting on the testimony she and I gave to the legislature on death penalty issues.
- 1:54:32 J. Stevens Okay.
- 1:54:30 K. Aylward I talked about the numbers and how we only had two cases in all this time that moved completely through the system and were in the federal system. Then I provided a separation between the costs for non-death penalty cases and the costs for death penalty cases to point out – "Look, we have 345,000 non-death penalty cases

that take \$197 million. We have only got 50 cases per biennium that are death penalty and they take \$27 million. It just doesn't seem like a good use of resources if we are going to put so much money into those cases." If there were some way to fix that it would be good. Senator Prozanski has put together – well there were actually seven bills out there originally - different ideas for ways to reduce the cost of the death penalty, and again, it is kind of hard to put a dollar figure on things because it always depends on the decisions that are made by either defendants or district attorneys. I gave a five to 10 million estimate and didn't specify which bill had to pass in order to see that kind of savings. I figured I was just giving them a really rough ballpark figure so they would know whether they were dealing with hundreds of thousands or hundreds of millions. Then I, of course, got a call from *The Oregonian* saying, "Well, you said five to 10 million. What would have to happen to get that?" So I won't do that again. We did get a question from Senator Whitsett. He asked what people would pick if there was a choice between death and life without parole. I deferred to one of the death penalty attorneys to address that. Barnes gave more testimony than I did.

1:56:38 Chair Ellis

I actually enjoyed doing this. The testimony that I gave came out of our Commission meetings. We had three where we looked at this - the remarkable disparity in the statistics between Washington, which has twice our population, and Oregon. They have twice our population – I can't quite remember what the numbers are - but remarkably fewer death cases. I said, "We are not here to advocate anything, but we are here to provide information." In general my pitch was that these two states have the same demographics. I think the incidence of murders per hundred thousand is the same in both states. So they have twice the murders and about, I think it was 10% of the cases that are prosecuted as death cases. The general pitch that I was making was, if in Oregon the timing of decision on death could be changed so that there is this period for the defense lawyers to talk mitigation with the prosecutors before they make their election, you might head off what we have in Oregon which is that most of these cases settle before trial but after all the expenses have been incurred. I thought the committee listened with interest. Ingrid, you probably know better than I if they show much likelihood of doing anything.

1:58:30 I. Swenson

I think they heard that message. The only bill that survived the process is Senate Bill 369A, as far as I know at this point, and that bill includes two provisions, both of which would attempt to move the decision forward as you had indicated in your testimony. The provisions would create a death penalty review panel of retired judges appointed by the chief justice, who review cases at the habeas, post conviction and post conviction/habeas appellate stages, to see if settlement at that stage in the proceedings is still possible and appropriate for a life without parole sentence. Then the other piece of it has to do with the DA notice – filing a notice of intent to seek the death penalty. It would give them 180 days in which to do that. Both of those provisions have the potential of allowing a resolution earlier in those two categories of cases, the trial level cases and then the cases on review. At this point the district attorneys are not embracing the idea of filing the notice, or deciding not to file it in order to allow the defense to argue against the filing of the notice. So they would have to change their behavior in order for it to have any impact, and nothing in the measure requires them to do that. It permits them to do that, so it remains to be seen if that will pass. It is currently in Ways & Means and I think it went there because of its potential for saving some public defense funds.

2:00:25 J. Stevens

Can I interrupt and ask a quick question?

2:00:28 Chair Ellis

You may.

2:00:31 J. Stevens

What are the bill numbers you are talking about?

2:00:31 I. Swenson

The death penalty bill, the surviving one, is Senate Bill 369A.

2:00:41 J. Stevens

Thank you.

2:00:41 Chair Ellis Do you have a PCR update here?

2:00:48 I. Swenson There are a couple of things that I wanted to update you on. If I may, Mr. Chair, the next one I wanted to tell you about – it is not on your list - but it was a meeting that we had with our Contractor Advisory Group and our Quality Assurance Task Force. We had a joint meeting because we hadn't gotten together for a while. This was April 26. At that meeting we discussed the Commission's new requirement of a board or alternative quality assurance mechanisms. We talked about the Commission's changed role in the review and approval of contracts, so that they and other providers would be aware of the process that we will be using this year. We talked about investigators in connection with the review of investigator billings, and who should be doing that and at what stage would they recommend that something occur. As a result of the conversation that we had with that group, it will be our practice in the future to require investigators to provide the attorney for whom they perform the work a copy of the billing which will set forth what they did and what they charged. That will be part of the process in all cases in which they are requesting investigative services from us. Kathryn talked about transitioning to a paperless process. I think the sentiment of the providers was that it would be useful at our next management conference, to deal in some detail with what is happening in various offices and here at OPDS, and what people can do to implement paperless processes in their offices. We also discussed the Measure 11 report. That was the Criminal Justice Commission's Measure 11 report. That was one of the principle reasons we wanted to get this group together, to review the findings there relating to the relative outcomes...

2:02:51 Chair Ellis Retained versus public defense.

2:02:56 I. Swenson Exactly right. Lane Borg had brought to our attention a law review article that had been published about the Denver, Colorado system. They had had some similar findings there. They reviewed that. What the study in Colorado concluded was that marginally indigent defendants, with the choice of spending resources on private counsel, or claiming indigency and using the services of the public defender, are likely to make that choice depending on the interplay of two factors; the seriousness of the charges and the strength of the prosecution's case. Marginally indigent defendants are most likely to spend resources for private lawyers if the charges are serious and if they are innocent. Conversely, they are least likely to spend resources on a private defense lawyer to defend minor charges for which they are guilty, or more precisely, for which they know the risk of conviction is high. In other words, they found that public defenders have less defensible cases and defendants may be self selecting for guilt. So, it is an unproven hypothesis, but we were nevertheless interested in it and in the relationship of the outcome to indigency status. Kathryn and her staff had reviewed the data the Criminal Justice Commission had provided to us, and gave them some additional data to look at. They recently reviewed that data and responded. Here is a basic summary of their findings. Defendants charged with Measure 11 offenses who are represented by a public defense attorney get a Measure 11 conviction 45% of the time.

2:04:55 Chair Ellis On cases that go to trial.

2:04:59 I. Swenson No, on all cases. Those with a private attorney, but who were eligible for a public attorney, get a Measure 11 conviction 37% of the time. So they could have a public defender but instead they retained counsel. Those with a private attorney who were not eligible for a public attorney, got a Measure 11 conviction 28% of the time. So we have 45, 37, and 28. They concluded that these differences are statistically significant and don't change much even after controlling for factors like crime type, demographic characteristics, whether the case went to trial, the number of Measure 11 charges on the case and prior criminal history. They concluded that they weren't sure what exactly can be said from these results, but said that they guessed you could argue that having a private attorney improved the outcomes for indigent defendants,

but it might not be because of the attorney, it could be that those offenders had better cases.

- 2:06:03 Chair Ellis But that makes no sense on the third category - the ones who aren't eligible for public defender.
- 2:06:13 I. Swenson Except that they have more resources. Just the presence of additional resources and the connections that are related to those resources are potentially a factor. They had more money and other resources. The offenders who are not indigent had better outcomes than the indigent defenders who had a private attorney, which seems to suggest that having more resources reduces your chances of getting convicted of a Measure 11 and your chances of going to prison. So it doesn't really answer - I don't know if we ever can, without looking at every case and trying to analyze the quality of representation that was provided... It is certainly something to be alert to when we review ...
- 2:07:14 Chair Ellis I find that data upsetting.
- 2:07:18 I. Swenson It is.
- 2:07:23 Chair Ellis Like everybody else I'm sure you have given it more thought than I have looking for some explanation, but if the explanation is, "In our system he with the resources gets off," that is a bad outcome.
- 2:07:38 I. Swenson Maybe regardless of its effort to provide equal representation for people, public defense can't and doesn't address the inherent inequities between privileged versus unprivileged people, connections, and all the things that are not related to retaining an attorney necessarily, but just who you are and what your situation is and how prosecutors look at people who come into the courtroom with ...
- 2:08:14 Chair Ellis I see several defense lawyers nodding their heads with what you are saying now.
- 2:08:20 I. Swenson I don't know. I wish we could have more precise information. We will certainly be alerted to the differential.
- 2:08:34 K. Rogers One major factor, Mr. Chair, is probably in custody versus out of custody.
- 2:08:50 I. Swenson They say they controlled for that. Kathryn, were there any other statistics that you noted that were relevant to that?
- 2:08:52 K. Aylward As an example, the analysts actually looked up all - I want to say 686 cases - to see what was going on. There are some examples where someone got a Measure 11 case dismissed, a private attorney, and we looked and saw the reason it was dismissed was that the client died. Okay, well, that can't count as a win for a retained attorney. Because the data is pulled from OJIN and the way it works is that OJIN will show that there is a retained attorney but you can't necessarily tell whether it is on the underlying case or a subsequent probation violation charge. On one of these cases it said there was retained counsel and there was a wonderful outcome. Counsel wasn't retained for the underlying case, however. They weren't retained until the PV, so it was the court appointed attorney who got that underlying, positive result. We looked enough of these up to think, "Yeah, well, maybe there is enough of a difference that it is showing you something, but it is not as much of a difference as the data would indicate if you actually look a little deeper." That is why we wanted him to look again. We noticed that some people did qualify. Some of our theories were about if you have bad teeth and a bad haircut you are going to have a worse result so we thought we should look at anybody who was eligible for court appointed counsel. That is where we could separate what was the attorney's fault and what was the client's fault. It is still alarming, but I was pleased to see that the difference wasn't all due to court appointed attorneys not getting as good an outcome.

2:10:51 Hon. Elizabeth Welch Any chance they controlled for whether or not the defendant had confessed?

2:10:53 K. Aylward No. They wouldn't have known that.

2:11:01 Chair Ellis Mr. Gartlan.

2:11:05 P. Gartlan Thank you, Mr. Chair. It has been a busy couple of months for the Appellate Division. Right now we are at the tail end of having five Supreme Court arguments, actually four directly out of this office, and one case that went with Bronson James, but he has been here for mooting. They are very important cases. One is *Rainoldi* and Ernie Lannet was the appellate attorney on that. That has to do with a really fundamental question about Oregon law and mental states and what elements in a statute take a mental state. This happens to be an issue that Judge Duncan has been running at for years. Now Ernie is picking up the lance and going forward. Hopefully we will get a decision from the Supreme Court on that. The next one is *Pitt*, which is character evidence which is going to be another important case for criminal law. What kinds of character evidence can come in to prove intent in a trial? The state is pretty much asking to wipe out the character evidence rule that has been around for a couple of hundred years. The next case was argued this morning, *Cloutier*, and Erica Herb argued that one. That has to do with the scope of appellate review from a guilty plea. In most cases there is a question about liability and then disposition. In appellate review of a trial case the Court of Appeals or the Supreme Court can look at both liability and disposition, but when it is a guilty plea or resentencing or something like that, the liability portion drops out and the court can only look at disposition. The state is saying that it is not just disposition but a very small core of dispositions. That is an important case because it has to do with the scope of review from guilty pleas. The next is going to be argued in about half an hour, *Lopez-Minjarez*, and that has to do with a jury trial instruction regarding natural and probable consequences. Our client was convicted of agg murder based upon the instruction of natural and probable consequences. Essentially the jury was told that if you find that he was involved in an initial felony, then the person is guilty of all the felonies that followed including an agg murder at the end if that is the natural and probable consequence of that first crime. Shawn Wiley litigated that in the Court of Appeals and won. He is defending that case in about a half hour. The other case is *Nix*. It is a fascinating issue because it has to do with the electronic world. It has to do with a search incident to arrest. There is a body of law, well established, about what the police can do, where they can search when they arrest somebody. This case involves how much can they search if they arrest you and you have one of these [indicating a cell phone]. What exactly can they search for? Can they search through this and all the information that this holds and has access to? It is a fascinating question. Now its like the electronic age is meeting up with the criminal law. Another development is that the Supreme Court is now streaming its arguments beginning this week. You can now access Oregon Supreme Court arguments through their website. It is not just as it happens, but it is also recorded. You can access arguments that took place anytime this week. Legislative update: our sole remaining proposal is sailing through the legislature. It is the mailbox rule that I have reported on in the past. That went through the Senate 30-0. It had a hearing in House Judiciary the other day, no opposition, so that is moving on and should pass. Also, we have the juvenile appellate section, and Shannon Storey who is the head of that section has been working with the legislature and Ingrid. She has been a resource to legislators for the last month or so. By the way, that unit is doing really well. All the reports that I get back from the Court of Appeals is that they are really helping shape Oregon law with respect to the arguments they are making. That is Shannon Storey, Shannon Flowers, and Holly Telerant who make up that unit. The next item is we have been sharing the briefs in the cases that we are arguing. They are now going to Alex Bassos at MPD. He is making those available on the MPD website. He making them available to any practitioners who want to take a look at some of the documents we have been filing on particular issues. The

next item is May Daze. May Daze is set for May 26. That is our CLE. We have a relatively large CLE twice a year. On the agenda for this May Daze is the DOC sentencing calculations.

- 2:16:43 Chair Ellis Who attends these CLEs?
- 2:16:46 P. Gartlan The attorneys from this office and we send out to the local practitioners, criminal defense practitioners. So it is: DOC sentencing calculations, representing challenging clients, not quite “compassion fatigue” but stress fatigue, and kind of a round up of Supreme Court review of significant cases that have been argued over the last few months.
- 2:17:14 I. Swenson Commissioners are invited.
- 2:17:17 P. Gartlan Commissioners are always invited, always welcome.
- 2:17:21 Chair Ellis Thank you. Any questions?
- 2:17:26 J. Potter You had a seminar on diversity, did you not?
- 2:17:32 P. Levy Yes. I think it was very successful.
- 2:17:41 K. Aylward It was excellent. Paul won’t brag about it, but he did an excellent job.
- 2:17:42 P. Levy We did get very good feedback. I was charged with putting on a day long diversity program. That is something most people would rather stick a pin in their eye than attend. I am among them because I have attended some that have been really bad and was determined that this one would not be like that. We had very interesting, engaging people. We had a keynote speaker who presented both in the morning and the afternoon, an African-American PHD candidate in Eugene, who is just an incredibly dynamic, engaging, and provocative speaker. He really got people involved and presented his ideas in an unusual way. People really responded very well to him. We had Dave Dahl, who is the Dave of Dave’s Killer Bread. He has sort of inherited his father’s Nature Bake facility, the original health food bread, Survival Bread, if you remember that, but he served 16 years or so in prison including Measure 11 time, and is now a model for rehabilitation although he still looks like an inmate, which helps. He is a very down to earth and interesting fellow. The first question is, “Well you must have had experience with public defenders? What was that like?” He has never met one that did any good for him. He was interesting. Then, also in the afternoon, two returning veterans from the Iraqi war provided very compelling, very interesting testimony. One fellow - you only had to look at him to understand his circumstances. He was missing an arm and part of his head – he was a mess but a very compelling presenter. Then a woman whom Ingrid knew from practice talked about her own experience in Vietnam and then her work with DHS.
- 2:20:27 P. Gartlan Can I just follow up. The Iraqi war veterans were fascinating because the message was that we are training people to go over and kill kind of reflexively, and they are coming back and they are potential time bombs walking around and if confronted, particularly by authority figures, there is a possibility of them going off violently. I thought it was really interesting that they were recommending that the law enforcement be trained in how to confront, deal with, people who might be veterans. It was a very sobering message.
- 2:21:12 I. Swenson Mr. Chair, one other brief update. Paul would update us on what is happening on post conviction relief, if you have time to hear that.
- 2:21:21 P. Levy Very quickly and a little bit of background. You will remember that the Commission held hearings on PCR in February of 2008 and eventually issued a report in 2009, concluding that PCR representation, generally, was unsatisfactorily. That followed

many previous studies that had reached the same conclusion. Between the hearing and the ultimate issuing of that report, there was a state bar task force that promulgated performance standards in PCR, and also a report that recommended to the Commission that it seek to establish an FTE unit of PCR practitioners. It also recommended another change which the Commission adopted concerning the attorney qualification standards. The Commission, having had the experience of trying to get funding for a PCR unit decided to proceed with the plan to contract - to achieve better performance through contracting - with a good, reliable group of PCR practitioners. We want to do a review, and will be doing a review, not only of that group but of other PCR practitioners to see how they are doing. We are about to conduct a peer review. Once that is done we will do this review. It will not be on the model of the peer review. It will not be a confidential process. It will be a process that will permit us to make a report to the Commission. It is timely not only because we are in the RFP process, but also there is a lot going on in PCR now. The Judicial Department is forcing a change in how PCR cases are handled. There is a cynical, widely held view that this is a full employment act for Plan B judges. There are so many Plan B judges that they need to have something to do. The Judicial Department will keep them busy with PCR cases. That is a widely held view within the judiciary. There is some logic to the streamlining that is occurring but it breaks down with the idea that a judge would be able to decide a case and issue an opinion within a day. That is just not viewed as realistic. A work group convened and worked on those rules. There were representatives of the Department of Justice and the local PCR Bar. I was a part of this group and it actually arrived at a set of fairly sensible practice guidelines and proposed orders for PCR cases. That group – or a sub-part of that group - is now turning its attention to rules for capital cases. The idea is that capital cases – and these cases would all have been handled by regular sitting judges here in Marion County. The capital cases, as well, will be handled by Plan B judges. There is going to be a lot of push and pull on how these capital rules are arrived at. It is a good time to look at how our PCR work is being performed. We hope to have a report within a couple of months.

2:25:10 Chair Ellis

Okay.

2:25:10 I. Swenson

That is the end of our monthly report.

2:25:16 Hon. Elizabeth  
Welch

I have to ask a question. You say “Plan B judge” and there is scorn just running off the edge. What is all that about?

2:25:27 P. Levy

I understand. The problem is – the reason this is viewed cynically is that it was thought that the Judicial Department needs to find work for Plan B judges, but they don’t want them to work too much. What they are trying to do is get PCR cases packaged with a little bow so a judge can hear a case and issue an opinion and be done with it and not take it home. It is not scorn at all for the judges but the cynical view of the process in which these judges are being forced to labor. There is actually some enthusiasm for the opportunity to present these cases to judges who are not that invested in the particular county or case. A Plan B judge just heard a hearing in a capital PCR case and I hear that went very nicely. I hold Plan B judges in the highest regard.

2:26:50 Chair Ellis

Any other comments?

**Agenda Item No. 6**

**Executive Director Recruitment Plan**

2:26:52 Chair Ellis

The last item is the executive director recruitment plan. I can report that the job description and the application instructions went out on a timely basis. Thank you, Kathryn. The deadline for filing applications is May 15. What I would suggest, once the deadline has passed, give two or three days ...

2:27:28 K. Aylward

You don’t need two or three days because it is emailed.

2:27:32 Chair Ellis Are they told they have to email it?

2:27:32 K. Aylward Yes, they are.

2:27:38 Chair Ellis Perfect. The person to whom they are all addressed is Kevin McKenzie. Probably Kathryn and I are the only ones in this room that know who Kevin McKenzie is. He happens to be my secretary. That was because if they came to me I would lose them. What we will do is – it will probably clog your server for a while - but we will ship these to all commission members. Then what I would like to do is schedule a telephone conference date when we can speak to each other, for those who are interested, by phone and see if we can't narrow whatever number there is to the hopefully three or four that seem like the most promising applications. For that date we ought to allow at least a week between when we send them out, before the telephone conference so people can read the materials. I am thinking of the last week of May. Can you send out a survey monkey for the last few days of May and first days of June? Let's see what times seem to work or don't work. We will schedule a telephone conference. I will set this up with a call-in number. Once we have narrowed it to what seems like the right number – the last time it seemed to kind of work pretty well. There was a pretty clear break line. In that same conference call I want to talk about how we get input, and that includes assigning a commissioner to each of these applicants to call their references and get what information they have. Then I want to find a way to get senior staff input. You are probably going to know many of these people and it is relevant to our decision what you all have to share with us. This is where I am not sure what to do because sometimes we get applications with a request for anonymity and we respect that. Contractors and providers are part of the community and we would like to know their thoughts, so I'm open to that. Any thoughts how we get that input in a fair and reasonable way? We are obviously not going to have open hearings. It is more about those they know and want to express a comment on. There may be some applicants they don't know are applying.

2:31:04 K. Aylward I was thinking about this too. Maybe the most that contractors could provide as input is to say, "Gee, you should really get somebody with strong lobbying skills because that is what we think is important", or, "You should get somebody who has been a criminal defense attorney because that is what we think is important." You are right.

2:31:27 Chair Ellis They are going to know who some of the applicants are. This is a relatively small community. I am sure they will.

2:31:33 K. Aylward And if applicants apply and say, "You can contact anyone you want," maybe part of the vetting process is to say, "It says on here 'list three references that you consent to be contacted.'" Maybe when we get the applications we could ask if they wanted to keep them confidential. I don't know if the application actually spelled that out.

2:31:59 Chair Ellis I know last round there was at least one that who did want it handled that way. I would be perfectly happy if providers or contractors, people with an interest, want to send me an email. I will see that that gets distributed to the Commission. I think that is a much better process than me being on the phone and then trying to translate what was said. My time is actually getting scarcer not more plentiful. Any thoughts?

2:32:44 G. Hazarabedian I will tell you, Mr. Chair, that Lane Borg and I talked about this, or more accurately he talked about this to me after some meeting we were at recently, maybe the last Commission meeting, and he was thinking that he might want to suggest, and I will do so in his absence, that there would be a contractor as part of the hiring committee. I don't know if he has given further thought to the idea or chatted to people, or whether it is something that he doesn't want to have proposed in which case I am

speaking in error. I am only saying it because he mentioned it to me after the last meeting. He is not here today so I will just throw that out in his absence.

2:33:26 Chair Ellis By statute I don't think we could do that if we wanted to. I am very open to find ways to get input.

2:33:40 G. Hazarabedian I think maybe once the Commission has narrowed the list down to what we would call finalists, maybe just ask those people what level of confidentiality they...

2:33:53 K. Aylward I think that was what I was trying to say. If it turns out that your three or four don't care who knows, then you can just say that these three or four are applying and give us some feedback if you want.

2:34:09 Chair Ellis How do I say that?

2:34:14 G. Hazarabedian It is easy enough to email contractors. Certainly OCDLA could be the communication vehicle, if not the Commission itself. Just let OCDLA members know that that the Commission is looking at finalists for the executive director position. "Here is where you might find materials for your review. If you have input this is where you send it."

2:34:41 ?? Contractor Advisory Group?

2:34:43 G. Hazarabedian The problem with a group is that I don't know if we speak as a single voice.

2:34:46 Chair Ellis I am not sure I want you to speak as a single voice. We will resolve this in the same telephone conference that we are going to have about the applicants.

2:35:01 K. Aylward And Paul pointed out that the application itself does say that you need to tell us if you want this to be kept confidential. If nobody tells us that...

2:35:14 Hon. Elizabeth Welch Have we gotten any applications yet?

2:35:14 Chair Ellis We have three.

2:35:20 Hon. Elizabeth Welch And how many days has it been out?

2:35:19 K. Aylward A couple of weeks.

2:35:27 Hon. Elizabeth Welch I was just curious. I wonder how long this conference call is going to be if we have 50 people to chat about.

2:35:36 Chair Ellis If it is 50 we will have to rethink. I am guessing it is going to be seven or eight.

2:35:42 G. Hazarabedian I will contact Lane shortly after this meeting and let him know this came up. If he has specific input now is the time to give it.

2:35:51 Chair Ellis Anything else on that issue?

2:35:59 J. Potter Can we go back to the week you were talking about for the phone conference? You said the last days of May or first days of June. The 30<sup>th</sup> of May is a holiday. That leaves four potential days in that week. I can do any of their four days.

2:36:20 Chair Ellis Do the survey thing.

2:36:21 K. Aylward The original timeline that I sent out with the materials was tight, but I am assuming that by the June meeting or during the June meeting you will make a final decision.

2:36:39 Chair Ellis I am not going to lock into that. It is not the end of the world if Ingrid drives away in her truck and we haven't done it yet.

2:36:51 K. Aylward Originally they have said we want someone on board and even some overlap. I was trying to make it work so you would.

2:37:01 Chair Ellis We are hopefully going to be out of the legislative shadow by then. No matter who it is, they are not going to be able to do much legislatively even if the legislature is still in session. I am more concerned that we do a good job than meet some arbitrary deadline. I think getting senior staff input is something we will try to work in at the June meeting. I think that should be face to face.

2:37:42 K. Aylward There is always a possibility that you don't get enough applicants or the right applicants and you might want to extend the deadline.

2:37:59 Chair Ellis Things could happen. Any other business for the good of the order?

2:38:02 Hon. Elizabeth Welch I have a question and it shouldn't take long. I don't remember when it happened, Ingrid, but the Chief Judge sent out a letter to the juvenile judges in Oregon saying, "Be more careful about letting children waive their right to counsel." It has been at least three or four months. I am concerned whether we have any way of tracking whether that has any impact. I know that some of the members of the Commission, myself certainly and I think Mr. Potter, were less than thrilled with that as a resolution of this issue. It seems to me that we need to find out whether this had any impact or not. I know that you have some stories and comments from people. We had trouble getting data that was reliable in the first place. Getting data now is probably going to be just as difficult if not impossible, but I would really hate to see us not keep an eye on that. The other thing is how is the case coming along? The case or cases in that vein.

2:39:38 I. Swenson Mr. Chair and Commissioner Welch, I have heard anecdotal information and you are right that that is all at this point. All of it that I have received has been to the effect that appointment is taking place more often. I have no sense of whether that is across the board or just in counties here and there. We can repeat a survey. As you will recall our survey was not well received. There was some concern among the juvenile directors that the data that they gave us was reflected in a way that they didn't expect it to be, or that didn't really indicate the nature of the way they do things. There was some dissatisfaction with that. Whether they would be particularly cooperative I'm not sure. I would like to think about that and the appropriate kind of follow up. I will continue to discuss that directly with you if I may. We can look into that. As far as a case is concerned, we had spoken to Youth Rights and Justice about two possible appellate vehicles. Mark, do you have anything to tell us on that point?

2:41:07 Mark My understanding from Angela Sherbo, who is handling those cases, is that the issues were not very well preserved in those cases.

2:41:18 I. Swenson Which would mean that we are still looking for a good case to litigate. It has been kind of interesting on a parallel issue, if I could take one more minute of your time, and that is on the shackling of juveniles. We sent out a companion survey. Those two issues were dealt with at the same time. In Yamhill County, Judge Collins heard an argument in a number of consolidated cases about the practice in that county of not only shackling kids to and from the court, but during the course of the court proceedings on a regular basis. He wrote a very strong opinion about that. We have circulated that to the defense bar. There are defenders in most counties where that practice continues who have brought challenges to that practice. They are in a less advantageous position to raise the waiver issue because they don't know about it. They are certainly aware of the issues and they have all received a copy of the

colloquy so that they know what the judges received. If the occasion arises for them to remind the court that that tool is available they could do that. OCDLA and other organizations have sent out a good deal of information about both of these issues. I would be happy to meet with you and discuss what our next step should be.

2:42:53 Chair Ellis

Returning to the other subject, why don't we schedule a meeting of the Commission, an executive session with senior staff, immediately following the June 16 meeting.

2:43:11 K. Aylward

That will work well because I think you are going to be in executive session anyway.

2:43:20 Chair Ellis

Anything else? Is there a motion to adjourn?

**MOTION:** John Potter moved to adjourn the meeting; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE: 4-0.**

[Meeting Adjourned at 1:20]

# Attachment 2

**Public Defense Services Commission**  
**Service Delivery Plan for Deschutes County**  
(June 2011)

**Introduction**

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems.

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

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

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

The original version of this report was provided to Commissioners and others prior to the June 17, 2010 meeting of the Commission.

## **PDSC's Preliminary Investigation in Deschutes County**

In April 2010 OPDS Executive Director Ingrid Swenson and Public Defense Services Commissioner John Potter visited with stakeholders in Deschutes County. They met with or spoke by telephone with six of the seven Circuit Court judges; the juvenile court referee; the trial court administrator and members of his staff; the District Attorney, his chief deputy and chief misdemeanor deputy; the Citizen Review Board coordinator; Juvenile Department staff; two CASA supervisors; DHS supervisory personnel; a Department of Justice attorney, State Representative Judy Steigler; and directors of all four contract offices.

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

#### The Circuit Court

There are seven Circuit Court judges in Deschutes County. Judge Michael Sullivan is the presiding judge. The others are Michael Alder, Alta Jean Brady, Stephen Forte, Barbara Haslinger, Edward Perkins, and Stephen Tiktin. The Trial Court Administrator is Ernest Mazorol. Steven Kurzer is a part time referee who handles primarily juvenile delinquency cases. All of the judges handle criminal matters. Judge Forte is the principal juvenile judge. Two of the Circuit Court judges restrict their caseloads to what were District Court cases prior to the consolidation of the state courts<sup>1</sup>.

The court operates a number of specialty courts – a drug court, a family court (in which all cases relating to a particular family are consolidated), a mental health court and a domestic violence diversion program. There is also an early disposition program in the county.

#### District Attorney

Long term Deschutes County District Attorney Mike Dugan was defeated in the May election and will be replaced by Patrick Flaherty, effective January 1, 2011. There are currently 18 deputies in the District Attorney's office. Two deputies are assigned to handle juvenile matters and their offices are located at the juvenile facility located several miles from the county courthouse.

#### Procedure in Criminal Cases

The court uses a hybrid docketing system. While cases are assigned to individual judges at the time of filing, they do not actually go to the assigned judge until after the entry of plea. The five felony judges alternate handling the arraignment docket on a weekly basis, with out-of-custody arraignments in the

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<sup>1</sup> This system may be changing at the end of 2010 upon the retirement of one of the "misdemeanor" judges; other docket changes may also be considered.

morning and in-custody arraignments at 1:30 daily. All in-custody arraignments are done by video from the jail. Attorneys are present in the courtroom and can communicate with incarcerated clients over a secure telephone connection. The judge assigned to handle arraignments also handles changes of plea<sup>2</sup>.

Misdemeanor cases are assigned to the two "District Court" judges, with odd numbered cases going to one judge and even numbered cases going to the other. These two judges alternate between hearing trials and hearing short matters. Delays in resolution of misdemeanor cases resulted in a backlog of unresolved cases that required the court to bring in an out of county judge to help clear the docket<sup>3</sup>.

Both felony and misdemeanor cases may be set over by either side.

Obstacles to resolution in felony cases were reported to include: not having a deputy district attorney present with authority to settle the case, defense attorneys not meeting with their clients<sup>4</sup>, defense attorneys not making counter offers to the offers made by the deputy district attorney at the time discovery is provided.

An entry of plea date is set in both felony and misdemeanor cases within 21 days after the arraignment for in-custody defendants and 35 days after arraignments for out-of-custody defendants. At the entry of plea hearing a case may be resolved, set for trial or continued. Settlement conferences are scheduled frequently. Cases are sometimes settled on the day of trial. Trial rates in Deschutes County are below average<sup>5</sup>

## Procedure in Juvenile Cases

### Delinquency cases

The juvenile court referee is assigned to hear delinquency cases one and one-half days a week in a courtroom at the juvenile facility. Attorneys are generally present at initial hearings. An "admit/deny" hearing is scheduled two weeks after the shelter hearing.

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<sup>2</sup> This system was implemented several years ago at the request of both the prosecution and the defense in order that attorneys could have all of their criminal appearances in a single courtroom.

<sup>3</sup> There was a difference of opinion about the cause of the backlog which resulted in cases being set out five and six months after the entry of plea, the defense attorneys indicating that the deputy district attorneys who appeared did not have authority to settle the cases and the district attorney's staff indicating that the assigned defense attorney were often not present.

<sup>4</sup> One person noted that the jail is four miles from the courthouse making it more difficult for defense attorneys to meet regularly with clients.

<sup>5</sup> In 2009, according to the State Trial Court's "Cases Tried Analysis," 3.4% of felonies and 2.2% of misdemeanors went to trial, compared to a statewide average of trials in 5.7% of felonies and 4.4% of misdemeanors.

Juvenile caseloads are declining according to the juvenile department. Five positions in the detention center were terminated in April. A portion of the 56 beds in the Deschutes County detention facility are rented to other counties and some are used to house juvenile Measure 11 defendants. The county has not been required to reduce juvenile department probation staff, however.

One juvenile department team handles only formal accountability agreements (FAAs). According to a spokesperson for the juvenile department, the county seeks to divert as many youth as possible to FAAs and to informal diversion programs operated by the Bend City Police, the Redmond City Police and the cities of Sisters and LaPine. Minor offenses such as Theft II, Assault IV and Minor in Possession are handled informally and do not require involvement of juvenile department staff<sup>6</sup>. Probation violations are prosecuted as motions to revoke probation.<sup>7</sup>

It is rare for a juvenile in Deschutes County to waive counsel<sup>8</sup>.

Trial rates in delinquency cases are above statewide averages.<sup>9</sup> In sex offense cases, a procedure has been developed in which counsel for the youth obtains a sex offender evaluation. Depending on the evaluator's conclusions, the report may be provided to the state. Through the use of a "conditional postponement" it is often agreed that the court will adjudicate the youth on one or more non-registerable offenses and the youth will make factual admissions to one or more registerable offenses with disposition being withheld on the registerable offenses. Successful completion of probation, including sex offender treatment, results in dismissal of the registerable offenses.

### Dependency cases

In Deschutes County the Department of Human Services provides factual information for dependency petitions and the District Attorney's office prepares and files them. Preliminary hearings occur in the afternoon and are scheduled only as needed. The Oregon Judicial Department reported that there were 77

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<sup>6</sup> Statewide Juvenile Justice Information System statistics indicate that in calendar year 2009, approximately 55.8% of youth were diverted in Deschutes County (compared to 34.0% statewide). However, 43.4 percent of youth had cases dismissed or not petitioned statewide compared to only 22% in Deschutes County. The percentage of youth adjudicated in Deschutes County (21.3%) was nearly identical to the statewide percentage of 21.2%. See: [http://www.oregon.gov/OYA/jjis\\_data\\_eval\\_rpts.shtml#\\_Dispositions](http://www.oregon.gov/OYA/jjis_data_eval_rpts.shtml#_Dispositions).

<sup>7</sup> While informal sanctions are often used to address probation violations, in 38 cases in 2009 a total of 728 days of detention were imposed post adjudication with an average length of stay of 19.2 days.

<sup>8</sup> Email from Bob LaCombe, Division Administrator, Deschutes County Juvenile Community Justice and testimony of Judge Steven Forte at the OCDLA Spring Juvenile Conference, April 2010.

<sup>9</sup> Oregon Judicial Department statistics indicate that in the one year period ending July 30, 2009, 29 of the 402 delinquency petitions were resolved by trial (approximately 7%), compared to approximately 4% statewide.

petitions filed in Deschutes County in the one year period ending September 30, 2009. Attorneys are appointed for both children and parents in almost all cases according to DHS. No discovery is provided prior to the hearing and usually only the petition and the temporary custody report are available. DHS staff indicated that initial hearings are never contested. A custody review hearing and settlement conference is generally scheduled for several weeks after the initial hearing. The great majority of cases are resolved at this hearing or at a third hearing, if needed. Statistics for the year ending September 30, 2009 indicate that 11 cases were tried.

The court and the Citizen Review Board (CRB) both conduct regular reviews in dependency cases. The Judicial Department reported that there were 555 review hearings in the year ending September 30, 2009 in Deschutes County, which is a ratio of approximately seven review hearings to each new dependency case filed<sup>10</sup>. The Deschutes County District Attorney's Office appears at these hearings.

Contested trials in termination of parental rights cases are reported to be rare in Deschutes County<sup>11</sup>. Most of the cases that proceed to termination are family court cases in which an array of services have already been provided in an effort to reunite the family.

Deschutes County has an active CASA program.

#### Civil Commitment Cases

Attorneys sitting as pro tem judges usually hear civil commitment cases in Deschutes County. Most of these hearings occur at the courthouse although some are held at St. Charles Hospital. A delay in processing the required paperwork in these cases has now been addressed. County Counsel represents the state in commitment proceedings.

#### Specialty Courts

Deschutes County has a relatively new family drug court that opened in 2007. Judge Brady is the family drug court judge. There are 21 clients in the program that requires involvement of family members. The court is directed primarily at women, many of whom are single parents. The family court drug team meets weekly.

The county also has a family court that was started in 1994. It was the first pilot site in the country and has been written up as a best practice model by a number of organizations including the National Center for State Courts and the National

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<sup>10</sup> The statewide ratio according to Oregon Judicial Department data is less than 2 review hearing for every new dependency petition.

<sup>11</sup> One state's attorney could not recall a termination trial in the past five years.

Institutes of Justice. All of the judges have cases that have been designated as family court cases. Currently each judge has between 15 and 20 cases<sup>12</sup>. Participation in the court is not voluntary. Cases are subject to family court treatment if members of a family have multiple cases before the court, at least one of which is a juvenile dependency case. Once the cases are “bundled” and sent to one judge, any new cases will also be transferred to that judge. Active involvement of the court requires that family members be willing to execute releases and waive confidentiality. If they choose not to, the cases remain bundled but are processed in the traditional manner. Active family court cases involve frequent court hearings and occasional family meetings with participation by multiple treatment providers. Brie Arnette is the Family Court Coordinator.

The county also sponsors a mental health court. Jail staff usually makes the initial referral of a potential mental health court candidate to the district attorney who determines whether the person appears to meet program admission criteria of: a pending non-violent felony or misdemeanor with a history of mental health issues. Judge Tiktin presides over the court. Participants appear twice a month. Successful completion of the program results in a dismissal of the charges. The Mental Health Department recently received a grant that will permit it to enhance coordination. The program can serve a maximum of 25 clients.

A domestic violence diversion program is overseen by Judge Sullivan. Persons charged with both felonies and misdemeanors are eligible to participate. The court meets every two weeks. A diversion offer is initially made by the district attorney. If the defendant accepts he or she must enter a guilty plea and agree to get into a batterer’s intervention program within 30 days. The case is then continued for 60 days to confirm that the defendant has entered the program. The program lasts approximately 18 months. The defendant is returned to court upon successful completion of the program or if diversion conditions are violated. Successful completion results in a dismissal of the charges. Approximately 50 to 60 program participants are monitored by the court and approximately 100 by probation and parole.

There is an early disposition program in the county. There were approximately 500 EDP cases last year. Most cases involve minor property crimes such as Theft II. EDP permits the district attorney’s office to focus on other offenses, including domestic violence cases and DUIs. According to Brendon Alexander, the attorney with whom PDSC contracts to handle these cases, there are between six and sixteen defendants a day referred to this program. Discovery is provided a day or two before the hearing; defendants plead guilty and are ordered to complete 8 hours of community service. Mr. Alexander meets with the defendants as a group and describes how the court works. If they have any concerns about the process he tells them that they can contest the charges if they wish or take a brief continuance to consider their options.

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<sup>12</sup> As of May 25, 2010 a total of 302 families had been assigned to the court. Currently there are 93 active cases.

Current funding does not permit the county to create a special DUII court or a veteran's court, both of which have been explored.

### Public Defense Providers

PDSC contracts with four providers for non-death penalty cases in Deschutes County: Crabtree and Rahmsdorff, the Bend Attorney Group, DeKalb, Brenneman & Brenneman, and Alexander and Associates.

The Crabtree and Rahmsdorff firm was established in 1981. It is a non profit public defender office with 13 attorneys and a number of non-attorney employees including investigators, administrative and clerical staff. The firm represents public defense clients in both Deschutes and Crook Counties. The current contract includes 3,640 Deschutes County cases per year, including all major case types except aggravated murder, and includes mental health court cases and family drug court cases. The executive director, Tom Crabtree, serves at the pleasure of the office's board of directors, which also reviews and approves office policies, budgets and contracts. The board's outside members include representatives of the local business community.

The Bend Attorney Group, a consortium of 9 attorneys, contracts to handle 1,914 cases per year, including family drug court cases and all major case types except murder and aggravated murder. Jonathan Pritchard is the administrator. The consortium formed a board of directors over a year ago. Members include a civil attorney, a deputy district attorney from another county, a criminal attorney in private practice, and a consortium member. The board hires the executive director, approves contracts, surveys judges and district attorneys, and reviews complaints and quality assessments.

At the time of the PDSC meeting in Bend, Dekalb, Brenneman & Brenneman was a law firm with five attorneys. Two of the partners left and the firm now consists of Jacques DeKalb and two associates. The firm contracts for 1,537 cases per year including primarily criminal matters, a small number of juvenile dependency review hearings and cases in the mental health court and the family drug court. Jacques DeKalb manages the contract.

Alexander and Associates is a law firm with three attorneys which contracts for 542 cases per year including all major case types except aggravated murder and contracts to handle the early disposition program. Brendon Alexander manages the contract.

Non-contract attorneys are not needed on a regular basis but there are some Bend attorneys in private practice who are willing to accept occasional public defense cases and one of the contractors in Crook County also accepts Deschutes County cases when necessary.

## Comments regarding Local Public Safety System and PDSC Providers

### Criminal Cases

OPDS received comments from judges, court staff, district attorneys and defense lawyers about court scheduling issues. There was no consensus regarding the causes of scheduling conflicts. The judges noted that felony trials are sometimes delayed for long periods because the appointed attorney is not available. They said that some contractors handle cases more expeditiously than others and are more cooperative with the court's effort to make the process more efficient. One lawyer is so contentious that he doesn't settle cases when it would be in his client's interest to do so. The judges said that there is a need for more attorneys qualified to handle major felony cases. Court staff noted that attorneys don't usually have calendars in the courtroom. If they did it would help to prevent scheduling conflicts.

District attorneys said that the defense bar moves slowly and has no real incentive to resolve cases quickly. Some of the attorneys will make an affirmative effort to negotiate, others won't. Defense attorneys don't always meet with their clients before settlement conferences and the need to confer with victims limits the state's ability to negotiate at the last minute. The district attorneys said that because all of the judges handle criminal cases lawyers often have multiple appearances, making scheduling conflicts common.

Defense attorneys point to the judges' individual dockets as the principle scheduling challenge and also note that it is difficult to resolve cases at settlement conferences when the deputy district attorney who is present lacks the authority to amend the offer. Scheduling has improved in misdemeanors since there is now a deputy in charge who has the authority to settle cases.

### Representation of parents

Juvenile dependency system representatives reported that most attorneys provide good representation to parents but some are more skilled than others at collaborative efforts on behalf of their clients in family court, with some appearing to prefer the adversarial model of representation. Several interviewees said that some contractor attorneys are not meeting with their clients before court, necessitating the rescheduling of hearings. Individual attorneys were identified as providing particularly zealous representation and others as providing relatively apathetic representation.<sup>13</sup> It was said to be unusual for all but two of the attorneys to have any contact with DHS between court hearings. One state's

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<sup>13</sup> One interviewee said that if he were a public defense client and either of two attorneys he identified were appointed as his counsel, he would sell his dog to be able to retain his own counsel. Information about the reported performance of particular attorneys was provided to contract administrators in each office.

representative said that sometimes attorneys are too passive and sign off on terminations without a fight. Attorneys are said to use the CRB process well.

### Representation of children

Children's attorneys are visiting with their clients more often than they did in the past. Other interviewees reported that they are generally on top of their cases. Some attorneys exceed expectations in the frequency of their contact with their child clients and the strength of their advocacy. Teens have expressed appreciation for their attorneys' efforts to assure them a voice in family court. One interviewee said that many attorneys are not adequately trained in how to communicate with child clients. They also don't meet with clients as often as they should. One dependency system representative said that adoption is a "black hole" in Deschutes County and urged that children's attorneys make a greater effort to see that adoptions are finalized.

### Delinquency cases

State representatives note that defense attorneys often fail to meet with clients before the admit/deny hearing, often requiring that the hearing be reset. Some attorneys also fail to return phone calls from clients and their parents. There are attorneys who are prepared and do excellent work and others who "are just there for the pay check."

## **OPDS's recommendations for further inquiry at PDSC's June 17, 2010 meeting**

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

### The Structure

Under the system currently in place, PDSC contracts with four providers in the county. The variety of provider types allows for some of the benefits and involves some of the weaknesses noted in the description of public defense providers at pages 6 to 9 of this report. A non-profit public defender office serves as a recruiting and training resource for the county, the consortium attorneys can represent multiple parties in a single case without conflicts, the law firms can provide special expertise such as the high quality representation in serious cases reportedly provided by the DeKalb firm and the ability of the Alexander firm to represent clients described by court staff as "difficult."

Currently, the caseload is declining in the county. Over time it is possible that fewer providers will be needed although there appears to be general agreement

that there is a need for more attorneys qualified to handle serious felony cases. Attorneys are still described as “stretched thin” and many interviewees acknowledged that as a result of the hybrid docketing system attorneys appear to be scheduled in multiple places at the same time, a situation that is aggravated by the fact that the jail and the juvenile court are located several miles from both the county court house and the law offices of most of the attorneys.

Commissioners might wish to question providers at the hearing on June 17 about ways in which the providers and PDSC could recruit and retain more attorneys skilled in serious cases.

### The Juvenile Dependency System

In Deschutes County, as elsewhere, representation at shelter hearings, even where it occurs, is compromised when attorneys don’t have adequate notice or access to discovery and when they aren’t able to meet with their clients until the hearing is in progress.<sup>14</sup> These are difficult problems to address since shelter hearings must occur within 24 hours of removal meaning that there is very little time to give notice to attorneys, to prepare and provide discovery to attorneys and to expect attorneys to meet with potential clients to prepare for the hearing. Critical decisions are made at shelter hearings that can shape the final outcome of the case. Some counties have had success in providing meaningful representation at this stage but they are a small minority.

Even if representation at the initial hearing is undermined by circumstances beyond the attorneys’ control, and efforts to modify the system have been unsuccessful, by the time of the second hearing it is reasonable to expect that attorneys will have met with their clients and discussed their cases and determined whether an expedited hearing should be requested, whether more time for investigation is needed, whether the case is likely to be settled or set for trial. The failure to have met with the client by the time of the second hearing in dependency cases is often explained by the attorneys in Deschutes County as well as attorneys in other areas of the state as the failure of the client to respond to a letter directing the client to call the attorney’s office and schedule an interview. PDSC’s contracts include the following requirements regarding initial interviews with clients:

#### **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

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<sup>14</sup> Standard 3.5 “Obligations of a Lawyer Regarding Shelter Hearings and Pretrial Placements,” Specific Standards for Representation in Juvenile Dependency Cases, 2005 revision, Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases requires active representation of the client’s interests at this hearing.  
<http://www.osbar.org/docs/resources/juveniletaskf>.

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.

Paragraph 7.1.4.2 appears to sanction a minimal effort by the lawyer to communicate with the client by notifying the client of what the client must do to schedule an interview time. It appears that both the client and the system would benefit from a greater effort on the part of the attorney to make contact with the client. Demands on public defense lawyers' time are already great. Initiating contact with the client as well as visiting with some child clients, monitoring compliance by both the client and DHS with the service plan as well as many other components of good representation in dependency cases can be performed by a well trained legal assistant or social worker. Several of PDSC's contractors have hired such professionals to supplement the work of the attorneys. PDSC could consider a policy option package in its '11 – '13 budget proposal to provide additional funding in juvenile dependency cases to either lower the caseloads of the attorneys or add support staff to assist them.<sup>15</sup>

### EDP Representation

Commissioners may want to talk with some of the invited guests at the June 17 meeting about the Deschutes County EDP program. While the program does not conform to PDSC's Guidelines for the operation of EDP programs, some members of the local justice system consider the program a success and urge that providing direct, conflict free representation for each participant is not necessary and that both the state and the clients are satisfied with the way these cases are being handled. Assuming that Mr. Alexander's relationship with the defendants in these cases is not an attorney/client relationship under applicable ethical rules, PDSC may want to consider whether it should be compensating a public defense contractor for participation in this process or whether someone other than a public defense attorney should be making the "orientation" presentation.

### Information Provided at June 17, 2010 PDSC Meeting

Chair Ellis welcomed members of the audience to the Commission meeting. Ingrid Swenson summarized the draft report on the delivery of public defense services in Deschutes County.

Ernest Mazorol, the Trial Court Administrator for the Deschutes County Circuit Court provided the Commission with information about the caseload in the county. He said there had been a boom period from 2005 to 2009 with the

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<sup>15</sup> The Juvenile Dependency Interbranch Workgroup is considering support for a similar proposal. The workgroup includes representatives from all of the agencies involved in juvenile dependency cases.

biggest area of growth in civil cases. Criminal cases, felony offenses in particular, however, had declined by 6%. Over that period the number of judges had remained the same but court staff had been reduced by approximately 15%.

Mr. Mazorol reported that the judges are very pleased with the quality of representation provided by public defenders in the county, although they would like to have additional experienced attorneys available. He said that the court is reviewing its calendaring system and will be considering changes over the next several months. The current system is a hybrid system with individual calendaring for criminal cases. This creates scheduling conflicts for the attorneys. Another challenge for the attorneys is that the jail is four miles from the courthouse making contact with clients more difficult. There are four public defense contracts. The public defender office receives a large portion of the felonies and some misdemeanors, the DeKalb firm is also appointed in felony cases. The consortium receives the majority of the misdemeanor cases and the Alexander firm handles the early disposition cases as well as some felony cases.

Chair Ellis noted that the trial rates in criminal cases in Deschutes County were significantly below the statewide average. Mr. Mazorol said that the court conducts a lot of settlement conferences.

Mr. Mazorol outlined the early disposition program in which a large number of lower level misdemeanors are resolved. He said that the report provided to the Commission by OPDS staff was helpful. He also said that if there were performance problems with any of the attorneys the judges would make their concerns known to the appropriate person. When asked particularly about the consortium he said that the administrator of the consortium had been very responsive to any concerns raised by the court. He said there will be some important changes in the near future with a new judge and new district attorney coming into office.

Brie Arnette, the manager of the family court program in Deschutes County, said that the Deschutes County program was the first in the nation. It was started in 1994 and is designed to bring all of a family's cases before a single judge who works with a team to address the underlying needs of the family. To be eligible, a client must have an open dependency case, a criminal case and a domestic relations case. Attorneys are involved from the beginning and attend family court meetings. Generally speaking, the group does not discuss matters that could affect the criminal case. Very few cases involve termination of parental rights, none in the past two and a half years. Parents in the program are usually successful in getting their children returned to them or else agree to another permanent plan for the children. There are approximately 300 families that have participated in the court. About 100 are currently active. The family court judge generally hears all of the cases, including the criminal case. Occasionally, however, another judge will hear a case if that is what the parties prefer. Most parents who also have criminal cases are represented by a single attorney in all

of the matters but occasionally there is more than one attorney for a party. When there are multiple attorneys they appear to communicate effectively with each other. Clients generally represent themselves in the domestic relations case. Some attorneys assist their clients with paperwork and legal advice but do not represent them on the domestic relations case.

Tom Crabtree said that the contractors in Central Oregon have had a long, stable history of providing services there. Crabtree and Rahmsdorff started as a private law firm in 1981 but from the beginning handled primarily public defense cases. Approximately five years later the firm became a 501(c)(3) program. The firm has 13 lawyers three of whom have been there 28 years. One attorney has been with the office for 12 years and the rest have all come since 2000. A lot of attorneys left over compensation issues. Four attorneys left in 2001 and then nine left between 2005 and 2008. His firm would like to be able to have more experienced attorneys. It is a challenge to attract them with the salaries public defense providers are able to pay. Currently the salary gap between his firm and the district attorney's office is approximately \$15,000 per year and DA salaries will increase in January, but since 2008 there has not been a problem with attorneys leaving. The cost of housing has declined in Bend so it is now more affordable for attorneys to live there. It has been easier to attract attorneys from Pendleton than from Portland or Eugene.

Beginning last year, Crabtree and Rahmsdorff began to fall behind in its case quota and were asked to return funds to OPDS at the end of the year. They ended up with a shortage of \$172,000 with credits and had to pay back \$7,000 per month despite a 12.5% increase in health insurance costs. Even though OPDS has handled the case assignment process for some of that time, the firm ended up short and is having to pay them back. In some counties the public defender gets all the cases until they have met their quota. In Deschutes there is an effort to predict in advance the number of cases that will be available. Pick-up dates are apportioned based on the percentage of the caseload that each contractor is supposed to receive but the schedule has to be modified when contractors aren't receiving their share. Crabtree and Rahmsdorff did not get its quota of cases and other groups got an overage. This is difficult for the office that has fixed costs.

Chair Ellis said that Commissioners are aware that it is harder for public defender offices to shrink and they cannot take private work like a consortium can. He asked about the low trial rates in Deschutes County. Tom Crabtree said that Judge Sullivan does an excellent job with settlement conferences in felony cases. There had been a backlog in misdemeanor cases but the Trial Court Administrator brought in some pro tem judges to conduct settlement conferences and trials.

Mr. Crabtree said there has been an increase in the juvenile caseload, which may be due to a temporary drop that occurred when the Oregon Safety Model

was implemented by the Department of Human Services. The caseload dropped dramatically but is coming back to previous levels. The family court program is excellent. It provides better results for clients than the adversarial system has. Ms. Arnette has excelled at bringing in outside community partners to provide services that aren't available in the normal case.

Tom Crabtree was asked to represent clients in the early disposition program for the first six months of its operation. He was not comfortable with the way it was run. The system processes cases quickly but the attorney role may not meet ethical requirements. Most of the clients just wanted to get their cases over with. In reviewing the Deschutes EDP program he urged the Commission to be guided by its own standards.

Chief Justice Paul De Muniz said that he had created a Court Reengineering and Efficiencies Workgroup that had been meeting for approximately seven months to identify ways of delivering judicial services at reduced cost. The entire Judicial Department staff was surveyed about cost saving ideas. A common theme in the responses was that money could be saved if the number of appearances were reduced. It was reported by a number of respondents that multiple appearances were often caused by defense attorneys' inability to meet with their clients between hearings.

Tom Crabtree said that because of the individual docketing system in Deschutes County from 8:30 to 9:30 every morning there are five felony courts in operation. If cases in one court run longer than expected, the attorney cannot get to the next appearance on time and cases sometimes have to be set over. He has invited the District Attorney Elect to discuss with his attorneys methods of streamlining the system.

Brendon Alexander of Alexander and Associates said that his office had reluctantly agreed to handle early disposition cases after the OPDS analyst for the county told him that his firm's contract would not be renewed unless it agreed to take responsibility for the EDP program. He said that he had run the program as well as he could have, given the resources available. It is a burden for a small firm to provide coverage for this court on a daily basis. He would not be unhappy if responsibility for the program went to another provider. It is a money losing kind of representation for him. The number of clients varies from two or three a day to 15 or more. Discovery is provided in advance. Most of the cases involve pleas with a set-over for sentencing. If all of the conditions are met, the case is closed. The goal is to keep people off probation. At the initial appearance the defense attorney tries to identify the cases that are not appropriate for EDP. Even if a civil compromise were possible in some of these cases, the firm does not receive adequate compensation to explore this option for EDP clients. Most cases are second degree thefts, primarily shop lifts. In most of these cases the defendant has already had an opportunity to get the case dismissed through a victim/offender reconciliation program but has failed to complete the conditions.

Other case types include misdemeanor hit and run cases and other motor vehicle cases. Most of the time there is a plea offer that reduces it to a careless driving, which means the defendant will not be convicted of a crime and his license will not be suspended. Oftentimes they are very questionable cases, but the attorney can usually identify those by reading the reports. Criminal mischief is the third major category of cases in the program.

Mr. Alexander generally meets with the EDP eligible defendants in a group. He is representing each individual client, however. He discourages some defendants from participating in EDP if their cases need investigation of if the client appears to have mental health issues. In addressing the group he discusses case categories but not the details of the offense, and gets the consent of the defendant before talking about what the charge is and the district attorney's offer in the presence of the others. If defendants request a private meeting with him he will meet with them in the hallway. About 10% ask for individual time.

Chair Ellis inquired why no one had considered implementing the standards adopted by PDSC for these programs. Mr. Alexander said there had been no complaints but with a new district attorney coming into office it might be a good time to take a look at it.

Commissioner Ozanne inquired whether it wasn't the Commission's obligation to take action.

Chair Ellis said he was not criticizing Mr. Alexander, only the structure of the program, and was trying to determine the best levers to push. He asked Ingrid Swenson who, from her observation of the local system, should be involved in the discussion. She said that a conversation with local officials might lead to the desired result but those who had designed the program might not welcome changes that significantly increased the amount of time these very minor offenses required to be resolved. Mr. Ellis said that the change in district attorneys offered an opportunity to take a look at the program and make adjustments. Commissioner Potter said that part of the appeal might be that if the model were improved it could be extended to other types of offenses. Mr. Alexander said that there had been an effort to extend the program to include additional offenses and he refused because of the more serious consequences attached to the additional offenses.

Commissioner Lazenby expressed concern about whether these programs are really making the system more efficient. Does the benefit outweigh the limitations imposed on the attorney/client relationship? Mr. Alexander said that one benefit is that PDSC is saving \$300 to \$400 per case through the use of this model. Chair Ellis said that a decision by the Commission on whether to continue funding this type of representation should be postponed until willingness of local officials to change the program had been explored. Ingrid Swenson was

directed to discuss possible changes with Deschutes County officials. Commissioner Stevens inquired whether there wasn't a value in having someone inform this group of defendants about the program and what they could expect from it without actually representing them. Commissioner Ozanne inquired whether most of these defendants wouldn't otherwise be waiving their right to counsel. Mr. Alexander said that he does believe it is important for them to have some legal advice about the impact of their criminal histories and how they could be affected by the property crime measures, and whether they are eligible for expunction of their records. People want someone to tell them that they will not be going to jail, tell them what the maximum punishment is going to be. Even though the judge is responsible for taking a knowing and informed plea time does not allow the judge to provide all the information people want and clients understand it better coming from an attorney than from the judge's comments to a whole roomful of people.

Jon Pritchard, the administrator for Bend Attorney Group, and Lori Hellis, an attorney with the group, said that their group included nine attorneys, three of whom regularly handle felonies and five who do juvenile work and a couple do misdemeanor cases. They are the conflict provider for the county. Except for misdemeanors they only pick up cases that the other providers cannot.

Ms. Hellis said that one difficult issue in juvenile dependency representation is that clients are unable to afford counsel to prepare domestic relations custody and parenting time orders that need to be in place before the juvenile case can be dismissed. Sometimes counsel appointed in their juvenile cases provide such services pro bono. Someone should be paid to make certain this work gets done. The Deschutes County Family Court is doing excellent work for families. It could benefit from the participation of the deputy district attorneys who are prosecuting the family's criminal cases.

Chair Ellis inquired about the Bend Attorney Group's board of directors and how it was decided to include an outside board member. Jon Pritchard said that the proposal was discussed for a number of years and was initially met with a lot of resistance from members of the group. He decided to go ahead and incorporate as a non-profit and select initial board members. The members of the group were initially opposed but are currently working with the system. The board chair is Cindy Spencer, an attorney who has practiced as a district attorney and a public defender. Jim Slothower, a local civil attorney, Mike Flynn who will be joining the district attorney's staff in another county, and a consortium member are the other members of the board. The board will decide on future board members after getting input from consortium members.

Membership in the consortium was traditionally based on who knew whom. Members cover for each other so all of them have an interest in the qualifications of other members. From now on the board will make the final decision about which attorneys will be asked to join the group.

The handling of complaints about consortium members was a problem in the past. Mr. Pritchard as the administrator had all of the responsibility but no authority. In the past he has been given only hearsay information so recently the consortium distributed questionnaires to the courts and administrators but they were reluctant to provide information and court staff was not permitted to respond. When issues do come to the consortium's attention, it responds to them by sending a letter of concern to the attorney and requesting a response. The consortium can take corrective action if needed, by reducing the seriousness of cases the attorney can take. If attorneys appear to be overwhelmed, the volume of cases can be reduced. Attorneys with health issues have been given sabbaticals for up to a year. One contract had to be terminated because an attorney about whom the judges had expressed concern was unable to meet required standards. People have been let go.

Ms. Hellis said that before the non-profit corporation was formed, the consortium was a loosely affiliated group and their contracts did not permit the administrator to hire or fire members. Current contracts provide that the board has the authority to evaluate attorneys and to hire and fire them. In the past Jon Pritchard lacked authority to act on concerns.

Mr. Pritchard said that the group can offer support to attorneys who are underperforming if they are willing to accept help and Ms Hellis said that if members have health or family issues that interfere with their ability to handle their cases, other attorneys will provide coverage. In a recent case, after covering an attorney's caseload for several months it was determined that his health did not permit him to resume participation in the group and he was removed to protect the integrity of the group. Mr. Pritchard said they would like to receive better feedback from the courts since they are more likely than members of the group to see problems.

With respect to having their calendars in the courtroom, both Mr. Pritchard and Ms. Hellis said they did not think this was a problem for the members of their group and that they had observed only one retained attorney who failed to have a calendar available in the courtroom.

Commissioner Welch said that the issue raised by Ms. Hellis about the need for custody orders before juvenile cases can be dismissed in some cases is a big, long-standing problem in the state. In some courts the lawyers do it voluntarily; in others, like Multnomah County, nobody does. It is a tremendous problem. Cases must be repeatedly continued to await a custody order.

Commissioner Lazenby said that information from the judges about performance of attorneys is critical feedback and in some counties they are reluctant to provide it. We need to increase that feedback while making the judges feel more comfortable about providing it.

Ingrid Swenson said that Jacques DeKalb had hoped to be present but would be unable to appear. She provided Commissioners with copies of a letter sent by Mr. DeKalb.

Asked whether his firm was meeting the time lines for initial contact with clients and for any additional comments he might wish to make, Tom Crabtree said that attorneys in his office generally have initial contact with their clients in the timeframes required by their contract with PDSC. He said that access to inmates is a problem for attorneys. The jail doesn't provide attorneys enough access to inmates. Over the years the jail has gradually restricted hours for attorney visits. There is only one attorney room available. If that room is in use, the attorney must talk to his client over a phone in an open booth next to another attorney. Commissioner McCrea said that since appearances of in-custody defendants are conducted by video, when she has a case in Deschutes County she must drive over to Bend for appearances since they cannot be done by telephone. She asked whether defense attorneys are able to speak with their clients about discovery during the video appearances. Mr. Crabtree said it was a problem and that for pleas the attorney must go out to the jail to get the client's signature and then drive back to the courthouse to submit it. Clients are transported for settlement conferences so that the judge can speak to them directly. Commissioner Ozanne inquired whether there was a local public safety coordinating group where these kinds of issues could be raised. Mr. Crabtree said that he believes the group has not been very active lately.

### **Additional Information and Developments After June 17, 2010**

With respect to the court's concern about a need for more experienced attorneys, the problem was exacerbated when the DeKalb firm lost two of its partners around the time of the June 17, 2010 Commission meeting. The firm was reduced to Mr. DeKalb, two associates who remained with the firm, and a new attorney, Thomas Spear, who had been in private practice but who joined DeKalb and Associates on August 1. The firm was seeking to hire another experienced felony attorney.

Information about early disposition programs in other jurisdictions was forwarded to the trial court administrator and he indicated that he would like to review the information and talk further with the judges before convening a discussion about the future of the program in Deschutes County. He had briefed Presiding Circuit Court Judge Michael C. Sullivan about the issue, however and Judge Sullivan was open to looking at existing procedures and any proposed changes. Additional information was requested about the current program from Brendon Alexander and an inquiry was sent to the incoming district attorney about his view of the EDP program and his willingness to explore other models. Data was still being collected and reviewed at the time of this report but information collected to date indicates that there are approximately 60 new cases per month

that are being processed through the EDP program. If the defendants in each of those cases had been provided with appointed counsel on the underlying case or cases, the cost to PDSC would have been approximately \$23,400 per month. The Alexander firm receives \$5,000 per month for the representation it provides in these cases. One of the things that is not known is how these cases would be handled if there were no EDP program. In some counties at least some of these offenses would be diverted or processed through a community court; some would probably be treated as violations rather than misdemeanors. Regardless of how they might be treated in other jurisdictions, it is largely up to the Deschutes County District Attorney to decide how they will be handled in that county. Until Mr. Flaherty takes office and decides whether he will continue the EDP program and, if not, whether he will prosecute all of these offenses and at what level, any changes attempted by others might be temporary.

### **Discussion of Service Delivery Plan at October 22, 2010 PDSC Meeting**

Ingrid Swenson reported that the district attorney elect of Deschutes County would not take office until January of 2011 and had had very little contact with court staff about any expected changes in charging practices or whether he would support changes to the EDP program. She said that OPDS staff had calculated the cost of paying standard case rates for the cases currently being processed through the EDP. Changing to case rates would cause a significant increase in costs. However, she said that it is not clear that all of the cases would be prosecuted if there were no EDP program. She said that since the commission hearing in Deschutes County two senior attorneys had left one of the defense firms, increasing the demand for experienced attorneys. Chair Ellis proposed postponing further discussion of a service delivery plan for the county until after the new district attorney had taken office. Tom Crabtree said that Patrick Flaherty had not yet met with other justice system representatives. Fifteen of the 16 deputy district attorneys had supported his opponent and were now attempting to organize a union in the office. He said that his experience with the EDP program in its first few months of operation indicated to him that a lot of cases would not be filed if there were no EDP program. Mr. Flaherty said during the campaign that he would file fewer cases and concentrate on the serious ones. Commissioner Ozanne asked whether part of the need for more experienced attorneys was related to the docketing system. Tom Crabtree replied that it was a significant part of the problem. He said another major problem was that defense providers had not been able to compete with the district attorney's office in salary levels in the previous contract period and had lost a number of attorneys. Commissioner Ozanne suggested that in order to maximize the value of the Commission's service delivery review process the Commission should address specific concerns, such as the lack of access to defendants in the county jail, to the local public safety coordinating council. He said that issues related to the EDP program and the court's docketing system should be addressed by the court but that county commissioners would be interested in costs related to operation of the jail. Lack of timely access to clients

can increase delay and costs. Ingrid Swenson was asked to follow up on these issues.

At the direction of the chair, approval of a service delivery plan for Deschutes County was postponed until Deschutes County officials had had an opportunity to consider whether they wished to make any changes to their EDP program.

### **Developments since October 22, 2010**

On January 4, 2011 the *Bend Bulletin* reported that one of District Attorney Pat Flaherty's first official acts after he was sworn in on January 3 was to fire five of his deputies. At his swearing in ceremony, Mr. Flaherty said, "The DA's office is not meant to be a bureaucratic institution," that "it needs to be a meritocracy, not a bureaucracy."

In February the Trial Court Administrator reported that the district attorney had met with the judges and that they wanted to schedule a meeting with OPDS to discuss the future of the EDP program. A meeting was scheduled for March 3. Mr. Flaherty was provided with a copy of PDSC's guidelines for attorneys in early disposition programs. OPDS staff participated in the meeting by video from Oregon Judicial Department offices in Salem. Participating in the meeting were Judge Sullivan, Judge Brady, Ernie Mazorol, Pat Flaherty and his two chief deputies, Brendon Alexander, Kathryn Aylward, Amy Jackson and Ingrid Swenson. Mr. Alexander explained that the current EDP program included only lower end misdemeanor cases, principally shoplifting charges, hit and run offenses and criminal mischief. Some cases were given violation treatment, others resulted in convictions. Mr. Alexander said that the offers made by the state had been good. He said that his role was not to provide representation, only consultation. His practice had been to read the police reports prior to the proceeding, to talk with the clients as a group, warning them of some of the possible consequences of accepting the state's offer, such as drivers license suspension. He told them he was not representing them. He said that some of them had cases that could be civilly compromised and that by accepting the offer they would not get a chance to clear their records. He estimated that half of the clients had already had one misdemeanor dismissed. He would like to have a discussion with Mr. Flaherty about the ones who would be eligible for a civil compromise. He handled approximately 1300 cases through the EDP process last year.

Mr. Flaherty said that he believed he would make more violation offers than his predecessor and expects to do that up front. Judge Brady said that the court would like to ensure that defendants are getting good information about the impact of accepting fast track offers. Issues discussed included whether PDSC would approve funding for "consultation" rather than representation and whether the bar would make any distinction. It was represented that 80% of the fast track

cases are resolved with a single appearance. OPDS agreed to work with its contractors to arrange for representation.

After the March 3 meeting OPDS staff undertook to review court records of the cases processed through the fast track program to identify the number of appearances and length of hearings in these cases in order to estimate the amount of attorney time required to provide appropriate representation.

OPDS's review indicated that there were sometimes five to eight appearances in a single EDP case. It was reported that the court limited the number of appearances per case to two. The defendant could accept the offer at the initial hearing or could continue the case for up to 10 days before making a decision. PDSC was later informed that there had only been five new EDP cases in March. Defendants in the program were being given up to 30 days to decide whether to accept the fast track offer. Although it was expected that most cases would be resolved with only one or two appearances, Mr. Alexander reported that he had many cases that were in warrant status. If clients turned themselves in or were picked up on outstanding warrants additional court appearances might be required.

Ernest Mazorol reported that the volume of misdemeanor cases had increased under the new district attorney, in part because there was a backlog of cases from the former district attorney. Fewer felonies were being filed by the new district attorney, however. Mr. Mazorol said that the DA's office was getting discovery out quickly and had implemented a 35-day rule requiring the defense to accept the state's offer within 35 days or set the matter for trial. He said that the court's calendaring system had been modified. Two courts were now handling short criminal matters (one in-custody and one, out of custody). The individual docketing system had been abandoned. PDSC's contractors were now concerned about having multiple matters scheduled for the same time in the two criminal courts. They were expecting to work on scheduling issues at a May 24 meeting with contractors.

At the May meeting it was reported that juvenile case filings had increased significantly.

In June, Tom Crabtree provided an update on some of the other issues that were discussed at the May meeting and on other developments in the county. He said that when Patrick Flaherty took office five deputies were let go and two resigned so that there were only eight DAs to do the work of 15. It was necessary for the felony deputies to spend a significant amount of their time training new misdemeanor deputies. In this period EDP cases were given very low priority. If there is a recall campaign against the district attorney, things will remain unsettled until November or later. He said that the anticipated reassignment of judges will not occur until July 11. There has not yet been a consolidation of the former district and circuit courts. Misdemeanor arraignments are still held

separately and there are separate call calendars for misdemeanors and felonies. Attorneys in the Crabtree and Rahmsdorff firm indicate that their waiting time has increased by three to five hours per week. Tom Crabtree said that jail access has apparently improved. There have been no complaints for some time.

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

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

# Attachment 3

*DRAFT*  
**Public Defense Services Commission**  
**Service Delivery Plan for Lincoln County**  
(June 2011)

**Introduction**

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems.

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

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

From 2004 through 2010, the Commission completed investigations of the local public defense systems in thirty Oregon counties.

**Lincoln County Reviews**

PDSC's first service delivery plan was developed for a region that included Lane, Lincoln, Linn and Benton Counties in 2004. At that time although PDSC contracted with a single entity in Lincoln County, the Lincoln Defense

Consortium, consortium members regarded themselves as individual attorneys and law firms in competition for the caseload. Consortium members even submitted individual RFP responses as alternatives to the Lincoln Defense Consortium proposal. Prior to 2001, PDSC's predecessor, the Indigent Defense Services Division (IDSD) determined the percentage of caseload for each consortium member and incorporated those percentages into the contract. By 2001, IDSD convinced the Lincoln Defense Consortium that, as a consortium, they should be able to reach agreement among themselves as to how caseload should be distributed.

In 2004, at the time of PDSC's service delivery review, the Lincoln County contractors expressed satisfaction with the operation of the system then in place. OPDS was concerned about the ability of this group to recruit and train new public defense attorneys but it was represented that the law firms in the group could bring in new attorneys as needed. Judges and the District Attorney expressed satisfaction with the work of the group and appreciation for the experience and skill of the attorneys. OPDS did not recommend that PDSC make any changes to the public defense delivery system in Lincoln County in 2004.

Since that time a Quality Assurance Task Force (QATF) site team, comprised of volunteer lawyers from around the state, conducted a thorough review of the quality of services provided by the Lincoln Defense Consortium. That evaluation occurred in September of 2006. A final report was presented to the consortium in January of 2007. Since QATF evaluations are confidential, with the final report being provided only to the contractor and OPDS, no conclusions from that evaluation are included in this report.

In 2010 PDSC identified Lincoln County as one of the counties it would visit in 2011 in order to update its earlier service delivery plan.

### **OPDS's 2011 Preliminary Investigation in Lincoln County**

To prepare for the March 10, 2011 Commission hearing in Newport, OPDS staff conducted a preliminary investigation into the current functioning of the public defense system in Lincoln County and submitted the initial version of this report.

On February 9 and 10, 2011 OPDS Executive Director Ingrid Swenson, Public Defense Services Commissioner John Potter and OPDS Contract Analyst Shelley Winn visited with stakeholders in Lincoln County, including Presiding Circuit Court Judge Charles P. Littlehales, Judge Thomas O. Branford, Judge Sheryl Bachart, Pro Tem Judge Paulette Sanders, former Pro Tem Judge Frederick Bennett, District Attorney Rob Bovett, Senior Juvenile Department Officer Larry Ballinger, CASA Executive Director Betsy Henderson, CASA Program Manager Carol James, consortium administrator Guy Greco, Jeff

Pridgeon of Pridgeon, Bjornsen & McCrum LLC, and sole practitioner Daniel Taylor.

In addition Ingrid Swenson met or spoke by phone with the Trial Court Administrator Bonnie Savage and CRB coordinator Walt Gullett.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area and OPDS is grateful to the stakeholders in Lincoln County for their much appreciated contributions to this report.

### **Lincoln County Criminal and Juvenile Court Systems**

The Lincoln County Circuit Court is located in Newport. Many county offices and facilities are located in the general vicinity of the courthouse, including the juvenile department, community corrections, the sheriff's office, the jail and the detention facility.

The court has three elected Circuit Court Judges and one pro tem judge. Charles P. Littlehales is the presiding judge. The other two elected judges are Thomas O. Branford and Sheryl Bachart. Paulette Sanders is the pro tem judge. In addition to other duties, she handles most of the juvenile cases. Bonnie Savage is the trial court administrator. Five staff positions have been lost to the court over the course of the current biennium<sup>1</sup>.

Rob Bovett is the elected District Attorney who replaced two-term Lincoln County District Attorney Bernice Barnett. Mr. Bovett, who was previously with the Lincoln County Counsel's office, served as the chair of Oregon's Methamphetamine Task Force and is the primary author of the state's methamphetamine lab control laws. He has a chief deputy and eight deputy district attorneys. The office also has seven legal assistants but, like the courts, has lost five positions due to budget cuts in the last two years. Mr. Bovett has been skillful in obtaining grant funding to retain additional positions that otherwise would have been cut. Commentators note that relations between the District Attorney's office and the defense bar have improved significantly over the relations that existed under his predecessor.

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<sup>1</sup> The state trial courts' report on judicial resources indicates that during the six month period ending June 30, 2010 there were 1,461 cases filed in the Lincoln County Circuit Court, 1500 cases terminated and 1,189 cases pending per Lincoln County Circuit Court Judge position. Statewide averages were 1,670, 1,663 and 1,374.

## Criminal Court System

The Lincoln County Circuit Court does not use a central docketing system. Individual judges manage their own dockets. Each criminal case is assigned to a particular judge at arraignment. All future hearings in the case are held before the same judge unless that judge is unavailable on the assigned trial date due to a conflict. The case may then be assigned to another judge for trial if one is available. Measure 11 cases, however, are assigned by rotation in order that all of the judges have a similar number of them. Hearings on motions must be scheduled with the individual judge's staff. Out-of-custody cases are assigned an Early Resolution Conference (ERC) hearing date approximately six weeks after arraignment. It is expected that discovery will have been provided by this date and that attorneys will be able to report on whether the matter will be scheduled for a Final Resolution Conference (FRC) date or for trial. A Trial Report Hearing is held three weeks before trial to confirm whether the matter will remain on the trial docket.

For in-custody matters there is usually only an FRC date scheduled and it is set approximately three weeks after arraignment.

Monday is the principal criminal court day. Trials are scheduled on Tuesdays through Fridays. In-custody arraignments occur daily at 1:15 pm. Out-of-custody arraignments are held on Mondays.

Court staff interviews in-custody clients prior to arraignment and makes a preliminary determination of financial eligibility for court-appointed counsel. Out-of-custody defendants who seek appointed counsel have counsel provisionally appointed until eligibility can be determined. The LDC administrator notifies the court in advance which attorneys are scheduled to pick up new cases. Court staff contacts the attorneys to advise them of the need to appear in court for arraignment.

An LDC attorney is present for all arraignments.

Currently there is no early disposition program in Lincoln County. Planning for such a program is underway, however. The district attorney is currently outlining his criteria for eligibility for "rocket docket" treatment.

There are four specialty courts in Lincoln County: a drug court, a domestic violence court, a mental health court and a "HOPE" court. The oldest of these is the drug court, which has been in place for approximately five years. Judge Branford serves as the drug court judge. The Lincoln County drug court has implemented the Ten Key Components of Drug Court recommended by the

National Association of Drug Court Professionals. If a defendant in a criminal case is determined by the state to be eligible for drug court participation, the defendant discusses the program with the attorney who is initially appointed to represent him/her and makes a decision whether to participate in the court. Most participants are eligible for a conditional discharge upon successful completion but some defendants who are on probation volunteer to participate in order to achieve sobriety. In the past drug court participants were not represented once they were accepted into the program. For the last two years, however, representation has been provided by consortium attorney Dan Taylor. There are currently 18 to 20 people participating in the court. Initially they are required to appear weekly, then bi-monthly and then monthly until graduation after participating for a year or more. The court continues to work with participants who are struggling with sobriety.

There is a Domestic Violence Court (DV Court), which emphasizes speedy resolution of the charges and regular compliance review hearings during the course of supervision. This court has been in place for approximately a year. The state is expected to provide full discovery at arraignment, including police reports. The consortium administrator, Guy Greco, indicates that the court is not operating as efficiently as it could because discovery is not always being provided at arraignment. Most cases involve deferred sentencing agreements but for those who contest the charges and are found guilty it is also available as part of a probationary sentence. Compliance reviews are scheduled after 60, 120 and 365 days. No contact is usually permitted between the defendant and the victim until after the first compliance hearing. There are approximately 100 people in the program. The rate of compliance with program requirements has been high. All of the criminal lawyers participate when they have clients in the program. The program is partially grant funded. Judge Bachart presides over DV Court cases.

Help and Opportunity through Probation with Enforcement (HOPE) Court is a prison diversion program funded by a Department of Corrections grant. It is directed at repeat property offenders who are facing presumptive prison sentences. It is modeled after the drug court but the focus is on victim restitution. Judge Branford presides over the Hope court.

A Mental Health Court was started very recently by Judge Littlehales working with the Mental Health Subcommittee of the Local Public Safety Coordinating Council. It is designed to divert offenders driven principally by mental health disorders from the criminal justice system into appropriate treatment, using regular court hearings to support compliance. This is designed to be a small program serving between four and six chronic offender clients.

There has been some discussion about a possible veteran's court but the demands on court staff may be too great to permit another specialty court.

Lincoln County currently has adequate jail space. There are 170 beds available which means that when the court imposes a local sentence, it is usually served in full. The jail administers a community service program and supervises inmate work crews.

### The Juvenile Delinquency System

There are three juvenile court counselors and one supervisor in the Lincoln County Juvenile Department. Positions have recently been lost both in the detention facility and in the juvenile department. The department uses Formal Accountability Agreements with many first-time offenders and in most misdemeanors. Under an agreement with the District Attorney's office the juvenile counselors prepare most of the petitions. The county has an 8-bed detention facility and a 12-bed shelter which is used for both delinquent and dependent youth. Most other placement resources are through the Oregon Youth Authority. Measure 11 youth (16 and older) are held in the county jail. Alternative approaches to the handling of juvenile sexual offenses has permitted some youth to expunge their records and be relieved of the obligation to register as sexual offenders.

Delinquency preliminary hearings are held immediately after adult in-custody arraignments. Attorneys are appointed in virtually all cases. Most delinquency court hearings are on Friday. The court seeks to group juvenile cases by case type in order to minimize the amount of time attorneys, clients and caseworkers need to spend in court waiting for their hearings to begin.

The juvenile court schedules "compliance hearings" for some probationers in an effort to prevent violations. Once an attorney is appointed for a youth, the court does not terminate the appointment. When probation violations are filed the court is now appointing the same attorney who represented the youth on the original petition.<sup>2</sup>

### The Juvenile Dependency System

Attorneys are appointed for parents at shelter hearings. Court staff notifies attorneys several hours in advance that they will need to be present. They receive the petition and the DHS shelter summary and sometimes a police report before going to court and usually have a few minutes to meet with the client before the hearing. Attorneys are rarely appointed for children except at the request of another party to the action. CASAs are appointed in most cases however. (There are currently 38 CASA volunteers in the county.) Since Paulette Sanders became the pro tem judge, there have been more review hearings than in the past. She usually schedules reviews 90 days and six

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<sup>2</sup> This approach is considered a best practice. Youth offenders benefit from having continuity of representation and being able to contact "their attorney" with questions and concerns during the probation period.

months after jurisdiction. A pre-permanency hearing is scheduled to determine what the agency's permanent plan will be so that parties can be prepared to litigate the issue at the permanency hearing if necessary.

The Lincoln County District Attorney's office participates in dependency cases in the early stages. They appear at shelter hearings and remain until jurisdiction has been established. They do not appear at post-dispositional review hearings or permanency hearings.

The court currently has a family court specialist who assists clients with domestic relations actions. This position may be in jeopardy if there are further Judicial Department budget cuts.

Lincoln County has a Juvenile Court Improvement Project Model Court program with participants from all involved agencies, including LDC.

The Confederated Tribes of Siletz Indians of Oregon is the largest tribe in the area. No tribal representative participates in the Model Court team or other policy making bodies. Tribal experts are available to testify in Indian Child Welfare Act cases but local juvenile court system representatives said that the tribe rarely intervenes in these cases, never seeks transfer of cases to the tribal court and rarely has services to offer to native families involved in state juvenile court dependency matters although the tribe does have a social services department and a number of caseworkers. Cathern Tufts, counsel to the Siletz Tribe, said that tribal law requires the tribe to intervene in all cases involving Siletz children. The tribe also offers services to children and families, including alcohol and drug treatment services, self-sufficiency services, housing, mental health counseling, medical and educational services. The tribe has a Women's Transitional Living Center (where members can have their children placed with them). Tribal caseworkers also participate in family decision meetings. Ms. Tufts believed there might be a misperception on the part of providers and advocates in Lincoln County about the role of the tribe and said she would be contacting DHS, the court and the attorneys to make sure they had current information.

### Civil Commitment Hearings

Judge Bachart and Judge Littlehales hear most of these cases. Attorney appointments are on a rotational basis.

### Public Defense Provider

PDSC contracts with a single provider for representation in all public defense cases excluding murder and aggravated murder cases and post-conviction relief and habeas corpus cases in Lincoln County, the Lincoln Defense Consortium. Guy Greco is the administrator of the consortium. The consortium contracts to handle 3,108 cases per year. The group includes five individual attorneys and

two law firms. The law firms are Ouderkirk and Hollen and Pridgeon, Bjornsen and McCrum. Senior members of both firms handle some public defense cases and each firm currently has two associates who also handle public defense cases.

LDC has no formal by-laws or written operating policies or procedures. It has a board comprised of consortium members. There is no formal process for evaluating the work of the consortium administrator or the quality of services provided by members of the consortium. There are several consortium meetings held each year but attendance is not mandatory. The consortium does not offer any services to its members other than management of the OPDS contract.

There is no mechanism in place for regular communication between members. When contract or system issues arise, however, the administrator contacts members, usually by e-mail. If a judge has a problem with the performance of an attorney, the judge usually contacts the attorney directly or the consortium administrator. Recently the consortium administrator sent a questionnaire to the judges regarding performance of the attorneys. At the time of OPDS's visit to the county, the results had not yet been reviewed.

New consortium attorneys are added either by being hired by one of the member firms or with approval from OPDS. The consortium provides no orientation or training to members. Each firm has very experienced senior members. The consortium administrator is a highly regarded criminal defense lawyer who is available to provide advice and assistance upon request. The consortium does not monitor the caseloads of individual attorneys. Such monitoring is deemed a function of the law firm rather than the consortium. Similarly, training and oversight of the work of these attorneys is not considered a consortium function in Lincoln County although the administrator has recently taken a more active role in identifying concerns about performance and seeking to resolve them.

#### Case distribution within the consortium

Each of the firms and each individual attorney member receives a specific percentage of the contract caseload. The administrator determines which office will pick up new cases each week in order to maintain the appropriate distribution of cases. Except for termination of parental rights cases for which the assigned office is paid \$2300 per case, the amount of compensation received by each office is based on the percentage of contract cases the office has agreed to handle. Cases are not weighted but are assigned at random on the assumption that the more time consuming cases will balance out over time. Each office receives a fixed amount per month based on their percentage of the total caseload. The consortium maintains a reserve in case the caseload falls short and they must reimburse OPDS.

## Comments from Lincoln County Stakeholders regarding Provider

### Dependency Representation

Reports received from a number of sources indicated that the dependency system in Lincoln County is being significantly affected by the performance of DHS management and staff. Staffing levels are seen as insufficient making communication very difficult. Caseworkers keep changing. Two workers who just completed their training are already gone. One of the permanency workers is also leaving. When the agency has to use interim staff they are often not adequately trained. The agency cannot provide staff to accommodate family meetings, which can be very productive in some cases. Family resources are often not identified until late in the case. The agency is sometimes too slow to remove some children, causing additional damage. There are not enough foster homes in the county and only two visitation supervisors. Judge Sanders is working with charitable organizations to identify potential lay supervisors who could facilitate more family visits.

With respect to the work of the lawyers, several lawyers are said to provide very good to excellent (or in one case “stellar”) representation in juvenile dependency cases. Several other attorneys were described as generally doing very good work but at times seeming overwhelmed. One of the newer attorneys was described as very eager and promising. It was noted that some children’s attorneys do not have sufficient contact with their clients. A small group of attorneys fail to explain juvenile court jurisdiction and its implications to parent clients and none of the attorneys are very active in identifying family resources for placement, visit supervision and the like.<sup>3</sup> There is a high level of competence in termination cases.

### Representation in Criminal Cases

One attorney is described as providing “superb” representation and always being on top of the issues in his cases. Several other attorneys were described as very good and others as competent. Three of the senior public defense lawyers who could provide excellent representation in all case types, including Measure 11 cases, never appear in criminal court. Two of the experienced lawyers who do appear seem apathetic and one of them provides obviously better representation to retained clients than to public defense clients. Neither of these latter two attorneys files motions or takes cases to trial<sup>4</sup>.

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<sup>3</sup> Non-routine expense authorizations have been approved for requests from some attorneys to use investigators to assist in finding relatives who may not be responsive to inquiries from DHS.

<sup>4</sup> Felony trial rates in Lincoln County are below the statewide average but trial rates in misdemeanor cases are higher. The state trial courts’ “Cases Tried Analysis” indicates that during the six month period ending June 30, 2010, 256 felonies and 806 misdemeanor cases were closed. Of those cases, 2.7% of felonies were tried (six to a jury and one to the court); and 6.6 percent of the misdemeanors were tried (23 to a jury and 30 to the court). Statewide for the same period 4.2% of felonies were tried and 3.6% of misdemeanors.

There are not enough experienced lawyers to handle the most challenging cases. The law firms tend to hire inexperienced lawyers and fail to provide them with training and mentoring. Even though some of the new lawyers are very promising and could become excellent advocates, they are overworked and underpaid and left completely on their own when they begin practice. There is no senior attorney present at their initial appearances or even at their first trials. The new lawyers don't know how to prepare a trial notebook, for example. Some come to trial with no plan for what questions they will ask on direct or cross examination and sometimes ramble ineffectively.

Commentators noted that the District Attorney's office faces similar challenges in the training of new lawyers. Some kind of mock trial training would be helpful for both the defense bar and district attorneys. Both appear to be in need of a training plan and a checklist of things new lawyers need to know.

One suggestion to PDSC was that it contract directly with the attorneys who do the work. It was said that PDSC could attract and retain well qualified attorneys if it used such an approach instead of the current "franchise" approach. Another commentator said that consortium members have gotten into the habit of believing they own a piece of the public defense contract pie and can do with it what they want.

The judges said they would be happy to meet with individual lawyers after cases are closed and talk to them about their observations and suggestions for handling cases. They are rarely asked to do so.

#### Issues for Possible Consideration by Commissioners at March 10, 2011 Public Hearing

##### *Measure 11 cases, training and mentoring:*

While the PDSC's structural review of a public defense delivery system is not intended to focus primarily on the quality of services being provided, in some cases quality issues may be directly related to the structure in place. That appears to be the case in Lincoln County. While the quality of representation in juvenile cases appears to be very good, significant concerns were expressed about the quality of representation in criminal cases, particularly the more serious categories of criminal cases. These problems were seen as primarily twofold: (1) there are an insufficient number of highly experienced lawyers willing to handle Measure 11 cases; and (2) new lawyers are not being provided adequate training and mentoring, are generally overburdened and underpaid<sup>5</sup> and are

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<sup>5</sup> Jeff Pridgeon said that Pridgeon, Bjornsen & McCrum had never lost an associate because of undercompensation. He said that new associates receive a lean but adequate salary and the firm provides a generous health care plan.

therefore not likely to remain long enough to develop into highly skilled criminal defense attorneys.

*Role of compensation:*

Prior to 2008, the Lincoln Defense Consortium's contract established a single flat rate for all case types with the exception of TPR cases and included a provision for hourly billing on Measure 11 cases after a certain number of hours. During every contract negotiation prior to 2008, OPDS's Contract and Business Services Division (CBS) tried to persuade the consortium to move to individual case rates. Finally in 2008, CBS insisted that cases be weighted according to seriousness. However it appears that while agreeing to a contract that valued cases appropriately, the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms<sup>6</sup>. Attorneys handling termination of parental rights cases do receive a fixed amount for those cases and the quality of representation in those cases is considered to be very good<sup>7</sup>.

*Weaknesses of the consortium model:*

In earlier service delivery reports, OPDS has described the types of entities with which it contracts and noted the relative strengths and weaknesses of each type. That information is set forth in Appendix A to this report. As the Commission has found in other counties the organizational structure of consortia varies from one county to another. When a consortium is the sole provider in a county some of the traditional weaknesses of loosely organized consortia may not be offset by the presence of other providers.

In Lincoln County there is no local public defender office that could perform the functions of recruiting new lawyers to the area, training them under the direction and supervision of more experienced lawyers, providing county-wide training and other services provided by some of the state's non-profit public defender offices.

*Qualification standards:*

The law firms clearly have senior members who are experienced and capable of doing all of the necessary training and monitoring but currently do not perform this function. The senior partner in one firm, when informed about the comments regarding the lack of training and monitoring, noted that the firm never assigns lawyers to handle cases for which they are not qualified under PDSC's own qualification standards. While these standards are intended to express the

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<sup>6</sup> Some of the law firm associates are described as offering excellent representation, others as needing more training.

<sup>7</sup> Lawyers in these cases were described as "being on full alert."

minimum qualifications attorneys must have in order to be approved to handle particular case types, they are not meant to serve as a substitute for comprehensive quality assurance systems which contractors should have in place, and which they will be required to have in place for contracts beginning in January of 2012. Nevertheless, PDSC could expand the qualification standards to include specific categories of training and preparation that would have to be demonstrated before attorneys could appear at particular types of hearings without a supervisor or mentor.

*Special contract terms:*

Since the standards appear to be serving their intended function in most parts of the state, however, it would probably be more appropriate for PDSC to simply include specific requirements regarding the training and oversight function in its contract with LDC.

PDSC could also, as suggested by one commentator, consider contracting directly with individual attorneys rather than with law firms that then assign the cases within the firm. This approach would involve OPDS more directly in the selection and monitoring of attorneys, and in the assignment of cases.

*Restoration of court appointed list:*

Although, as noted in the Appendix below, the use of a court appointed list does not involve a contractual relationship or provide for any meaningful assurance of quality and cost-efficiency, neither the consortium's current quality assurance system nor its internal compensation system provide a sufficient incentive for attorneys to expend the time and skill required for adequate representation in the most serious cases. Using a rigorous, carefully administered qualification process for a court appointment list in Lincoln County might result in improved representation in Measure 11 and other serious cases.

*Outside training resources:*

The Metropolitan Public Defender office has offered to provide its mock trial training to public defense attorneys from other parts of the state on an as needed basis and without cost. OCDLA provides an annual new lawyers' seminar and a trial skills training program. These resources are currently available and would address at least some of the concerns about new lawyers who lack basic courtroom skills. They would not substitute however, for ongoing mentoring, training and monitoring within the firm or contract entity.

*Statewide mentor attorney program:*

There are many areas of the state in which training for new attorneys is not as comprehensive as it should be. One approach to meeting the need for training

statewide would be to use skilled attorneys who want to devote a portion of their time to the training of new lawyers as traveling mentors. At least one of these attorneys has indicated a willingness to provide such assistance. OPDS would need to either compensate these trainers for their time or provide adequate contract funds to allow providers to retain their services.

While the Oregon State Bar is in the process of implementing a new attorney mentoring program statewide beginning with new admittees in 2010, this program will focus more on professionalism and attorney ethics than on practice issues although each mentor and new attorney will be involved in the design of the mentoring plan for the new attorney.

#### Testimony at March 10, 2011 PDSC Meeting in Newport, Oregon

Chair Ellis provided a brief history of the Commission and its legislative charge to develop a high quality, cost efficient system. He described the Commission's service delivery planning process and some of the changes it had implemented in the public defense systems in Lane and Marion Counties. He said the Commission was not in Lincoln County to impose a system of the Commission's choosing but was there to work with the community to jointly develop the best system for the county. He described the mixture of service providers in other areas of the state. After receiving an initial report and conducting a public hearing he said Commissioners would continue to discuss the circumstances in the county and what the most suitable service delivery system for the area might be.

Guy Greco testified that he had been doing public defense work in Lincoln County since 1977. In those days there were a lot of attorneys who accepted court appointments. The Indigent Defense Services Division introduced contracts and two groups successfully bid for the initial contracts. PDSC later recommended formation of a single contract entity consisting of the two law firms and five individual attorneys.

Jeff Pridgeon said he is one of the partners in a five-person firm, four of whom handle public defense cases. One of the associates in his firm has a year of criminal law experience and the other has two.

The other law firm member of the consortium is Ouderkirk and Hollen which has four attorneys. Guy Greco said that most of the public defense cases are handled by two experienced associates in the firm, even though the partners have more experience than the associates.

He said that consortium members don't compete with each other for public defense cases. They have agreed among themselves how the cases are to be distributed. Some lawyers prefer to handle juvenile matters and others prefer to focus on criminal cases. Members devote varying percentages of their time to

public defense. Mr. Greco devotes approximately 10% of his time to consortium management. Jeff Pridgeon said that three of the independent attorney members of the consortium were associates in one of the firms before establishing their own offices. Other associates and one of the firm partners left the area seeking a drier climate or a more prosperous community in which to practice.

Chair Ellis inquired about the training of attorneys in the Pridgeon firm. Jeff Pridgeon said that there is no formal training system but that the firm has an open door policy and new lawyers tag along with senior lawyers. He said that he and Guy Greco have started working on a training process and plan to meet monthly to discuss training issues. Guy Greco said they would follow the Lane County example of holding monthly meetings where lawyers can discuss training and practice issues. Mr. Greco is not available to observe new lawyers in court but he recently surveyed the judges about their observations. They raised a couple of red flags for him to follow up on. He plans to meet with the judges more often. He will take the time to mentor lawyers who appear to need it. Chair Ellis asked about the report that one attorney provided far better representation to his retained clients than to his public defense clients, which he said was unacceptable to the Commission. Jeff Pridgeon agreed and Guy Greco said he would talk to the attorney.

Guy Greco said that the consortium has a board of directors that includes one member per office and meets approximately every six months. The focus of board meetings has been on controlling the flow of funds to each firm so that there will be sufficient funds available to repay OPDS if the group is under its contract quota. Last biennium they had to repay \$136,000. Their caseload, like Lane County's, fluctuates wildly. One reason for the fluctuation is the influx of tourists in the summer months. There are an additional 100,000 people in the county in August and September. With regard to the Commission's requirement for contracts beginning in 2012 that contractors have a board with outside members, Mr. Greco said that lawyers in private criminal practice and possibly an accountant could make a contribution to the board. The consortium has largely been trying to meet the needs of the court and responding to the court's requirements that they be present for all hearings. The consortium could develop bylaws but it has seen itself as largely just responding to the court's demands. The firms have had the obligation to mentor and train their own attorneys.

Jeff Pridgeon said that none of the current public defense providers came to the county for the purpose of handling public defense cases. People came to the firms and then went out on their own. Chair Ellis said that public defender offices are working well in other counties and the training and supervision offered by these offices is one of their strengths. Jeff Pridgeon said that no one had considered starting a public defender office in Lincoln County and if one were started there would be a loss of the senior people. He would not be

interested in working in such an office. His impression is that there is a high level of turnover in public defender offices. In Lincoln County the same lawyers have represented members of multiple generations of the same families over the years. The lawyers know the county and are part of the community. Chair Ellis inquired whether training was an issue first raised by the Commission. Mr. Pridgeon said that it was. Guy Greco said that lawyers are expected to fulfill their own training obligations. Jeff Pridgeon said that attorneys do receive CLE training but the questions may be more about training on local practice issues. This is an area of weakness.

Chair Ellis said that the Ouderkirk, Hollen firm appears to have senior partners that do very few public defense cases and associates who spend 90-95% of their time on these cases. He said that that model is very different from some of the other firms with whom PDSC contracts such as the Jack Morris firm and the Jim Arneson firm. The senior partners in those firms are very engaged in public defense and in their local criminal justice systems.

Guy Greco said that those firms may be doing mostly public defense work, like the Crabtree, Rahmsdorff firm in Bend, but Lincoln County has never had firms that dedicated 100% of their time to public defense. Jeff Pridgeon said that PDSC's predecessor had encouraged Lincoln County lawyers to spread out the public defense caseload in order to cover conflicts. Guy Greco said that the Ouderkirk, Hollen firm covers the overhead expenses for the associates and is devoting two FTE to public defense work. He understands that one of the judges' concerns is that there is a need for more experienced attorneys on Measure 11 cases and the senior partners in the firms could do some of this work but choose not to. The other concern is that the associates may be handling too many cases.

Commissioner Ozanne said that PDSC cannot control how a firm manages its associates and whether a profit is going to the firm. Guy Greco said that Jeff Hollen and his partner were willing to take caseload overflow but the associates had not indicated that they were overloaded. Chair Ellis asked whether Lincoln County might not be better served by a public defender model than the current model where the partners become a kind of pass through. Richard Scholl said he had practiced in Lincoln County for 20 years and that there are five or six sole practitioners who would not be part of a public defender office. Chair Ellis said that even with a public defender officer there would need to be a consortium to handle conflicts. Mr. Scholl said lawyers obtain their training from OCDLA-sponsored events, from the MPD trainer and by exchanging information with each other. The only thing that might be missing is mentoring for the new associates.

Guy Greco said that the system is not broken, why fix it? Chair Ellis read a passage from the initial report about senior partners not handling Measure 11 cases and two senior attorneys who appear apathetic and who fail to file motions

or take cases to trial. Chair Ellis asked Guy Greco whether the consortium's decision to continue using a single rate model internally despite a contract that values cases by seriousness level didn't make Measure 11 cases less attractive. Guy Greco said that the lawyers don't think in terms of case weight but only in terms of volume and assume that the heavier cases will average out. He, for example, would rather do Measure 11 cases than juvenile cases even though they take more time. Each firm receives a fixed amount per month regardless of the case mix. He does not see any cherry picking occurring.

Lincoln County Presiding Circuit Court Judge Charles P. Littlehales said that overall public defenders have been doing an adequate job. The judge's main concern is that there are attorneys who aren't familiar with the Evidence Code. The experienced law firm partners don't come to court. It is the new associates who come. He would like to seek more mentoring. The same is true of the district attorney's office. A lot of cases that shouldn't go to trial are going to trial. He had a number of cases in the last three to four years where cases went to trial even when it wasn't in the best interest of the client. The trial judge hears more of the details of the case and this does not benefit the client when it comes to sentencing. Guy Greco said that the judges are good about not punishing people for going to trial but Judge Littlehales said that more negative information comes out in trial that the court does consider when it comes to sentencing. There is not enough effort by either the defense or the state to really evaluate their cases.

Chair Ellis asked whether conflicts are being identified in a timely manner. Judge Littlehales said it is not an issue in Lincoln County. Some mentally ill clients "fire" their lawyers but the court has not seen a major problem. Guy Greco said that conflicts are often Measure 11 driven. Clients don't like to hear what their choices are. Conflict cases are reassigned within the consortium. There are no double payments for these cases.

Judge Littlehales said the system could be improved by adding more attorneys qualified to handle Measure 11 and other serious cases. He said he is concerned with the effort by some defenders to "judge shop." The newest circuit court judge is a former prosecutor, like all the other judges, and the defense sometimes claims that their clients can't get a fair trial from her even though the defendants are personally unfamiliar with the judge. She is an excellent judge. Judges shouldn't be severe towards anyone. They should follow the law. Guy Greco asked Judge Littlehales whether he thought a public defender office would be a good fit for Lincoln County. He said there would be a lot of conflicts and there would need to be five to seven other lawyers to handle those. A public defender would not be the best fit. The current system would work better if the judges monitored it more closely.

With respect to the use of non-routine expense funds Guy Greco said that he regrets that he may get only seven to nine hundred dollars for handling a murder

case when the expert witness he uses may be paid six or seven thousand dollars.

Jeff Hollen said one of the two associates in his firm is a very experienced attorney and the other just became Measure 11 qualified. Although at one time he devoted 95% of his time to public defense work, he and his partner do very few public defense cases any more but they are available to accept them when their associates can't. He said lawyers can't dabble in these cases. The firm has two offices, one of which does exclusively court appointed work. Chair Ellis said that when PDSC contracts with law firms the senior partners usually do full time public defense work themselves and they train, supervise and mentor the younger lawyers. Jeff Hollen said the partners in his firm are available to mentor the associates when necessary and he stays current on criminal law issues. The office has a database that includes all the current cases. He said there is not a lot of retained criminal work in the county. Chair Ellis asked why the firm continued to have its associates handle public defense cases. Jeff Hollen said he had been involved in public defense since 1976. The firm is offering a service. The firm handles a variety of case types. It has a building and a system set up for doing public defense cases. All the support is provided so that the lawyers are free to focus on their cases. Without the firm the associates who do the public defense cases wouldn't be in the county. Attorneys can't afford to come to the county and open a public defender office. Former associates of the firm have been able to go out on their own and do public defense cases. The pay for public defense work is so low that one benefit of opening a public defender office might be that it could at least provide better benefits. Chair Ellis said that other benefits would be institutionalized recruitment, training, supervision, mentoring and participation in the criminal justice system. Jeff Hollen said that those things had been provided to associates in his firm. He said that there are more and more expectations of public defense lawyers without any increase in pay. People are not moving in and setting up new offices.

Commissioner Ozanne said that PDSC expends \$1.1 million on public defense in the county with 20% of it going to the Ouderkirk and Hollen firm, but, because it is a firm, PDSC cannot see what the associates are being paid, what the overhead is and where the funds are going. Commissioner Welch asked what the consortium could do to increase the number of experienced lawyers handling Measure 11 cases. Guy Greco said that actually there are eight lawyers handling these cases in the county. Jeff Hollen said he hadn't handled one for some time but could if needed. He didn't see Measure 11 cases as a problem. Commissioner Ozanne noted that the lower than average felony trial rate suggests that there may be a problem. Jeff Hollen said that when the district attorney's office declined to negotiate on these cases he advised his lawyers to simply set them all for trial. Many of those ended up getting dismissed. The district attorney's office is different now and you can negotiate with them.

Alan Reynoldson said that he is one of the five solo practitioners and has been practicing in the county since 1992 when he started with the Pridgeon firm. He remained there five years and then went out on his own. Currently about 80% of his work is public defense. There isn't a lot of money in the county to support other types of law practice. If a public defender office were opened it would squeeze out some of the current practitioners. Criminal practice is very demanding. You can't dabble in it. Lawyers who handle public defenses cases have an incentive to do them well if they want private clients to hire them. If a public defender office were created it would take the less demanding cases, leaving the sole practitioners with more of the trial cases. Chair Ellis said that had not been his experience. PD offices tend to take the heavier cases. Mr. Reynoldson said that there are benefits from the public defense contract work but if the income were reduced very much, private work would become more attractive. With respect to monitoring quality, all the lawyers are friends and can talk to each other. Guy Greco said that in order to monitor there has to be communication. He has to know there is an issue. In the last two years the judges have become more willing to let him know about problems. When problems have been identified he has acted to address them. Chair Ellis said that Guy Greco had no authority from the consortium to take actions against attorneys. He asked whether consideration was being given to adding outside members to the board. Mr. Greco said he had gotten some new ideas from the Lane County testimony.

Judge Sheryl Bachart said that the initial report appeared to be thorough and reflected her own concerns about the weaknesses of the system. She said she took the bench in 2008 after practicing in the district attorney's office since 1997. She handles many case types but not all of them. Chair Ellis asked her to comment on the use of law firm associates to handle public defense cases. She said she sees the associates daily but has no contact with the partners. There is a learning curve for new attorneys. Mentoring would help these lawyers. She has not seen a senior partner or other mentor actually observe the new lawyers in trial. Commissioner Ozanne asked her how she as a judge felt about the lack of a centralized court docket. She said that she likes knowing her cases and their history and having control over the trial status. She tries to be sensitive to the needs of the attorneys who might have multiple trials set for the same week in different courtrooms. Guy Greco said a centralized docket would make life easier for the lawyers. Commissioner Welch asked whether she was concerned about the availability of qualified lawyers to handle Measure 11 cases. She said that the lawyers who are handling them appear to be qualified. But she does see inexperienced lawyers who don't appear to be using all the tools available to them in negotiating with the state and at sentencing. Newer lawyers need to have somewhere to go with their questions. Commissioner Welch said that she sees it as part of a judge's job to raise concerns about the qualification and training of the lawyers who appear in court and asked whether there had been a culture of silence in Lincoln County in the past. Judge Bachart responded that she would feel comfortable letting Guy Greco know if she had concerns. She

said that as a district attorney she sought out the judges' comments and that judges would not have been reluctant to contact her boss if there were a problem. She said that Guy Greco had given the judges questionnaires to complete and that she completed hers. She said that after jury trials she often debriefs the jury and is willing to share that information with counsel as well. Richard Scholl asked whether a juror had ever told her that a lawyer had done a terrible job. She said she had received such a comment and had passed it on to Guy Greco. She said that as a judge she tends to be more critical of deputy district attorneys than of defense lawyers since that is her background. She is sensitive, however, to the needs of the defendant. If defense lawyers don't know the sentencing guidelines they cannot give proper advice so it means a lot and she holds defense lawyers to a higher standard as far as their ability to handle complex cases is concerned. Commissioner Potter asked about the quality of representation in civil commitment cases. She said that there are not a lot of them in the county and it is an area of concern for both the lawyers and the court.

Ingrid Swenson reported that District Attorney Rob Bovett had had to leave and would not be available to testify later in the day but that his comments had been included in the initial report.

Dan Taylor said that he is one of the sole practitioners who handles public defense cases. His largest concern is the issue of compensation. It is hard to attract and retain quality people when the compensation is so low. He explained his personal financial situation and said that out of contract funds he has to pay all his own costs and can only afford part-time staff. His own salary is less than \$45 per hour and he has no retirement plan. If the Commission wants to recruit people to come to Lincoln county and stay it will have to offer something more than is being paid right now. Attorneys in public defense offices that he worked in in Coos and Washington County seemed to stay a couple of years and then leave. He suggested that the Commission advocate for more money in the legislature since public defense is an important part of the public safety system. Commissioner Ozanne said that lawyers who do the work have not communicated with their own legislators.

Guy Greco said that he participated in an OPDS site visit to the Clackamas Defense Consortium, which he was told was doing really great work. He visited with four or five sole practitioners. They worked in slums on bare bones budgets. In contrast, he is able to make a good living in Lincoln County because he is not tied exclusively to public defense cases. If you join local groups and get your name out there in three or four years you can get a practice going and make a decent wage. The question for PDSC is whether it can afford to have full time lawyers in a public defender office. If so, maybe lawyers like Dan Taylor could work there and get some benefits and a better wage. Commissioner Ozanne said that most of PDSC's providers take primarily public defense cases. Guy Greco's practice is unusual.

Judge Thomas O. Branford said that he had a long civil trial underway in his courtroom and had not had a chance to review the initial report but that he had spoken to Judge Bachart about the information she provided and said that he agreed with her. He said he would prefer not having a public defender office. He would not want to see current providers cut out since they have been doing good work for a long time. Chair Ellis raised the issue of having firms that commit only associates, not their partners, to the public defense work and asked whether a public defender couldn't replace the firms. Judge Branford said there had been a lot of turnover in the Pridgeon firm. People gain talent and then leave the area. He would like to see attorneys who have chosen to live and work in the county and who are doing good work stay and not be financially undercut. Commissioner Ozanne said the difficulty with the firms is that PDSC cannot look inside them. Judge Branford said he too struggles with the lack of oversight. New people are really put out to sea. It is not fair to defendants. Chair Ellis said the Commission had confronted a similar consortium model in Marion County. It developed a defender office and the combination is now working well. Both organizations are now better and stronger. Even if it wanted to the Commission couldn't substitute a public defender for the consortium in Lincoln County because of the conflict rule. Commissioner Potter said that Lincoln County has a model but there is no structure underlying the model. There is nothing that governs recruitment, training, administration. If a public defender were introduced and had no structure it would fail. Any model can fail. It works depending on the structure. Commissioner Ozanne inquired about the county's trial rates and whether lawyers were assessing cases well. Judge Branford said that it is a problem on both sides.

Chair Ellis said he would like to get some initial reactions from commissioners on Lincoln County. John Potter said that it was important to talk about a public defender office but that more important than the model is the structure. There are a variety of successful models around the state. The same model doesn't work everywhere. There are examples of good providers with each model but the structure and how it is put together is more important than the model itself. The Lincoln County system has no structure. There are no bylaws, no vision for the future, no training or mentoring, nothing other than receiving and distributing the funds and reporting on case numbers to OPDS. It is a hollow shell. He mentioned to Guy Greco that he would like to see him come back and fill in the blanks. In Lane County the system he recommended to the Commission didn't work because it didn't have a good structure and a really good manager. The system in place there now is the same model that hasn't worked here. But it is working in Lane County with someone who is turning out to be a good manager. If PDSC were really clear about the structure it wants to see in Lincoln County, the providers might be able to make it happen. The Commission has been here before, however, and has talked to people and really nothing has changed.

Commissioner Ozanne agreed with the structure/model distinction.  
Commissioner Welch said she agreed with the comments too but believes

people should be told what is wrong with their system and asked whether Commissioners agreed on what is wrong. Commissioner Ozanne said they had been told what was wrong. Chair Ellis said OPDS is contracting with an amorphous group without bylaws and in which there is no one to do the fundamental things PDSC requires such as recruitment, training, supervision, mentoring and discipline. There is not only no structure but no model. There are no bad actors. This is just how they have always done things. There is a big vacuum to fill. The climate is right for a public defender with the right director. The judges might be willing to support it if it didn't displace the individual practitioners. Commissioner Ozanne said that the community seemed more open to change than when he came to Lincoln County as the OPDS director. Ingrid Swenson said that the five independent lawyers are all reported to be doing good work without any organization. They need a sufficient caseload to sustain them. A public defender office, to be functional would need to take a large part of the caseload. It might be more difficult to start a public defender office in Lincoln County where the bench is less dissatisfied with the current system than it was in Marion County. It would be difficult to create a public defender office without local support. Commissioner Ozanne noted the involvement of the chief justice in creating the office in Marion County. Ingrid Swenson said some of the judges had suggested contracting directly with the lawyers who do the work or with a consortium, like that in Lane County, that is comprised of individual attorneys all of whom do public defense cases. Chair Ellis said he thought a public defender office could work in Lincoln County. Commissioner Ozanne said the office could start as a very small office and expand as needed to replace attorneys who might be retiring. Commissioner Ozanne suggested that a topic for a future PDSC retreat could be whether the site visit process and the structural reviews conducted by the commission would be combined.

Chair Ellis said that the next step for the Commission would be to discuss what they had heard at future meetings and that it would take several months before a final report was issued.

Comments provided after the March 10, 2011 PDSC Meeting:

On April 12, 2011 Guy Greco informed OPDS that the consortium was in the process of finalizing new bylaws and attorney agreements and was creating a nonprofit corporation. A new board of directors would be formed that would meet the PDSC requirements for contracts beginning in January of 2012. The new body would be creating a complaint policy and possibly a conflict of interest policy for board members. It would be creating a form for attorneys to complete after all trials so that the group could objectively measure whether members were getting effective results in bench and jury trials. OPDS's Best Practices were being used as a model. Mr. Greco also reported that that the consortium's new attorney agreement includes mandatory minimum CLE requirements and provides that any member with less than five years experience will be required to

complete a trial skills course. There are five Measure 11 lawyers who appear to be doing good work and three who were identified as having issues that need to be addressed. The consortium has a new evaluation process that will allow its board of directors to prohibit a lawyer from handling Measure 11 cases if they are no longer qualified to do so. The Board will also ensure that there are an adequate number of Measure 11 qualified lawyers available.

Judge Littlehales provided the following comment on April 21, 2011: "I am very pleased at the direction indigent defense is moving under the direction of Guy Greco. Setting up the nonprofit corporation with guidelines, case caps per attorney and requirements for CLE and training updates is a good way to go. .... Over the more than forty years I have been doing this, the courtroom has always been a training ground for new attorneys. However, over the past several years it seems more so and this is true of both defense attorneys and DA's. I believe with [Guy] Greco's work with three individual attorneys and with the overall group and new rules on training and competency, we will have a truly functional public defender system."

#### Testimony and Discussion at May 5, 2011 PDSC meeting

Ingrid Swenson noted some corrections to the Lincoln County report provided to Commissioners for the May 5, 2011 meeting.

Guy Greco reported that he had completed the attorney performance review that had been undertaken before the Commission's March 2011 meeting in Lincoln County. He said that he had met with all of the judges and discussed the information that they had provided and identified three attorneys in the consortium about whom concerns had been expressed. He had observed a significant change in the judges' willingness to bring performance issues to his attention. Judges were now informing him about attorney performance in individual trials. He said that the attorney who appears at arraignment will not necessarily be the attorney to whom the case is assigned. Cases will now be assigned based on the qualifications of the particular attorney. There are two or three attorneys who should not be handling Measure 11 cases. Even without these attorneys, however, there is a sufficient number of qualified lawyers to handle the Measure 11 caseload. He said that in response to PDSC's next request for proposals the current group of providers would organize as a non-profit corporation that would have written agreements with each lawyer who would be accepting cases under the contract and that it would not be contracting with the firms. The corporation would be governed by a board with two outside directors appointed by the Lincoln County Bar Association. The board would have the authority to terminate its agreement with any attorney, even if the attorney were an associate in a law firm. The Administrator would be able to monitor the caseload of each participating attorney. The agreement would not prohibit a law firm associate who handled public defense cases from leaving the law firm. The consortium administrator would oversee training, supervision,

mentoring and monitoring of the attorneys, including those employed by law firms. Although he could not control the amount of compensation paid to an associate he could control the number and type of public defense cases assigned to that attorney.

Chair Ellis said he was looking for a way to work with the local legal community. There needs to be a structure. There is a problem in a consortium that includes law firm members when the firm partners do not participate in the work. From the testimony provided in March, it did not appear that either the consortium or its members were providing training, mentoring or quality review. He said that it appeared that there was now an effort to address these needs. He said that one possible model for Lincoln County would include both a consortium and a public defender office. He asked whether there had been any discussion of a public defender office. Guy Greco responded that monthly lunch meetings had been instituted and will be mandatory in the future. None of the attorneys with whom he spoke expressed an interest in being part of a public defender office because they all preferred to be able to accept private cases. If PDSC wanted to create a public defender office it would have to recruit lawyers from outside the area. Chair Ellis asked how Mr. Greco recommended the commission proceed. Mr. Greco said that the Commission could refuse to fund the associates. He said "Salem" used to determine who received cases. That has changed and PDSC now wants the provider to be doing this. He said that the consortium would make the changes that PDSC required it to make. Compliance might demand a lot of the administrator's time. He said that if PDSC didn't want the firms to participate in the consortium it could prohibit them from doing so. Commissioner Potter asked whether the board of the non-profit would hire and fire the administrator. Guy Greco said that that is what is provided in the bylaws. The non-profit will be incorporated by the time it responds to the RFP. There are some tax issues that need to be resolved relating to whether the administrator is an employee and whether the group's retained earnings are taxable income. Ingrid Swenson asked if it wouldn't address the Commission's concerns if the consortium were to contract directly with individual attorneys rather than with law firms, so that even though associates in law firms might be handling public defense cases, it would be the consortium, rather than the firm, that selected attorney members, assigned cases and oversaw the quality of representation. Chair Ellis asked whether the consortium's contract would be with the individual attorneys rather than with the law firm. Mr. Greco said that was correct and the consortium board would have to approve the addition of any new lawyers. Chair Ellis said that the formation of a public defender office would not be an easy thing to do. It took a lot of effort in Marion County and the Chief Justice had been instrumental in recruiting the initial board of directors there. He said the Commission was not anxious to rush down that track but PDSC could go that direction in the future if needed. Guy Greco said that a public defender model could work in the future but that current providers value their freedom to engage in private practice. He said there would be changes in the operation of the consortium because there would be an administrator overseeing their work.

Chair Ellis said he was encouraged by what the consortium was doing and that it had made a good faith effort to respond to the Commission's concerns. Guy Greco said that in addition to the changes already described he was creating a trial form to gather information about the cases tried and those pled and the outcomes so that he would have information in addition to the impressions of the trial judges about the work of the lawyers.

Commissioner Potter said that he applauded the consortium for initiating changes and advised Mr. Greco of the June 16, 2011 RFP response date.

Commissioner Welch said that she was pleased with the changes that were being implemented.

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

Although the Lincoln Defense Consortium has been operating for a significant period of time as little more than a pass through for state public defense funds, the changes undertaken since March 2011 indicate consortium members heard the Commission's concerns (regarding the contractor's lack of structure, its inability to control caseloads and the assignment of cases, its failure to provide training, mentoring, supervision and quality oversight), and have taken encouraging steps and committed to taking others to address identified deficiencies. Should the consortium structure itself into the proposed new entity and should that entity be the successful bidder for a PDSC contract beginning in January 2012, PDSC approves continuation of the current service delivery plan - a single consortium providing representation in Lincoln County for all public defense case types excluding post-conviction, habeas corpus, murder and aggravated murder. PDSC will review the Lincoln County service delivery plan and the administration of the contract in approximately May 2012.

## APPENDIX A

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.<sup>8</sup> Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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<sup>8</sup> Spangenberg and Beeman, *supra* note 2, at 36.

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>9</sup> As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

2. Consortia. A “consortium” refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC’s RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the

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<sup>9</sup> Id.

original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

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

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

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

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

Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in

a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

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

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

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

# Attachment 4

(5/10/11 memo to PDSC contractors)

Memo:

**To: PDSC Contractors**

**Re: Establishment of Initial Priorities for 2012-2013 PDSC contracts**

As many of you know, over the course of the last several biennia the Public Defense Services Commission has increased its oversight of and participation in the public defense contracting process.

Again this year the PDSC's June meeting will be held in conjunction with the OCDLA annual conference in Bend. The Commission's meeting is scheduled for June 16, 2011 from 9 am to 12:30 pm at the Seventh Mountain Resort.

In odd numbered years the Commission sets aside a portion of the June meeting to receive input from public defense contractors or other interested persons on the priorities that it should establish for contracts to be approved for next two year period. Submissions may be oral or in writing.

To assist us in planning the June meeting I would appreciate your letting me know whether you intend to provide either written or oral testimony to the Commission on this issue.

Thank you and please let me know if you have any questions or would like additional information about the meeting or the commission's role in the contracting process.

Ingrid

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