

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 18, 2009
9:00 a.m. - 1:00 p.m.
Mt. Washington Room
Seventh Mountain Resort
Bend, Oregon 97301

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's May 21, 2009 Meeting
<i>(Attachment 1)</i> | Shaun McCrea |
| 2. Commission Discussion of Service Delivery Plan for Clackamas County
<i>(Attachment 2)</i> | Shaun McCrea
Commissioners |
| 3. Commission Discussion of Service Delivery Plan for Post Conviction Relief Cases
<i>(Attachment 3)</i> | Shaun McCrea
Commissioners |
| 4. PDSC Budget Report
<i>(Attachment 4)</i> | Ingrid Swenson
Kathryn Aylward |
| 5. Presentations from PDSC Contractors and Others regarding PDSC Funding for 09-11 | Contractors and
Others |
| 6. Training Opportunities for Public Defense Providers
<i>(Attachment 5)</i> | Paul Levy |
| 7. Annual Quality Assurance Task Force Site Visit Report
<i>(Attachment 6)</i> | Paul Levy |
| 8. OPDS Monthly Report
<i>(Attachment 7)</i> | OPDS Management
Team |

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

The meeting location is accessible to persons with disabilities. A

request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Weeks at

(503) 378-3349.

Next meeting: The next meeting of the commission is scheduled for August 6, 2009 from 9am to 1pm at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, May 21, 2009
9:00 a.m. - 1:00 p.m.
Jury Conference Room (B 148)
Marion County Courthouse
100 High Street NE
Salem, Oregon 97301

MEMBERS PRESENT: Shaun McCrea
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

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

(Meeting was called to order at 9:08 a.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's April 16, 2009 Meeting

MOTION: Janet Stevens moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 3 Presentation Regarding Proposal to Create Veterans' Resource Center

Jesse and Jennelle Barton testified in support of their proposal to create a veterans' resource center for defense attorneys who represent veterans and family members of veterans who might be affected by the veteran's military experience. Combat veterans may have mental and physical conditions relevant to criminal culpability, all veterans may forfeit some benefits if incarcerated and may be prohibited from possessing firearms if convicted of offenses involving domestic violence. The resource center would provide information about these issues, would provide a legal resource library and a list serve. The resource center could develop a screening tool, such as the one used by the San Diego Public Defender's office, to help defense attorneys identify veterans' issues.

Funding would be needed to create and maintain a webpage and the legal resource library. Commissioner Ozanne suggested seeking support from Oregon's Congressional delegation and from Oregon Legal Services and possibly submitting a grant application for federal

stimulus money. He said the concept should be embraced by OPDS. Jess Barton suggested that if one public defense attorney were to develop special expertise in the area, that expertise could be made available to other public defense attorneys representing veterans and their family members.

Commissioner Potter said that the concept required more than just a website. Jennelle Barton said that many of the resources already existed. There are people with expertise but they are not connected. Commission Potter suggested that OCDLA could possibly host the website and invited the Bartons to makes such a proposal to the OCDLA board. Jess Barton said the primary need is for training and ongoing technical assistance.

Agenda Item No. 4

Presentation regarding Proposed PDSC Funding Priorities

Angel Lopez was congratulated by Commission members on his appointment to the Circuit Court. He said that his law firm, Squires and Lopez, would become Squires and Barnett and that it would continue to provide public defense representation as part of the Portland Defense Consortium. The firm will continue to provide Spanish speaking services to public defense clients.

Mr. Lopez suggested preserving contract offices by assigning them the same percentage of public defense cases this biennium as they received last biennium. In addition, defender payment should be increased to permit defense attorneys to approach parity with district attorneys over the next several years. Another approach would be to reduce caseloads by 10% in view of the declining case numbers and increase compensation by 10%. This would allow defense providers to stay where they are in terms of funding, but with fewer cases.

Commissioner Potter urged Mr. Lopez to submit a response to OPDS's request for proposals that describes what will be required to keep the office in business, to tell OPDS and the Commission what is needed.

Mr. Lopez said that the courts, the prosecutors and the defense bar should stand together for adequate funding for all three.

Mark McKechnie, the Executive Director of the Juvenile Rights Project recommended that the Commission consider some restructuring of its contract rates. He said that the priorities previously established by the Commissioner were appropriate. In terms of the implementation of those priorities he recommended that the Commission consider providing contractors a certain amount, possibly 10% of the contract amount, for overhead costs regardless of caseload. He noted that the bar's performance standards are difficult to comply with without an adequate infrastructure in the contract office. In the past requests for additional funding have translated into increases in caseload. Fluctuations in caseload are another problem and could be addressed by the overhead allocation, or by increased case rates. Another recommendation would be to provide different rates for different classes of juvenile delinquency cases, as is done with adult criminal cases. In juvenile dependency cases he said that compensation related to court hearings does not adequately compensate attorneys who challenge administrative decisions and pursue remedies outside the courtroom.

Commissioner Potter inquired how OPDS should compensate contractors for high quality work, based on an assessment after the fact or provided in advance on the condition that services be improved.

Mr. McKechnie said that both history and a contractor's current capacity for high quality representation should be considered.

Commissioner Potter asked whether OPDS should contract with organizations that do not provide quality representation. Mr. McKechnie said that the Commission's policy option

package would have helped by allowing the Commission to reduce caseloads and increase compensation. Current rates do not reflect the cost of doing the work.

Commissioner Welch said that in her observation, the Juvenile Rights Project has provided state of the art representation. Many attorneys would not make the effort to challenge administrative rulings. The core of the problem is what lawyers perceive their job to be. How do you quantify the differences between what some lawyers do and what others do, and how do you compensate those who do the best work?

Vice Chair McCrea said that one way to address quality might be for contractors to describe the amount of time and energy that were spent under the last contract and seek additional compensation in the next contract.

Ingrid Swenson said that the current contract does allow contractors to seek additional credit for unusually difficult cases, and the hope is that for most contractors difficult cases will be balanced out with less difficult cases. She described a Washington state pilot project that increased compensation and significantly lowered caseloads for attorneys representing parents in juvenile dependency cases. The pilot was very successful and resulted in decreases in terminations and increases in family placements, which benefited both the clients and the state. PDSC's policy option package would have allowed OPDS to reduce the caseloads of Oregon attorneys. She said that to the extent that funding allows, OPDS will try to achieve some of the same goals.

Mark McKechnie said that Juvenile Rights Project's case rates do not adequately reimburse them for the effort put into the average case.

Agenda Item No. 2

Discussion of PDSC's Previously Approved Funding Priorities and Review of Draft RFPs

Kathryn Aylward said that when PDSC receives funds from the legislature that exceed funding at its essential budget level the Commission has choices it can make about how to direct that funding. In addition, when there are a number of potential providers in an area, PDSC can decide which of those providers to select. At the end of the last legislative session, PDSC prioritized its contract goals to do things like fixing rate disparities, providing consistency, increasing rates in some areas. At the end of that process she noted that there were some things that might have been done differently, including providing greater increases in eastern Oregon rates, greater increases in juvenile rates and a bigger differential for contracts that include investigation. Some things need to be finished up in this contract cycle and, now that there is a more even playing field, PDSC could focus on rewarding quality. OPDS now has more information about the quality of services provided by its contractors than it did in the past. This is not, however, a session where there will be increased funding and people won't agree to contract for lower rates. There will be a drop in caseload and it will be important to keep good providers viable.

Vice-Chair McCrea said that things did not seem to have changed from the principles and priorities adopted in August of 2007.

Commissioner Ozanne noted that public employees across the state are taking less money for next year, giving up their COLAs and their merit increases to save jobs.

Kathryn Aylward said that public defense attorneys whose retirement savings have declined may be seeking increases in their case rates or looking for better paying work. She said that the Commission's goal appears to be to achieve "bottom line parity" among its contractors. If this is true then offices with higher overhead will need higher rates.

Commissioner Ozanne said that to him parity means treating similarly situated people similarly. There is a bottom line and, above that, an effort to reward quality or provide security.

Vice Chair McCrea said that that is why the Commission phrased its priorities the way it did, to provide for flexibility to do what needs to be done and to promote quality. She said that despite the negative economic climate, contractors should not pull back in their bids. People have been underpaid for so long and shouldn't assume that they have to cut back on their bids. They should tell us what they need and why. Peter Ozanne agreed but noted that we have to be sensitive, as legislators are sensitive, to all the employees who decided to take reductions in pay to save their fellow workers.

Commissioner Potter said that if we continue to do what we have in the past, we will ask contractors to tell us what it takes to do the job and tell the legislature what the cost will be. If the legislature cuts the budget, we have to stop taking cases, instead of deciding early on that we have to cut back. Commissioner Ozanne agreed.

Kathryn Aylward discussed the proposed request for proposals and said she would like to issue it on May 22, 2009. There are two versions, one for existing contractors and one for new contractors. The version for existing contractors is similar to the state budgeting process and asks the contractor to tell OPDS what the contractor needs for the next two-year period to continuing doing what it has been doing and what it would do if it received additional funding to improve the quality of representation. OPDS does not intend to include a list of Commission priorities in the RFP but will include the list of best practices for contractors. The Commission approved release of the RFP.

Agenda Item No. 5 Amendments to Qualification Standards

Paul Levy summarized the proposed amendments to the qualification standards in response to decisions and recommendations made by the Commission at its April 16, 2009 meeting. He noted that the revised standards and the attorney certificate now require that attorneys agree to "observe" Oregon State Bar Performance Standards, not just review and become familiar with them. Mr. Levy also pointed out that the amendments delete language that said that "an attorney is qualified if" and substituted "minimum qualifications require" so as not to declare an attorney qualified when no such determination has been made. Another change to the attorney certificate makes it clear that if an attorney believes the attorney possesses equivalent skill and experience but doesn't meet the minimum qualification, the attorney must inform OPDS of this fact.

Agenda Item No. 6 Draft PDSC Drug Court Guidelines

Ingrid Swenson said that at a previous hearing Commissioners were informed by some of the attorneys who work in drug courts that it would be beneficial to have a set of guidelines regarding the role of counsel for the defendant in these courts. The current draft directs the guidelines to the court. Commission members discussed whether it would be appropriate for the Commission to advise the court that it either "shall" or "should" follow the guidelines and determined that it would be more appropriate to direct the guidelines to the attorneys who represent public defense clients in drug court proceedings. A revised draft will be prepared.

Agenda Item No. 7 OPDS Monthly Report

Peter Gartlan provided a status report on the petition for cert in *Bowen v. Oregon*. He reported that he had attended a meeting with Chief Judge David Brewer of the Oregon Court of Appeals regarding SB 262 and that he and other defense attorneys attending the meeting were satisfied that the changes to the appellate process authorized by SB 262 would not be implemented in a way that would adversely affect their clients. Mr. Gartlan also summarized

the topics to be covered in the Appellate Division sponsored CLE, May Daze, scheduled for May 29, 2009. Commissioners were invited to attend.

Paul Levy gave a progress report on the diversity survey that was sent to public defense providers and summarized the results of the annual statewide public defense performance survey. The results of that survey indicated a slight improvement in the perceived quality of juvenile dependency representation. The comments received with the survey responses are particularly useful. Mr. Levy advised the commission of some changes in the Oregon Public Ethics Law. Admission and the cost of food and beverages at receptions and meetings of organizations that are attended by public officials are not considered gifts and do not have to be reported. Reasonable expenses associated with attending a convention are not a gift when the sponsoring organization is a non-profit corporation. The executive director of OPDS has been added to the list of officials who are required to file annual statements of economic interest.

MOTION: John Potter moved to adjourn the meeting; **VOTE: 5-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, May 21, 2009
9:00 a.m. - 1:00 p.m.
Jury Conference Room (B 148)
Marion County Courthouse
100 High Street NE
Salem, Oregon 97301

MEMBERS PRESENT: Shaun McCrea
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

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

(Meeting was called to order at 9:08 a.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's April 16, 2009 Meeting

0:46 Chair McCrea Let's call the meeting to order. Good morning everyone. Let's start with our first action item which is approval of the minutes of the April 16, 2009 meeting. Are there any additions, corrections, changes?

1:03 I. Swenson Madam Chair, just one. There are a couple of typos. On page one of the official minutes is it reads "Mary Cohen" and it should be "Marty Cohen."

1:014 Chair McCrea Okay, we will make that correction. Was there another one, Ingrid?

1:22 I. Swenson No, the others are typographical and we can correct them internally.

1:28 Chair McCrea I would entertain a motion to approve the minutes.
MOTION: Janet Stevens moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 2 Discussion of PDSC's Previously Approved Funding Priorities and Review of Draft RFPs

1:38 Chair McCrea

The second item on the agenda is discussion of PDSC's previously approved funding priorities and review of draft RFPs. What I would like to do is defer that and move to Items 3 and 4 so we can take the testimony of our guests. Let's start with Jesse Barton.

Agenda Item No. 3

Presentation Regarding Proposal to Create Veterans' Resource Center

2:04 J. Barton

Thank you, Madam Chair. You all received my memo. I just mainly want to answer any questions you might have. I think the memo pretty well lays out what we are attempting to accomplish here. One thing that I want to mention that we want to have in this program that is not discussed in the memo is follow up with the courts on these cases. I spoke yesterday with a webpage designer. They can actually design a webpage that will provide reports of cases that have gone out to the folks to be processed in this legal resource center. Then data generated reports come back in and populate a database report about these cases - basic information about the cases and the counties they are from, what kinds of cases they are and also give us information about the outcome of the cases and the kind of success rates that we have - like a legal resource center. The idea of providing this kind of legal resource to returning service members is new to the state. When I got into this concept I was just thinking of a legal resource center for service members or veterans who were facing criminal prosecution, but after discussing this with other folks I came to realize that there actually would be a lot of demand for these services in the area of juvenile cases. Very quickly, where you have a juvenile delinquency case you might have a child who is acting out because dad just got sent on his fourth tour to Iraq, his fourth deployment to Iraq, and it is causing the kid to act out in a certain antisocial way. The idea would be for even a delinquency attorney to know to investigate the possibility that the child's delinquent behavior is attributed to his parent's military service, in the same way that a person would need to do some sort of preliminary checking to determine whether a criminal defendant's antisocial behavior might be attributed to his own military service. The juvenile delinquent might have that same sort of problem. You might have a juvenile who suffers from that secondary PTSD which I discussed in the memo. You can also have juvenile dependency cases. You will recall under the Service Member Civil Relief Act the civil proceedings get stayed when the person gets put on active duty. For example, a service member might have a dependency case. Then he gets deployed, he gets put on active duty and while he is on active duty, under the provisions of SMCRA, the Service Member Civil Relief Act, the dependency action could be stayed until deployment is over. I don't know that that is the kind of information that attorneys presently have. It is the sort of thing they would get through this legal resource center through the training process, not only how to identify the kinds of cases that would arise out of the kind of PTSD or traumatic brain injuries that I talked about, but also make sure the folks are trained when specialized types of issues arise. Another specialty area that we are looking at is if you are a veteran and you are receiving disability benefits and you get convicted of a crime and put in prison, your benefits are reduced to 10 percent of what they previously were. So if you were 70 percent disabled and you get convicted of a crime and put in prison you would only get seven percent while you are in prison. I don't know if folks know this but there are possible ways to ensure, if the veteran inmate has children, there are possible ways to keep the benefit level at a higher rate because the veteran is in prison but his wife and children are not. They could continue to receive the benefits that the veteran was entitled to, for example. That is the kind of training that this legal resource center would provide in addition to the more standard ones you could think of in terms of training folks on how to defend cases presenting PTSD and TBI related offenses. I also mentioned the Lautenberg Act in my memorandum. I have seen a fairly large number of cases recently where if the case indicates in any way, in certain types of documentation in the case file, that the case is a domestic violence case, under the Lautenberg Act a person can't possess a firearm, period. It interferes with a person's ability to participate in military service. We have a lot of cases with folks who would be deployed, actually want to be deployed with their military unit, but can't be deployed because they can't possess firearms. Attorneys need to be aware of the Lautenberg act and many aren't. They need to be trained in that specific area. For example in plea negotiations if you have a case that is denominated a domestic violence case, any mention of domestic violence

should be scrubbed from the file so that a person can continue in military service and not lose that opportunity which is now happening with many people. I am aware of one infantry company in this state where because of a substantial number of folks who are suffering from PTSD area affected by the prohibition on firearm possession under the Lautenberg Act, units are having to deploy people who are like 50 years old because they can't form units large enough with younger folks because of the denial of firearm possession under the Lautenberg Act. The idea is just to put together this legal resource center that would as much as possible be an online center. We would want to have a center that would just provide general information about the cases I have been talking about, but also have a regularly updated legal resource library and a list serve that would be monitored. Folks could get information about how to deal with certain kinds of legal issues that arise as they go along. All of that is laid out in my memorandum. I could probably go on about this for a lot longer but I don't think that is necessary. If you have any questions, I would be happy to answer them.

10:11 Jenelle. Barton

Hi. I am Jennelle Barton and I am working with Jess. One thing I would like to add to this is that in the early '90s I was a trial practitioner in Multnomah County. We would see the occasional Vietnam veteran and many of these veterans were veterans with some pretty severe problems. James Cunningham would tell his jungle rot story, not in mixed company, but you will get the general idea. Back then it was difficult to represent these individuals because there was not the understanding of the issues both legal and psychological that we have today. The best we could hope for at that time was to get in front of a judge who would be sympathetic and compassionate. We always wanted to have our Vietnam vets in front of Judge Beckman because we knew that he understood, having been a Vietnam veteran. Having a resource like this would be valuable to the trial attorneys because they then would know where to go when they had these individuals with these types of problems. That is why we want to put this together and have this resource available for the trial attorneys and also appellate attorneys who have these issues. That is all I have to add.

11:27 Chair McCrea

On page three of your memorandum, Jess, you talk about because of LRC's reliance on preexisting entities, the costs of it should be minimal (perhaps equal to an 0.25 to 0.5 FTE position). Can you flesh out for me what you are thinking in terms of reliance on preexisting entities?

11:49 J. Barton

I don't think this legal resource center would need to have any staff attorney positions. That doesn't seem necessary to me. What is needed is just to make sure there is basic information provided to the attorneys now under PDSC contracts. I can see scenarios arise. In the 41st Brigade there are companies that are formed all over the state. There can be service members from anywhere in the state who are eventually going to find themselves in some sort of legal process that this LRC would serve. In some fashion or another, a case is going to arrive in somebody's lap, in some public defender office somewhere, some office somewhere, where it is going to be a court-appointed type case. That person is going to have to have some sort of system for identifying whether his or her new client is a veteran or whether this is a veteran case as described in my memo. One thing that the legal resource center would provide initially is some sort of screening mechanism for determining or identifying types of cases that could be served by the LRC. The first question that needs to be asked is, "Is this a veteran case at all?" That question needs to be asked. If you have an initial interview with a new client you could find out, "Are you a veteran, or is your father a veteran, or is your spouse veteran?" That is the first thing that needs to be found out. If so, then there is actually a checklist that could be gone through like the one that the San Diego Public Defender's Office has developed for determining whether the case presents PTSD types of issues or traumatic brain injury type issues. That kind of information can be made available through the legal resource center.

13:49 Chair McCrea

Okay. Where do you envision the Legal Resource Center residing? I know mostly online, but is it going to be connected with OPDS, or with the Appellate Division, or with a public defender office? Maybe you haven't thought about it in mechanical terms so far.

14:07 J. Barton No. I thought what we would do is form a 501(c) corporation and just run it out of my office. It is going to be something that is just there. For the most part it is not going to be run like somebody is actually doing something. It is just going on over the internet once the thing is put on line. The first thing that needs to be done is to put together the webpage that I was talking about, a webpage to provide for initial screening, and for training services, the legal resource library, the case completion reports to generate the database that I was talking about. I would probably need a more specific question to answer. I am not sure what you are looking for, Shaun.

15:08 S. McCreia I appreciate everything in your memorandum and the comments that you made today. I have learned something here already, myself, in terms of veterans and issues like the Lautenberg Act that you talk about and the ability to possess firearms. That is something that I would not ordinarily think about, and all of that I think is extremely important. What I have kind of done is shift over from the issues and the policy questions to the mechanical. Basically saying, what are you asking for from us? That is kind of my question to you, Jess. What are you asking for?

15:48 J. Barton Well the first step is there would be costs involved in setting up the webpage. We would need money for that, to work with the webpage designer to put together the kind of page that we need and get it online, ideally, by January or February. So there is a cost there. That would be a few thousand dollars. The price I was given yesterday by a webpage designer was a figure between \$3,000 and \$5,000. There is going to be some ongoing costs of maintenance to the webpage. It shouldn't be too much. Maybe something like \$100 a month or more. Let's say \$500 a month. Somebody needs to put together a legal resource library. There would be some time involved in that so there would need to be some kind of compensation for that sort of thing. Frankly, there could be a phone number that folks could call. There might need to be a separate telephone line from my office number. That might not be a bad thing to have. So there is a cost there. That could be another \$50 to \$100 a month. We are not talking about a high cost thing here. What we are really talking about is just this legal resource center, something very similar to what OCDLA's website already is. It would provide very similar kinds of services to what you could get off the OCDLA website. I would want to make sure that the legal resource legal documents library is regularly maintained and updated. I don't want a library of antiquated documents. That is kind of how it would go, Shaun. The whole thing might cost maybe \$20,000. That is just a ballpark number. I'm not talking about a lot of money. We are really just talking about making the information available to the attorneys to ensure they have ready access to up-to-date information.

18:26 P. Ozanne Mr. and Mrs. Barton it is good to see you both. I think this is a terrific idea or perhaps I should say concept. I have a number of friends who work in VAs as therapists. We all know nationally that we have let down our service members. I just wonder whether we are thinking way too small. Why, and it wouldn't be fair to ask you this, but why don't we consider, and maybe with the help of OPDS, two things, going to our congressional delegation with this concept and finding out what Oregon Legal Services has done in this regard, and if nothing, our chances are better. Think about filing federal stimulus grant money which is out there floating around. We know the new administration has claimed a lot of sensitivity to veteran's affairs. I don't know if this is being done around the country. If it isn't, I think we ought to get our senators and congressmen behind this. I think as much as we would want you involved going forward, it seems to me that this should be embraced by OPDS. I certainly appreciate the thought of running it out of your office, but I think we should consider this more aggressively, or at least it should be explored. I think it is a great concept.

20:33 J. Barton If you want to run this out of OPDS offices that is fine.

20:38 P. Ozanne I don't mean so much running it. I think it should be institutionalized. We should buy into it as a system. That is my initial impression but certainly federal involvement should be there.

It seems to me that it would be a really appealing concept. I don't know if others share that view.

21:05 J. Barton As I said in my memo the San Diego Public Defender has a returning veteran program. They just literally set up the unit right in their office. You think about San Diego and they probably have as many veterans as the State of Oregon.

21:29 P. Ozanne I think that your point is well taken given the assumed availability of resources. Given our structure, the contract structure, I like your concept of being advisory rather than processing cases to begin with and then I think we ought to have an attorney attached to this.

21:50 J. Barton I am going to volunteer a guy's name. I worked recently with an attorney in the Washington County Metro Office, Paul Butterfield, and he is a marine and a veteran of Desert Storm. Let's just assume that the cases in Washington County that he ends up taking are veteran's cases because he is a veteran. He volunteers to take these cases and does these cases and gets very well versed on handling criminal cases that involve these veteran issues. I can see something like that happening maybe over the course of a half of a year and he becomes an expert in this area. Then some case arises in a completely separate county. Then let's say Phil Studenberg gets one down in Klamath County and isn't aware of how to present the type of case that needs to be presented. He gets on the list and finds out there is a guy in Washington County who knows all about it. It would just connect those people up. It could be worked out that the attorney from Washington County ends up going to Klamath County to assist the attorney in the case. I could see that easily happening as a result of this legal resource center. That would be the point of having it - to connect people and resources. The individual in Washington County now is a resource for other attorneys around the state who don't know how to defend those kinds of cases yet. There are two more things that I want to mention. We have thought about the idea of grant applications. The grant programs that are available to the stimulus program are ones that are designed to create some jobs or development.

24:07 P. Ozanne I laugh because I am applying for a lot of stimulus grant money and the theory in Washington is that people are just supplementing their function. We are creating a job if we got an attorney and some FTE. There is a lot of government expansion under the stimulus program.

24:26 J. Barton One thing I do want to let the Commission know is that I dealt with this before. Thirty years ago I was working on Agent Orange issues and we met a lot of resistance. There was a class action lawsuit out of New York State. We got a lot of resistance, even from veterans group in pursuing that idea, because it was perceived that the military had failed service members in Vietnam by allowing them to be exposed to Agent Orange. It was perceived as an attack on the military and an attack on civilian authorities. Now Agent Orange exposure is a presumptive disability under veteran law. Things have really changed in 30 years in that area. There will be some political resistance to an idea like this. I have a brochure here from the Returning Veterans Resource Project. Judge Cinniger wife is on the board of directors of that organization. People will like the fact that counseling services are being provided through this entity, but when you start talking in terms of providing a similar service to veterans or service members who are being charged with crimes, it takes on a different sort of flavor. It is very negative and there will be some resistance to that sort of thing. I have already encountered it. People will want to help the veteran who attempted suicide, but if the veteran attempted to kill somebody else the support for that veteran just goes away. It is a political problem that has to be dealt with and I wanted to make the Commission aware of that. It is not going to be something that is warmly received by everyone. It is not. There is going to be some real resistance to it and resistance to it will come sometimes from someone you think would be getting active political support for this idea. I just want you to know that.

26:42 Chair McCrea Did you have a comment, Judge? Any other comments or questions? Do we have some consensus among the Commission that this is something that we want to pursue?

- 26:57 J. Potter I tend to agree with Peter. This is an idea that is really larger than what Jess is laying out. Running it out of your office and having a little website, it may get your foot in the door but this is really bigger than that. It has a chance to fail under your plan, I think. I think if we are going to jump into this its need to be bigger. Whether it is federal stimulus plan or something out of OPDS, or State Veteran's Association, someone else should be jumping into this rather than throwing \$20,000 in and putting up a website. That is my gut reaction. The retort of course is that that would be better than what we have. I appreciate that but I also think that that has the potential to fail and it may be a step background.
- 27:52 Jennelle. Barton The resources already exist. We already have practitioners who specialize in veterans issues both from the psychologically basis and legal. We have these people. The problem is we are not always communicating; we are not always hooked up. I think making this bigger might be a duplication of effort. That is one of the reasons we started out so small. We didn't want to duplicate the effort that is already out there, contracts that are already out there. It is a matter of hooking this all up.
- 28:26 J. Potter Putting on my other hat with OCDLA. If that is a track you are interested in taking then maybe a presentation to the OCDLA Board saying, "Just expand the various list of things that are currently offered by OCDLA." You have juvenile, death penalty, and you want veterans. You include that on an already existing website that is already established. You step up and say I am willing to do this work and it is going to cost \$20,000. That may take away some of the duplication you are talking about.
- 29:11 J. Barton I have discussed this with OPDS staff and recognized that to come in and ask for something large would be impractical at this time. I saw the paper yesterday that OPDS is slated for seven staff positions to be eliminated. At one point we were contemplating asking for a substantial sum of money from the Commission. Maybe we should have stayed with that. The more that we talked about it it seemed to me that something that is going to provide the training and then the ongoing technical assistance in these areas is what is really primarily needed. To go beyond that would be wonderful. Go from \$20,000 to \$120,000. I don't know if it is even necessary at this point. I think that the basic thing that we are talking about doing is enough, at least as a start, and I have thought about tying in with OCDLA. You know, why develop another webpage? OCDLA exists and it has a webpage. Why not expand it? That is one thing we are trying to duplicate. OCDLA has a webpage. Why not have it on OCDLA's webpage. The only real reason for keeping it in my office was really just a control thing, being able to have it in one central location and the whole thing is right there. One of my big things, John, is maintaining, for example, the legal resource library. It is important that the documents be kept up-to-date, be regularly updated, and it may be more difficult through the OCDLA webpage. I don't know. Maybe it is no harder.
- 31:26 J. Potter You could attach it to OPDS's webpage, or the Oregon State Bar's webpage or wherever you thought was an appropriate place. You could be in Sri Lanka and it wouldn't make any difference.
- 31:48 Chair McCrea I guess my confusion here is I am hearing a number of different things which I think Jess is too because you guys are saying there is a whole spectrum of options that could be pursued. On the one end of the spectrum I am hearing that we could do something as simple as a webpage that would have information and documents that could be updated. Then based on your memorandum, we go to everything from organizing conferences for training law firms, to what I am hearing would be a hotline for defense attorneys to call in with issues to be able to get help or direction to someone like Mr. Butterfield who would be an expert in these areas. I understand what Peter is saying and suggesting and what John is saying and suggesting. The possibilities range from OCDLA to getting the congressional delegation involved. I am not sure where we should go as the Commission at this point and maybe Ingrid can help me. I think it would be of assistance to have maybe something more definitive or, I don't know, do

we need to set up a committee? Do we need to have another proposal? Help me with some direction here, Ingrid.

- 33:07 I. Swenson Just some additional thoughts. Kathryn has met with Jess and talked about this concept. I like all of the ideas I heard today. Maybe we can take a little time and look at those and discuss them and come back to the Commission. There is no particular urgency.
- 33:40 J. Barton We talked about organizing CLEs out of this resource center. That would actually be a big part of our resource center.
- 33:56 Chair McCrea I understand that and I think that is a great idea. I think we are in the infancy stage and need to explore it. You came in and tried not to ask for too much and now suddenly it is kind of ballooning, which is not a bad thing.
- 34:22 J. Barton I'm stunned. I am at a loss for words.
- 34:23 P. Ozanne I don't share Jess' view, his skepticism about the unpopularity of this. Everything we do is unpopular at some level. That is the name of the game. This would be a project with the main goal to help veterans. It would reflect well on the defense community if we got behind it.
- 34:52 J. Barton It is not my view that it is unpopular, Peter. It is my view that it will be unpopular in some corners.
- 34:56 P. Ozanne Sure. I can imagine going to the state legislature and in average times maybe getting them to respond positively. This guy is charged with a crime but we are saying it is related to his or her service. I think it is really an appealing concept on all kinds of levels.
- 35:19 J. Barton One different hat I wear is I am associate legal counsel to an organization called Oregon War Veterans Association. We have a bill that is in the legislature now, it is House Bill 3396, and it is called the Veterans Diversion Mitigation Bill. What the bill would do if it were enacted would be to enable or expand the ability of district attorneys to divert cases from criminal prosecution. It would establish a sentencing mitigation scheme for service members who are convicted of crimes. That particular part of the bill is modeled after a California law. To me conceptually what that bill does is what that legal resource center would do, in terms of dollars and cents. Very similar concepts. It would be wonderful if this legal resource center were put in place at about the same time that that bill took effect which would be January 1. That would be just fantastic. The two would work together so well. It would be amazing. That bill will not get a hearing. The district attorney's association is adamantly opposed to it. They don't see the need for that. They don't see any reason why the veterans should get this special treatment. I got that in writing from the Multnomah County District Attorney's office. The bill should die because it provides for certain people but not others. The chairman of the Judiciary Committee where the bill sits will not give it a hearing. He is willing work on it over the interim and he might be willing to give it a hearing. There will be supplemental section in February and we might get a hearing then, but we are not going to get a hearing this session and the bill is now dead. That is the political opposition that I would also expect this legal resource center to come up against.
- 37:13 J. Potter It strikes me, Jess, that there are lots of problems out in the world that are obvious to those involved with them, but getting that message out to a broader group is oftentimes difficult. Just by the two of you being here today it helps broaden the base of understanding of a problem that is clearly something you have worked on for quite some time. I will gladly chat with you, if you would like to give me a call and I will take a look at anything we can do.
- 37:50 P. Ozanne This is great. I think it is a great concept. You have my support.

37:57 Chair McCrea Other comments? Okay. Thank you very much.

Agenda Item No. 4 Presentation regarding Proposed PDSC Funding Priorities

38:12 Chair McCrea Let's go to four and then we will come back to two. Angel, I understand congratulations are in order. You are going to be leaving us, technically, having been appointed to the bench.

38:25 A. Lopez Thank you. Good morning, Commissioners. Peter, I am especially glad to see you here.

38:32 P. Ozanne Thanks. That is really good news.

38:32 A. Lopez I remember way back when on Ground Hog day in 1982 I started with the Public Defender's Office. My goal at that time was to be able to try a misdemeanor trial without getting yelled at by the judge. I like to think that I succeeded in that goal. I have acquired a few more accomplishments along the way. As you know, on the 8th of May the Governor appointed me to take over the seat on the bench that Judge Marshall Amiton had. I am very happy to do that. My starting date is going to be the 15th day of July. That being said, I know that some of the members, especially the administration, are a little worried about the future of the Squires and Lopez firm. The Squires and Lopez firm is in the Multnomah County area. It is the preeminent firm for delivering Spanish speaking services to indigent defense clients. We have been doing that since the 1980s. I am happy to tell you that that will continue. It is going to be called "Squires and Barnett." Russell Barnett is a graduate of the University of Oregon. He started out with the Public Defender's Office in Eugene and had been working with me as an associate for the last three years. I am leaving the office in capable hands. We are still formatted to deliver Spanish speaking services and we still plan to remain part of the PDC. I would also add that there is some precedent. One of my colleagues on the bench, and a former colleague in the bar, Kenny Walker, was appointed a judge two and a half years ago now. His firm, his ex-firm, continued under the name of "Warren and Watkins." So that is possible and I am looking forward to seeing that continue and I am looking forward to representing the people of the State of Oregon as a member of the judiciary following in Judge Welch's very competent, capable footsteps and Judge Lipscomb's back here. I am still in business on behalf of PDC, obviously, and I will be until I quit the last day of June. We had a meeting a couple of weeks ago and decided what kind of presentation we should make. In preparation for that I have pulled the testimony I gave before the Ways & Means Committee two years ago, and the testimony that I gave before the Ways & Means Committee last month. As you can see, there is a theme in terms of the issues. The issues keep getting more convoluted and more complex. Our responsibilities are forever being heightened to our clients. I see no end in sight. The bottom line is that we are in a position now that we have never been in in terms of making sure that we retain the best and the brightest in this very important part of the judicial system. I asked, "What is it is going to take to keep people here?" There were two ideas and I bring those to you now. The first is that we start focusing on the disparity, and we start focusing seriously on the disparity of pay between the public defenders and our counterparts in the DA's office. One suggestion was that for this next funding period that we kind of take a time out of sorts. Instead of having to do the type of budget that we have done in the past, that we get something on the order of the same proportion of Multnomah County cases for the five law firm consortium (PDC) that we had in our last contract, that we work with that and that we work with you in terms of finding out what we can do to get to 15 percent less than the prosecutors make this time around, ten percent less than the prosecutors make next time round, and five percent less. I think that the group would settle for five percent less forever, at this point. That is one idea. The other idea is that if we are going to go on a case unit basis as we have traditionally, to allow us to bid for a 10 percent decrease in cases which PDC does, right now, in view of the caseload decrease in Multnomah County with a 10 percent increase in case funding. That would get us about to the same point. That would get us the same type of funding that we are enjoying right now with the lesser caseload reflective of reality. If we get the same type of funding that we have right now, along with the same case load that we have right now, we are going to remain in

the quagmire that we are right now, which means working at a deficit. We do not work well in a deficit. It is a very stressful situation. What we have done in order to help ameliorate that issue is we have simply taken 15 percent of what we get on a monthly basis as a set aside, so that at the end of the contract that money is going to be there if we have to pay it back. If we can figure out a way to fold it into the next contract we will be happy to do that as well. None of us want to be in debt. We all enjoy living in a house and hope to continue doing so. That being said, those are our recommendations, either proportionate funding or a 10 percent drop in cases and a 10 percent increase in funding would keep us at normal funding level this time, but we really, really need to nail down the disparity between where we are and where our colleagues in the prosecutor's office are. I think they are aware of how much harder we have to work. They are aware of the high level of professionalism that is exhibited by our group. I just want this to continue and to continue successfully. We can't afford to do anything other than that. Thank you.

- 45:08 Chair McCrea Thank you, Angel. Questions, comments? John.
- 45:10 J. Potter In the past you submitted an RFP. Do you put in your RFP what you were just talking about? That is to ask for 10 percent more and a 10 percent reduction in cases. Are you are going to be around for this next RFP process which I understand is going to be sent out sometime in the middle of May?
- 45:33 Chair McCrea Probably Monday.
- 45:35 J. Potter So let's say in the next day or two it gets sent out. You are not leaving until June. What would you be doing in that proposal?
- 45:43 A. Lopez What we would be doing is we would do the alternative proposals. We would say that this is option A and this is option B, but regardless of whether we do option A or option B, we need that budget to focus in on parity. That is really what the discussion should be. That is what the dialogue should be about now and in the next six to eight years.
- 46:09 J. Potter So clarify for me just a little bit and I haven't looked at your proposal. When you say option A and option B, you submit two separate proposals that say, "we will do this work for this amount of money or take this amount of cases", and then option B is we will do it for less?
- 46:22 A. Lopez No. Option B is that we would do it for a prorated share of whatever the big pie is assuming that we are going to have a bigger budget to work with and it would, in fact, result in some sort of raise for the attorneys and support staff in the offices. Option A we are seeing as kind of a place holder. We believe that as the economy improves, and the jobs come back in the DA's office and prosecutors that are added to the rosters, the case level is going to go up. At that point that is when we are going to see our raise. But either way, either a short term raise or a placeholder with the prospect of a long term raise, are two options that we can live with as a consortium.
- 47:20 J. Potter You have been to a number of the public defense management conferences over the years, and you have heard discussions about RFPs and how to present them. If I were in your shoes, and I'm not, but if I were I would be submitting proposals that tell OPDS and this Commission what it takes to do the work. You give them one proposal.
- 47:38 A. Lopez Okay.
- 47:39 J. Potter Then negotiate from there.
- 47:41 A. Lopez I think that I can incorporate the testimony that I have given and I will take other comments from the other members of the consortium.

47:49 J. Potter I think I understand what you have been doing in your proposals. You are looking at the large picture and you will take a look and see what the legislature has done overall. You will get a sense if they have increased or decreased budgets. Then you will take a look around at what other contractors are getting. You want a percentage of the pie based on this. I am just suggesting to you that you look at it, though, as a question of what it takes to keep you in business. What is it that has gone up since the last time you contracted? If health care has gone up seven percent you had better reflect that in a proposal. It would seem to me that if I were on the staff that I would want to know that, and as a Commissioner I want to know that.

48:31 A. Lopez Thank you.

48:31 Chair McCrea Yeah. I am with him. Tell us what you need.

48:34 A. Lopez And why. Thank you.

48:40 Chair McCrea Don't short yourself.

48:40 A. Lopez We have been doing that much too long.

48:41 Chair McCrea I know. There has developed this culture, as someone said, we have been down so long it looks like up. We are trying to change some of that culture. I am not saying that we can do everything, but we need to hear from contractors what they need and why.

49:05 A. Lopez You will. I will get that message back to my consortium.

49:05 Chair McCrea I have to say that I am sorry to say we are losing you in the defense bar but I am happy for you.

49:10 A. Lopez Thank you. You know one of the things, even when I was the bar president, I had a firm belief that the criminal justice system is never going to be as strong as it needs to be until you have some sense of unity on the issue of funding for the prosecution, for the bench, and for the criminal defense bar. You need all three of those groups to be willing to stand shoulder to shoulder and say why it is necessary and why we need it now. To the extent that I still will be able to bring that message home as a judge, if at all, I intend to.

49:45 Chair McCrea Good. We will call on you.

49:49 A. Lopez Thank you. Good luck to everybody with your continued work..

49:55 Chair McCrea Do we have another witness on this, Ingrid?

50:03 M. McKechnie Good morning. I'm Mark McKechnie. I am the Executive Director of the Juvenile Rights Project. Thank you for giving me some time this morning. Following up on this topic I would also like to talk about how defense contractors can get what we need to do the work. I wanted to focus on a few mechanical ways in which the contracts could be structured in a somewhat different way in order to make sure that we consistently have the maximum amount of the resources that are available to do the work. I would echo what Angel said, that it ends up being very uncomfortable and disruptive to operate in a deficit position, particularly when I know all of my staff is working so hard. Even if our case numbers are only down a few percent that doesn't mean that anyone is working any less. It just means that the clients that we do serve are getting a little bit more attention and a little bit better representation, because they have a few less cases on their caseload to worry about at any one time. I wanted to go over four recommendations which start at the bottom of the first page. I want to preface it by saying that I believe that the Commission has set very clear priorities, and they are appropriate priorities. My recommendations focus on how to implement the priorities that have already been set by the Commission in terms of quality of representation, in terms of

manageable caseloads, in terms of adequate compensation for public defenders. I know that this has been discussed in the past particularly in relation to rural providers needing a certain level of consistent support knowing that the caseloads are small and can vary widely from month to month. I would put forward that perhaps, not for all contractors but many contractors, there should be a provision for the administrative and overhead costs of doing this business that be structured in the contract in a way that is not impacted negatively by swings in the caseload. What I would propose, and I think I wouldn't presume to say which contractors this should apply to or not apply to, but should this be implemented the idea would be that basically 10% of the total value of a particular contract should be designated for administration separate from the total of the case credits that make up that contract. I would point to the standards of quality of representation that have been adopted by OPDS, many of which I have listed on page two. Those are the things that if we have an adequate infrastructure we can accomplish and maintain. But when we see even small declines in our caseload causing us to be in a deficit position, those are going to be the activities that we look to first to sacrifice. They are in addition to the direct representation that we provide. These are all things that go to cost of supervision, management, case management functions, and capital expenditures, overhead. Those are the things that get sacrificed when our budgets are low and we have to look for areas to trim back. In order to do performance reviews, in order to do adequate training, in order to respond to complaints, we need adequate supervision and management in our organization. In order to have up-to-date computer systems we have to know that we will have the revenue to purchase and maintain that equipment. Yet those are often the expenditures that we delay, and delay, and delay, knowing that our revenue may not be there when we expect it to be there.

54:44 J. Potter

May I interrupt, Madam Chair?

54:44 Chair McCre

Yes.

54:44 J. Potter

Once again it is sort of the same question that I asked Angel. Do you put those requests into your RFP year after year and have them denied. That is, do you put in money that would allow you to purchase computers that would update your office and have them denied?

55:07 M. McKechnie

I will preface my answer by saying that I have not been involved in the RFP process. I have only a little over a year as executive director. My understanding is that, yes, we have said that we need those things in our contract. The dilemma has been that when we say we need X amount of revenue that has translated into adding numbers of cases in order to reach that amount. Again, I think Angel described the same problem. I think another way to accomplish this would be to focus the increase in overall amounts of contracts and increasing the case prices rather than the number of cases. My second recommendation would be to take an approach like that but then create a plus five tolerance in meeting those case numbers.

56:12 J. Potter

So that is a margin of error that you are suggesting.

56:16 M. McKechnie

Just as we recognize that the kicker is very problematic because no one can ever nail down exactly what the state's revenue is going to be, we can never exactly nail down, either on a statewide level or on an individual contract basis, exactly what our case numbers are going to be two years into the future. We often find that we are off. We only find out what our actual case numbers are after the fact. Then it is too late to make adjustments in our expenses to match the actual case numbers. I think there would be a couple of ways to go about it. One would be the administrative allowance. Another would be to focus on putting any increases into raising case prices versus increasing case numbers in order to meet the target that we ask for in our RFP. We say we need this amount of resources to do the work and it could be made up by increasing the case prices to get to that level with the agreement that then if we are in a position where we need to do more cases than we have contracted for that we would absorb those cases up to a certain point.

57:39 J. Potter

Thank you.

57:59 M. McKechnie

The other two issues I wanted to raise are specifically related to juvenile representation. The first two are about juvenile delinquency representation. One of the very first things that struck me as I started looking at our budget and our contracts is the fact that there is a single rate paid for juvenile delinquency cases. There is one rate for juvenile felony cases and one rate for juvenile misdemeanor cases. Excluding homicide, adult criminal defense is broken down into four different rates. The juvenile felony rate is closest, just slightly above, the adult C felony rate. It is pegged to the lowest level of adult felony rates. What you see on page three is the juvenile felony rate as a percentage of the corresponding adult felony rate. It is roughly equal to the C felony rate. It is only 54 percent of the B felony rate, 45 percent of the A felony rate, and then for Measure 11 charges, only 18 percent. Obviously, Measure 11 is a different ballgame. However, what this means is that a 15-year-old who is charged with second-degree robbery is having their legal representation paid at a rate five and a half times what a 14-year-old charged with Rape I is receiving. It is the 12, 13, and 14-year-olds charged with sex abuse, rape, sodomy charges that are the most time consuming and take the most qualified attorneys to represent them. I would say that this needs to be remedied in the next contract. There needs to be some differentiation among the juvenile felony rates to correspond to the severity of the charges and the time that it takes to provide adequate representation to those juvenile defendants. Then finally, regarding juvenile dependency representation, this has been discussed previously I know. I think we would like to have some consideration of looking at a different method for crediting juvenile dependency work. It is more of an ongoing representation than a criminal or delinquency case that is for a discreet period of representation, a discreet charge that is sooner or later resolved and then the case is complete. Whereas representing children or parents can be a multi-year process and the amount of work that is involved in providing quality representation to either parents or children only loosely correlates to the court hearings that occur through that process. The payment on those cases is tied to court events, and only specific court events. For example, a review hearing is held, and it is complete, and the judge makes findings and doesn't continue the hearing to another day or continue hearings over multiple days, which would only garner a single case credit. One of our attorneys provided testimony to the Ways & Means Committee during the OPDS budget hearing and described a case where she represented two young children. She spent over five years trying to get those children placed and ultimately adopted by their grandmothers, and now in hindsight I think everybody recognizes that that was the right move. Much of the work that she did was outside of the courtroom. It was a very intensive process through the administrative procedures within the Department of Human Services, getting discovery, appealing administrative decisions by DHS that were all integral to her representation of the children. Because much of that took place outside of court hearings much of the work was not officially compensated through our contract for providing representation. I would be glad to answer more questions. I am sorry I didn't get this written material to you in advance. You can read it at your leisure.

1:02:36 J. Potter

On your fourth point here, Mark, would you suggest to the Commission paying more for quality representation based on a judgment made after the fact? That is, we do an assessment of a contractor for a year or two. Based on the assessment of the representation provided in the next contract cycle that contractor would then be awarded more money. Or would you do it based on a proactive measure in which we are saying, "We will give you more money if you provide better services and here is what we mean by better services."

1:03:25 M. McKechnie

I would say it is a combination of both. I would say that history is important. A track record is important and findings of the reviews that have been done are important, but a contractor could also demonstrate in the RFP that the organization has the resources, including support staff, investigation capacity, social workers, adequate supervision. There are certain indicators in an organization that show whether it has the capacity and caseload size that will be strong indicators as to whether quality of representation is likely or not, in addition to the history of the organization.

- 1:04:09 J. Potter It puts us in a strange catch 22 at some point, though, when we are saying that we recognize organization X is providing quality representation and we are contracting with them and we are going to give them more money. Then we are recognizing Y as not providing very good representation so we are only giving them this much money. We are saying why should we even be contracting with Y then? They are not providing the quality of representation that we want.
- 1:04:47 M. McKechnie The policy packages were an attempt to get you out of that dilemma and unfortunately I don't think the legislature is going to grant those requests this time. I think that is the ultimate solution for that dilemma is getting additional appropriations to improve compensation and reduce caseloads, in the dependency area in particular which, statewide, is one of the weak links in our system. I agree in the short term that it is somewhat counterintuitive. On the other hand, I don't think the rates under the current system really bear much connection to the reality of the actual costs of doing the work. The contracts currently, I don't think, re-enforce the quality efforts that are going on.
- 1:05:47 J. Potter Fair enough. Thank you.
- 1:05:46 Hon. Elizabeth
Welch I don't know how much you want to get into this but it is actually much more complicated than has been said. I can say as an observer that the work that is done by Mr. McKechnie's organization is, in general, state of the art. It is about the best there is. There are lawyers around the state who do very, very good work, but JRP in terms of long-term advocacy for their child clients, do what he is talking about - having to go and fight with the caseworkers or with the administration of DHS about attitudes and policies within that organization that interfere with permanent planning. You don't know when you are going to have a case that has that. There is no way to identify that in advance. I don't think there is anything comparable to it. In a way there might be something in the death penalty area that might have some comparability. The point is you don't know when you have a case, even fairly far into it, in which you are going to encounter repeated trips to appear before committees, to actually appeal decisions within the bureaucracy and so forth. I am confident that there are lawyers in this state who represent children who have never done that. It is also a professionalism issue with lawyers. What people perceive as being what their job is. It is really sort of at the core of this. How do you quantify it? How do you compensate for it? After the fact. How else. In terms of contracting process I would not even touch that. I don't understand that. There is no way to say that everybody who has a dependency case needs to get compensated for doing all of that kind of extra work, if they don't do it. Mr. McKechnie, I promise you, there are lots and lots of lawyers who wouldn't even think about attending one of those committee meetings much less appealing the decision.
- 1:08:19 Chair McCrea I wonder if there is a way to capture that. Obviously it has to be after the fact, but when the RFP is put in for this next contracting period if you can't set out some of the cases over this past contract period, and the incredible amounts of time that were spent and that were uncompensated for, and say we need to have compensation in this next contract period. I can't promise you it is going to happen but it is starting point. Part of it is to set out again what you need and why.
- 1:09:01 I. Swenson A couple of comments. The current contract does permit contractors to say, "This was an unusually difficult case and I would like additional credit for it." People don't do it very often and I couldn't tell you numerically how frequently it is accepted. That is one avenue. The other is we are hopeful that on average we pay people a case rate that takes into account the difficult cases as well as the less difficult cases. That is again not the really difficult part of this. You are probably all tired of hearing me tell you about the Washington pilot project. Peter is familiar with it from several years ago, but what they did, and what we mirrored in our policy option package on juvenile representation was to say, "Let's examine the need for

lawyers to have significantly fewer cases, significantly increased compensation, and see what the impact is on the outcomes in these cases.” It was stunning, frankly, in Washington State. They used two judicial districts to start with and they reduced caseloads to 90 cases per attorney and later to 80 because even 90 was too many. We are way above that on average, and they increased their compensation, increased their staffing levels. The outcomes in those two districts were striking because they resulted in significantly fewer termination cases. This was a parent representation project. It had to do with effective representation of parents. So they significantly reduced the number of termination cases and they increased the number of family placements for children. It wasn’t necessarily a return but they were successful in identifying appropriate relatives. In that state that saved a lot of money because the state didn’t have to pay for non-relative foster care. They were pleased with the outcome and funded 26 counties the next time a round. It continues to be an enormous success. We know the direction we would like to go. The legislators heard all this testimony in 2007 because they were fully aware of the deficits in juvenile representation, and Senate Bill 411 in the 2007 session would have allocated \$23 million to PDSC for the specific purpose of increasing compensation for these lawyers. This time around there is SB 450 that would provide additional funding for dependency representation. It doesn’t include a number. And then there is our policy option package which asked for \$17 million. It would have reduced caseloads and it wouldn’t have gone as far as the \$23 million but it would have been significant. We are all aware of what needs to happen, and to the extent that we are able to do it, it is certainly one of the things Kathryn will be talking about to you later. One of the things we would like to accomplish as we can with the funding we have is to focus on juvenile representation.

1:12:32 M. McKechnie I would just like to say one more thing related to the case rates. As was pointed out I think that the amount of effort, and the different kinds of activities that go into cases statewide varies hugely. Just speaking for our organization and the rate that we are paid, I don’t think that the rates are adequately reimbursing us for the average effort we put into our cases. Because there is a disparity in that if the assumption is that we are being compensated adequately for the average case that we do, it makes the judgment about what is extraordinary very subjective and a matter of disagreement in many circumstances because if your average is already high then what becomes extraordinary becomes even higher and more difficult to justify. I think if we are assuming that whatever the rates are pegged at is the right level for the average case, then I think that is part of the problem for us.

1:14:12 Chair McCrea Thank you, Mark. Since I am in Barnes’ position I am getting kicked for the break. Chip, are you still with us? Maybe not. We will take a 10 minute break and come back and talk about the funding priorities.

(Break)

Agenda Item No. 2 Discussion of PDSC’s Previously Approved Funding Priorities and Review of Draft RFPs

1:24:01 Chair McCrea Let’s go back to item 2 and discuss our previously approved funding priorities and review of the draft RFPs. That is behind the pink sheet, Attachment No. 2. I think you will all recall that at least several of us on the Commission, who were Commissioners at the time, spent a lot of time at the retreat going through these items in August 2007. I would like to have a discussion about whether we still endorse those as our priorities, and our principles and priorities, or whether there are some changes at this point. Ingrid, do you have some initial comments for us?

1:24:46 I. Swenson Just very preliminary. We are here, of course, to answer your questions if you have them, but also I wanted to note that next month at the June conference, which coincides with the OCDLA conference, we will hear from more contractors and other representatives in the public defense community. You don’t have to draw ultimate conclusions today about how

you want us to handle this. It just seemed like an appropriate time to have a discussion before the RFP goes out.

1:25:25 Chair McCrea Kathryn, did you want to add something?

1:25:26 K. Aylward As you can imagine I have thought about this a lot. I think there are situations where having principles or guidelines are necessary when you are making decisions. An example is, if you have a policy option package for \$10 million to fix three things and the legislature says, "Well, we don't have \$10 million we have \$4." Then you have to go back to the table and say, "Okay, which of those three in that package are we going to be funding." In that kind of situation there is a need for a decision. Or if you have a choice of providers and you are trying to choose between the structures that you want, and this person has these qualities that we want, whatever. But at this point if we are extremely lucky we will have a budget that is our essential budget level, which basically means what you need to keep doing the same things again. Last time what our goal was in the contracting process was given these priorities to try to fix some things - rate disparities, consistency, acknowledgment that rates need to be higher in certain areas because of these following reasons that we are trying to fix. So we got pretty far last time. I remember at the end of the negotiations I wrote to note to myself, two years from now, 18 months, what I would have done differently or wished I could put more of an emphasis on. Eastern Oregon rates - when we set out or planned what we could do within our budget we thought, "Well here is a bump up because you are eastern Oregon." I think it should have been much more than a bump. It should have been a mountain. We put a lot of increases into juvenile case rates. I think it should have been more. I would like to continue to have an emphasis on juvenile cases. I think there should have been a bigger differential for contracts that include investigation. So when we sat in the office and we said, "Okay. Here are the factors that apply to this contract. This will be \$10 more on this case type and \$50 more on this," it is those kinds of adjustments that I wish I had done differently. In my view we needed to finish up things so that we can say, "Okay, now we have a system that is consistent, logical, accounts for some things. Now that we have got a somewhat more level playing field, let's look at rewarding quality." You are never going to get quality unless you pay for it, because eventually why would you do good work if you are going to get the same amount by doing lazy work. The difficulty in the past was that we weren't in a position to measure quality. I think we have a couple of things now - the service delivery reviews that the Commission has done and the reports that have come out and the recommendations. There is a lot of information in there about who is doing good work and what the particular focus should be in a particular county to make those changes. We also have the statewide surveys and lots of information comes back in terms of quality in those cases. We are not there yet. This is not a biennium where there will be rewards, but I think if we are looking at a drop in caseload and we are looking at protecting some entities and keeping them viable, then certainly that is where quality kicks in. "I would like to pay you more because you are better than the other guy, but if we don't have any money at least I'll make sure you stay and the other guy has to go." My last thought is because we always use existing contracts as a sort of base for any changes in the future, I say, "I know you got a hundred dollars last time." Then we say it is either \$100 or it is \$102 next time. People just don't agree to contract if you try to pay them less than you did for the last two years. Since the basis for next time is what we currently have in place, and what we currently have in place is a result of following the principles and guidelines you set before, I just want to make sure that nothing has changed. By the nature of the negotiation process, those will continue to carry through the subsequent contract period.

1:30:20 I. Swenson Unless they wish to change them.

1:30:20 K. Aylward Exactly. Unless you change them now.

1:30:25 Chair McCrea Okay. From our August 2007 retreat we have No. 1, the items proposed and considered for priority, and we have No. 2, our principles and priorities established by the Commission. I

will say that I looked at these. I thought about these. In this latest contract period we were able to provide a small increase in the hourly rate, particularly for investigators. We had the 3.1 increase. In terms of the other principles and priorities, I, just speaking for myself, don't see that we really have anything that has changed but I want to have a discussion if others see it differently, or had other thoughts?

- 1:31:16 P. Ozanne Well, I have a thought. I haven't thought through what the impact of this would be. In Kathryn's very articulate presentation there was one thing that caught my ear because I am in the middle of this in Multnomah County as are many people throughout the state. People are taking less money for next year across the state. People are giving up their COLAs, their merit increases in county, city, state government employment, to save jobs. That is what the unions are doing. I just want to be sure we know that is going on. I am not suggesting by that comment that that is something we are going to propose here. It is a context that we all have to remember.
- 1:31:57 K. Aylward Certainly. I was talking historically, about what has always happened in the past.
- 1:32:05 P. Ozanne I didn't mean a criticism by it. I just wanted to add that footnote. That is the reality of the Oregon economy right now and relates to how we look at increasing the hourly rate for attorneys and investigators. I hope everyone knows that I support that.
- 1:32:19 K. Aylward One of the things you think about is how is the economy going to impact public defense? If I have a small law firm and I have a little 401k that I just saw cut in half and I go home and my spouse says, "You know you are a lawyer. You should be making more money. Get out there and make money," it may well be that the economy is going to drive people away from public defense contracts into something ...
- 1:32:46 P. Ozanne Only bankruptcy.
- 1:32:44 K. Aylward ...where they are better off. It may be even tougher. It was \$100. Could be \$110 now. "I want to retire someday. If you want me to do this work, I have got to have \$110 instead of \$100."
- 1:32:58 P. Ozanne Could be. I'm not suggesting anything by my comment other than that the economic environment is such that other people are saving jobs by taking reductions.
- 1:33:12 I. Swenson Just one comment on the hourly rate if I could. I think we consider that you directed us to do that last time and we did it and it is done. We have not been funded to do that again this time.
- 1:33:30 K. Aylward I was sitting there and it was like a lightning bolt. I suddenly realized there is a slight miscommunication because you guys are talking about rate disparities. To us, when we hear that, it means different contract rates. That means you get \$300 for a case and you get \$250. That is a rate disparity. What I think your goal is is to not have some people better off than other people. What you are talking about is bottom line disparity. You don't want there to be somebody who can't afford to pay their employees and somebody else who is doing quite well off a contract. I think the assumption might be that that is what you are telling me when you say, "I don't want rate disparities." We talk a lot in the office, and we talked about this at the last retreat about offices that may have more expensive overhead than other offices. If we make the rates the same then in the office with the lower overhead, those people are actually able to pay themselves more. In my view maybe that is what you are telling me. Of course rates will have to be different. Forget about the differentials for eastern Oregon, investigation, quality and whatever. Rates will be different because for somebody who doesn't have a lot of overhead, they can afford to do this contract and it is a good deal for them as opposed to somebody else. We worked hard to get rates to be the same. JRP is a good example. JRP had always been paid more than other contractors because they were better. They just always were. They were the "golden child" is what we called them. They got higher rates because

they were wonderful. Well, then somebody said, “How come you have rate disparities? How come you don’t pay MPD, or MDI, or somebody else as much as you pay JRP? We don’t want rate disparities.” Okay, so any money we had went toward bringing them up. Now they are equal. JRP comes forward and says, “Why can’t you pay us more because we are better?”

1:35:51 P. Ozanne To me the concept of disparity means treating similarly situated people similarly. I know that administratively that is very difficult, but that would take care of your concept of covering overhead unless you want to reward that. As you said there is a bottom line and then above that we make some effort to reward or provide security for quality. I appreciate the position you are in sometimes with our priorities and directives.

1:36:24 Chair McCrea I agree with you. I think that is what we tried to capture. There was an extensive discussion, as I recall, at the retreat and part of it was mitigating rate disparities in any market in which the disparity would jeopardize OPDS’s ability to retain desired contractors and then also subsidizing providers to help attract and retain qualified attorneys where needed. That is the only way we could come up with a solution to meet the context because everybody is not the same, in terms of the type of cases in an area, the geographical situation, the overhead, the needs of those particular attorneys. At least in my estimation that is why we came up with these priorities. We phrased them that way so we could cover that and give you the flexibility to do what needs to be done to try to be as – I guess “fair” isn’t exactly the right word - but to promote the best quality, which is our charge under the statute. Peter, going back to your comment, I think we all recognize what is happening in the economy. Just speaking for myself, I guess where I am is that what I hope is that when the RFP goes out, and the contractors make their bids that they don’t think, “Okay, we are in bad economic times so I have to pull back.” I am not suggesting that anyone should be asking for the moon, but on the other hand I think it is really, really important that we don’t lose how far we have come. Our people have been paid so much less for so long for the work that they do that I want the contractors to - like I keep saying - “Tell us what you need and tell us why,” to not automatically assume that, “I have to cut back because of the economic times”, because if they tell us what they need, and they tell us why, we may not be able to provide all of it but I want to be able to at least have that as a starting point.

1:38:38 P. Ozanne Sure. It is not their job. I urge them to ask for their needs. It is our job or Kathryn’s. The buck stops with her. That is where we come in. I just want to remind people and I certainly lost sight of it when I was in Ingrid’s position - I’m sure Ingrid hasn’t - you know, for example, (inaudible) people who decide, and you can just draw the picture here of the mentality of the legislators who have collectively heard about employees who decided to take reductions in pay to save their fellow workers. In our quest for compensation we just have to be sensitive to what is going on with other people who are in more appealing straights, frankly, than the lawyers, as I much as I understand the inadequate compensation that we provide. I am not suggesting that the people shouldn’t ask for what they need.

1:39:42 J. Potter The other part of the calculus, too, if we maintain what we have done in the past, is that we are asking contractors to tell us what it takes to do the job. We are telling the legislature what the job is. They give us the money. Then we tell the legislature this is how much of the job we can get done. That is what is happening this time as far as I can tell in the budget. If the legislature cuts the budget, they put a footnote that says, “We have cut the budget. You stop taking cases six weeks, five weeks, two weeks, whatever weeks it is at the end of the biennium.” That is slightly different than Peter’s scenario in which people are making determinations early on that they are going to cut back and we haven’t done that.

1:40:27 P. Ozanne That is not my scenario. I agree with you, John. The scenario is really to try to pay what we should, have the contractors ask for what they need. Then we simply tell the legislature this is simply all we can do. Then the buck stops with us as the Commission. Do we say more? We are not going to support any further services by reducing the level of compensation. I am with you.

- 1:40:58 Chair McCrea Other comments about our priorities? Okay then. Let's move along. Kathryn, would you like to talk to us about the RFP, the draft RFP?
- 1:41:14 K. Aylward I think after the last Commission meeting, within minutes of getting back to the office, I thought, "We can't release the RFP in July. That will never work." I think originally that was the plan. We worked it all backwards to try to figure it out and we thought, "Oh my gosh, we have to release it now." We had just had a Commission meeting and hadn't presented it or discussed it. It is in the materials. It is the same as you have seen before. It is one of the requirements of boards and commissions that you be made aware of this step of the process. I would like to issue it tomorrow. We are also going to be issuing a slightly different version for mitigation specialists. We talked about this before. Staff in my office actually had it prepared and it was ready to go out in September but we had a little problem with already having a contract with one mitigator. It was just better timing to put it out with the rest of the contracts. We have two versions. We have the full blown version where we ask people to tell us a lot and the version for existing contractors because we already know a lot about them. The easiest way to find it is to go to the purple divider and then come back five pages. It is labeled page one, part three of the 2009 request. We did this RFP for the first time last time. It is a completely different approach that tries to mimic how state agencies are budgeted. The first question, and maybe it is not very well worded or something, but what it is intended to get at is, "Tell us what you need for the next two-year period to continue doing what you have been doing." We are giving examples of the kinds of things that we don't want attorneys, who often maybe aren't business people, to forget. We don't want them to forget that they have additional costs, for example, even if your health insurance went up only 10 percent, or is going up 10 percent next year, but you have always had to buy really bad health insurance and you are having people quit because they want vision and dental. They don't want large co-pays but that is what you have had to do. I am not just talking about increases. I am talking about funding that you need to do this job to the standard that is required constitutionally and statutorily. It is difficult for people. So often in the past the RFP has just ended in their copying the last proposal. We literally had someone pull out a copy of their old RFP and cross out the date. People have developed the notion that it doesn't matter. "You are just going to tell me what you are going to pay me anyway." It is completely different since we started using this approach. It is absolutely crucial that our office be told what it takes. Then the second question is, "What would you do if you had additional funding? What would you do to improve the quality of representation that you are not already doing, and I am assuming that you are not already doing it because it costs money?" This part corresponds to the policy option packages we have in our budget. Then some more questions just to not make it a two question RFP.
- 1:45:30 P. Ozanne Kathryn, part three that you are calling our attention to, is that a change from last year or part of the last year's new approach?
- 1:45:34 K. Aylward This is identical to what we did in the last round. The last round was the first time that we used it. We got some excellent information in the bids that was really helpful. Then we got some awful bids. We can go back to people after we get a bid and request additional information, asking specifically about this, this, and this. It is so much more helpful if bidders do a good job the first time and understand the kind of information that we are asking for. On the other hand you don't want to do it for them. You don't want to spell out all the information to be included, but maybe we have to.
- 1:46:16 J. Potter You have spelled it out. You have spelled it out at management conferences in the past. You are spelling it now.
- 1:46:24 K. Aylward You are right. There are two categories of people. There are people who pay attention and follow what is going on and come to meetings and get tired of hearing it over and over. Then

there are people who have no clue about any of the discussion, anything that is going on statewide, and they are the ones that just say, "Give me more money."

1:46:46 P. Ozanne Have you made any changes to the RFP that is going out tomorrow from the 2007 round?

1:46:50 K. Aylward We crossed out 2007. We have been busy.

1:47:03 P. Ozanne I meant a controversial change. Anything that is going to cause the board concern?

1:47:10 K. Aylward No. What we said way back when was, "Let's have our priorities and include our priorities in the RFP." I could go either way on that. We don't actually have specific priorities and the problem is if you say, "I am looking for an organization that has a board of directors." Bingo, they will get a board of directors. It is almost like – not that the priorities are a secret, but I don't want an RFP to be influenced, to be tailored to what they think we are looking for. "Tell me about your organization, and, by the way, if you want help being a good organization, here is a list of best practices. Here are the Commission's priorities," whatever. I think putting them together is just tempting fate. That is the only thing that we had talked about that isn't proposed in what we are doing here.

1:48:10 I. Swenson The reference to best practices is in there.

1:48:11 K. Aylward That is right. Best practices is fine but not the principles for contracting.

1:48:24 Chair McCrea Comments? Questions? Okay. I think go ahead and send it on out.

Agenda Item No. 5 Amendments to Qualification Standards

1:48:34 Chair McCrea Paul, you are up. Let's talk about amendments to the qualifications standards.

1:48:46 P. Levy And what I have tried to slip by or not.

1:48:50 Chair McCrea I didn't say that but we will see.

1:48:52 P. Levy The discussion at the last meeting was very helpful.

1:49:11 P. Ozanne We read your work, Paul.

1:49:13 P. Levy We have actually made a number of changes to reflect concerns that were raised in the discussion at the last meeting and they are for the better. I am going to talk about that. The things that are different in this draft from what you saw before are these. First of all, concerning the procedure to establish qualification through equivalent skill and experience in capital cases including trial level, appellate, and post conviction, we have gone back to the original language which says that if you do not meet the minimal qualification you must be prescreened by a peer panel. That is as a policy and is in practice a good way to do this. I thank the Commissioners for insisting on that. I do want to say that it was painful reading the transcript of the meeting. I much too easily conceded the point that without that, anybody walking down the sidewalk could come in and be qualified. This provision only applies to people who have extensive criminal or civil trial experience. We have gone back to the original language on that and that is a good move.

1:50:41 Chair McCrea Paul, I don't want you to change anything but it seems to me, and there may be good reasons not to but I can't imagine what they were, we should include the director of the Capital Resource Center under the peer review notion. It seems like that person is going to be endowed with a sense of the quality across the state.

1:51:09 P. Levy He is on the peer panel. I think whoever holds that position we would assume would be on the peer panel. I mentioned last time that we had meant to put an educational requirement in the PCR standards. That is in there now on page 11. The way it reads is consistent with the education and training requirements of some of the other standards. Then we made two important structural changes in large part as a result of the conversation at the last meeting, but these are both changes that I think we wished to make anyway and talked about. In order to explain them I need to give you just a little context. The observation has been made a number of times that in some sense attorneys are certifying themselves. In fact they do sign a certificate of attorney qualification saying, "This is what I am qualified to do." That is provided and we then decide, of those who provide those certificates, who will be eligible for appointment using criteria that is in the standards relying, in some part, on the supplemental questionnaire that the attorney provides and then obtaining other information, checking references, and that sort thing, and then decide who is eligible for appointment. When attorneys sign that certificate they are saying that they meet the general qualifications of all attorneys. They are licensed to practice law, they have a telephone or an answering machine, and those types of things and that they meet the minimum qualifications for a particular case type that they are certifying. That is the structure of how this works. What we have done is proposed an amendment to the general qualifications that said that the attorney has reviewed and is familiar with the Oregon State Bar's performance standards. To me "review and familiar" is the same as "I skipped." We have changed that now to read that, "I have read, understood, and agree to observe the Oregon State Bar Performance Standards."

1:54:09 J. Potter Where are you reading that Paul?

1:54:07 Chair McCrea Page two.

1:54:13 J. Potter But it isn't changed in the post conviction proceedings part.

1:54:14 P. Levy No. These are the general qualifications that apply to all case types. This is the starting point.

1:54:24 J. Stevens Why did you choose "observe?"

1:54:22 P. Levy Well, we choose it carefully. We couldn't say, "abide by."

1:54:37 J. Stevens Because?

1:54:37 P. Levy Because these are not mandatory standards. They are guidelines. Some of the standards are mandatory but some are aspirational, so "observe" was the term we thought best described it. "Observe" was the closest we could come to dealing with a set of rules which are not mandatory but which we still wanted you to follow where they are applicable.

1:55:15 P. Ozanne How about adding the words, "passed OPDS's test regarding?"

1:55:23 P. Levy Okay. Thank you. Moving on. In conjunction with that change we have changed the certificate also. The certificate used to say that, "I have reviewed the qualification standards," which again meant, "I have skimmed them," and the reality is people check boxes without reading anything. Now they are on record as saying that, "I have read, understood and agreed to observe the performance standards." This is the discussion that Peter led last meeting and it puts us in a much better position to say, "These are the standards. You said you understood them and agreed to follow them." It will help us with encouraging better performance, in dealing with instances where we have to be involved in the complaint process or some sort of corrective action. The other change that we have made since the last meeting is a little more subtle but it is pretty fundamental. The standards for each case type currently begin by saying, "An attorney is qualified if he or she meets the following." I think we have been increasingly uncomfortable saying categorically that an attorney is qualified, "if you have tried three cases or been to the seminar," because, in fact, for a variety of reasons an

attorney could have satisfied all of the minimum requirements but still not be qualified, but here we are as a Commission and an agency saying they are qualified. Without too much change to the structure of these standards otherwise, we have simply substituted the language that ...

1:57:44 Chair McCrea

The minimum qualifications require.

1:57:47 P. Levy

Thank you, "that the minimum qualifications require." Now the syntax for that sentence is a little weird but we had to do that otherwise it would have required a major rewrite of all the standards. We are very simply saying that these are the minimum qualifications. We are not declaring somebody as qualified but you are not going to be able to do the work unless you meet these minimum qualifications and have been approved for appointment. It is just changing a few words but it is a significant change in approach philosophically. The last thing is on the attorney certificate making it clear that if you are checking a box because you believe you possess equivalent skill and experience but don't meet the minimum qualification, you need to tell us. The standards have said that for a long time but people don't read the standards. We are trying to make it clearer that you need to tell us that and you need to show it to us as well. Those are the changes from the last meeting.

1:59:12 Chair McCrea

Further comments or questions? Alright, so I would entertain a motion to approve the amendments to the qualification standards.

MOTION: Peter Ozanne moved to approve the qualification standards; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Passes. Thank you, Paul.

Agenda Item No. 6

Draft PDSC Drug Court Guidelines

1:59:42 Chair McCrea

Ingrid, will you take us through the draft PDSC drug court guidelines.

1:59:40 I. Swenson

I will be happy to do that, Madam Chair, and to also let you know that this is the first viewing of this document. We are not asking you to endorse it but just to provide some input if you have any before we circulate it more broadly to the people affected by it. After the two hearings that we had on drug courts, we certainly learned from the attorneys who are practicing in that area that they saw a valid purpose being served by this Commission issuing a statement of standards for participation in these courts. They have used the standards which you adopted for EDP programs, and it has been valuable to the attorneys and to the programs to have your statement regarding appropriate defense participation in those. These are patterned after those. The introductory language is very similar. As you review them you will see that they cover a wide range of topics, including the things that lawyers should discuss with their clients prior to urging the client to make a decision about participation. Perhaps that isn't a guideline for a drug court, but it is a place in which to identify the important components of representation. It is very far reaching and suggests not only the outlines of programs in which defense lawyers should participate, but tries to delineate the sorts of obligations that those lawyers have.

2:01:39 P. Ozanne

In that regard, Ingrid, would it be going too far to change the verbs in the first three guidelines from "should" to "must?"

2:01:50 I. Swenson

Commissioner Ozanne, I would say this. We can't tell the court what to do. We are saying the drug court "should." We can tell them what we think they ought to do, but if we were to use the terminology you suggest, then our choice would be in or out of a lot of existing programs and I assume we would be out. By stating it in this fashion, I think we make a very strong statement about your view of what these courts should look like. Over time I think that will have the desired effect. If you take a different approach, at this point, and say, "Our lawyers will only participate in programs that do X, Y, and Z," I don't think we would

participate in very many. As Commissioner Welch pointed out last time there are other people involved in the decision about what these courts look like. Some of those people ...

- 2:02:56 P. Ozanne How about changing it to say that, “an attorney under contract with OPDS must” and kind of work it that way. Do we really want to be saying officially that we are going to continue with drug courts that don’t provide opportunities for attorney/client – particularly the first three? I guess we are doing it but do we want to continue to say that?
- 2:03:22 I. Swenson It could be restructured as a set of guidelines for attorneys who participate in these projects.
- 2:03:28 P. Ozanne It is a good idea but how would you know whether to follow up. I think we are sending the message to the courts in early disposition programs that we are happy to work with them or happy to design it, but we have a set of ethical standards, or we want our lawyers to agree that they do, and we don’t want to participate in a program that doesn’t meet those basic standards and won’t.
- 2:03:54 I. Swenson I am not certain that we don’t participate in some EDP programs that don’t comply with those standards. They have been used and quoted in a number...
- 2:04:07 Hon. Elizabeth Welch I was wondering what was going to happen on this issue today. This was talked about last time and at least one other time. I am not sure that we all know, at least the Commissioners, I certainly don’t, what programs are doing what. What we have heard on our trips out to the countryside is stuff that is pretty distressing. I don’t think you can say “a court should,” frankly. I think that is too strong.
- 2:04:37 P. Ozanne No you can’t.
- 2:04:37 Hon. Elizabeth Welch But it does.
- 2:04:43 I. Swenson And it means a drug court program. Maybe that would be the way then to express it, “a drug court program in which these lawyers participate should have the following.”
- 2:04:53 Hon. Elizabeth Welch I think by doing this we are taking the position that the Commission and OPDS are not going to tell lawyers that they may not participate in a program even when there are profound questions about due process in the way that program is run. Right?
- 2:05:15 I. Swenson I am not certain. Looking at the discussion last time I think there was some recognition that the client who wishes to participate in such program, whether it meets due process requirements or not, should not be denied appointed counsel because we have prohibited counsel from representing those clients. I think that was the dilemma that we identified. Once again, this was the approach taken with respect to EDP programs. It doesn’t have to be the approach you take now. You are free to decide how to proceed.
- 2:05:59 Hon. Elizabeth Welch Maybe I stated it in too florid terms but...
- 2:06:06 P. Ozanne Your point is well taken. There are more implications than I thought through this morning.
- 2:06:13 I. Swenson Once again, this is not your final discussion at all. We could get input from the courts, for example, and from others as well as our providers and see what their reaction is. It might be interesting. I did want to update you on Umatilla County. That was one of the counties that raised this issue. I talked to one of the attorneys up there and they have amended their program requirements now, not because we expressed considerable concern about the fact that

they were requiring a plea of guilty to all charges before you could participate in their drug court program. They changed it because nobody was participating. They made the decision based on a cost/benefit analysis and said, "We won't do that."

- 2:07:07 P. Ozanne The other thing again in a different bureaucratic position that I am in now, you look at where the resources are going and you look at a relatively expensive, high-end personnel drug court which has got a lot of passion behind it, but we don't have any treatment anymore and we are going to lose treatment. You can't continue to fund and staff a drug court when you really need the treatment. Shouldn't we think of some other way to deliver the treatment? I don't think it would be the end of the world if certain drug courts didn't operate. I will ruminate on it on my own for a while. Thank you for reminding me why we shouldn't say "must" to the court. We may not even say "should." I think we went through this with the early disposition.
- 2:08:17 J. Potter It is probably not the place to go into this in great detail but that is what you do for a living. What happens when you substitute in the first sentence where you are giving the overall parameters and there is a "should" in there, the court "should" comply. You can't put "must" in there, but PDSC is saying what needs to happen. What should go in there is, "Courts need to comply with the following guidelines."
- 2:08:55 Chair McCrea Needs to comply as opposed to should comply?
- 2:09:00 J. Potter They need to comply in order for OPDS to participate.
- 2:09:08 J. Stevens But what if you have a client who says, "I want to participate," and you say, "Yeah, but it doesn't meet these standards." Do you say, "Now I walk away and you are on your own."
- 2:09:20 J. Potter You are asking Ingrid that question?
- 2:09:20 J. Stevens I think that is the dilemma isn't it, Ingrid? If you make these mandatory for the lawyer then you have the very real possibility of just telling the client, "Good luck, buddy. Here is your hat."
- 2:09:39 Chair McCrea They are listed as guidelines and recommendations. I don't think they are listed as mandatory.
- 2:09:44 J. Stevens If we make them sound mandatory then they become mandatory for some people.
- 2:09:54 Hon. Elizabeth Welch Doesn't it have to be directed at the lawyers?
- 2:09:58 I. Swenson It can be. That is a different approach.
- 2:10:05 Hon. Elizabeth Welch Judges are not going to do something different, probably. Maybe some will because of this document.
- 2:10:16 I. Swenson I think lawyers could still use it as a tool which is what they do when they are invited to participate in the planning of one of this programs. "Here is what we have to do so you have got to leave time for us to do this or we are going to have trouble with PDSC." Maybe it serves the same purpose to direct it towards the lawyers.
- 2:10:39 Chair McCrea It might make more sense because then the lawyer is in the position, instead of saying, "Judge, this is what you are supposed to be doing so I can participate," the lawyer can say, "Judge, it is not my fault. This is what PDSC tells me I am supposed to be doing." It puts it more back on us than our kind of putting it on the court.

2:11:00 I. Swenson Why don't I draft it and bring it back to you in June. I will circulate it after I have incorporated that initial change.

2:11:11 Chair McCrea Any other? Thank you, Ingrid.

Agenda Item No. 7 OPDS Monthly Report

2:11:15 Chair McCrea Now we are to the monthly report which is Attachment 7.

2:11:29 P. Ozanne You run a tight ship, Madam Chair.

2:11:29 Chair McCrea Are you complaining, Mr. Ozanne? Mr. Gartlan.

2:11:47 P. Gartlan Thank you. Thank you, Madam Chair. Peter Gartlan with the Appellate Division of OPDS. I really have three topics to discuss this morning and give the Commission an update. First is a status report on *Bowen v. Oregon*, which is the cert petition that is currently in the US Supreme Court. Our cert petition asked the US Supreme Court to take a look at whether or not a non-unanimous jury is constitutional. There are two states in the union that allow non-unanimous juries, Oregon and Louisiana. Since our last meeting the Supreme Court has asked the State of Oregon to respond to our cert petition. That is a good sign because the Court is taking it seriously. We expect that the case will be conferenced at the US Supreme Court in September. We should know by the end of September, or sometime in early October, whether or not the Supreme Court will take the case.

2:13:08 J. Potter How many organizations have had requests been made of them for *amicus* on this case?

2:13:13 P. Gartlan How many *amicus* requests have we had?

2:13:16 J. Potter How many has the Court asked for *amicus*?

2:13:20 P. Gartlan The US Supreme Court? I don't know if they have asked for any. We have had *amici* requests and then they ask the Supreme Court. I don't know the number, but we have had several all over the nation, Oregon and Cornell and some from Louisiana. I think we are going to be well represented by *amici* coming in at that stage. In conjunction with that, this document that was handed out this morning was produced by Bronson James, Chief Deputy Defender in our office. This is our preliminary report with respect to the number of non-unanimous felony verdicts in non-murder cases in Oregon. We did a review of the files that were in the office and they represent the last two years. If I could get to the bottom line, I think the bottom line is on page four, with respect to findings of the frequency of non-unanimous verdicts. What the record shows us, what our files show us, is that in those cases where there has been jury polling, 65.5 percent of those cases included a non-unanimous verdict on at least one count. Up until now we hadn't really had a good picture or idea how many cases it affected. It looks like over 60 percent of the felony trials have a non-unanimous jury verdict. We were contacted by, I think it was Cornell, and told that this is pretty much consistent with what the frequency is in civil cases when there are non-unanimous jury verdicts. This seems to be something of a norm for how humans on a jury seem arrive at a conclusion, a verdict. The second topic I wanted to discuss was a follow up on something we reported on at the last meeting and that was the Court of Appeals legislation that would affect how the Court of Appeals does business. That is Senate Bill 262 and that has made it out of the Senate and out of the House. As a follow up we met with Chief Judge Brewer and expressed some concerns that we had. He addressed our concerns and pretty much mollified them. To remind the panel this legislation does pretty much three

things. One, it allows for a two judge panel for cases. Judge Brewer explained to us that that would be for select categories of cases. In those cases he said there would be a process by which the court would first notify the attorneys, or the parties, that their case had been selected for a two judge panel. If either of the parties wanted to opt out, the parties could opt out and the case would not be addressed by a two judge panel. Judge Brewer was reluctant about employing a two judge panel. He has concerns about it and he wanted to limit its use to select categories of cases, so cases that have been in the pipeline for a long time, and perhaps have been slowed down, would benefit from being moved along. Some of the categories would be post conviction and civil commitment cases, cases where perhaps it wouldn't even be in the appellant's interest to be where it was. With the option of opting out of the two judge panel we thought that that would probably address the concerns that we had. It would not affect cases from OPDS and the Appellate Division.

2:18:15 P. Ozanne

It kind of affects the vulnerable populations though doesn't it? Civil commitments fall on people who really can't object to their lawyer, or don't.

2:18:26 P. Gartlan

If they are represented by counsel and they want to opt out they can.

2:18:36 P. Ozanne

I can see why you are mollified.

2:18:37 P. Gartlan

Selfishly. The second was the two judges, two pro tem judges for a three judge panel. Again, Judge Brewer said he was reluctant to employ this but he would employ it and he expects to use pro tem senior judges, particularly senior judges with appellate experience. So Justice Carson and former Chief Judge Mary Deits would be sitting on the panel. The third was discretionary review in TPR cases. That would involve JRP cases and within the Appellate Division at our office that will affect the juvenile dependency cases. This legislation reserves or retains de novo review for TPR cases, for termination of parental rights cases. We are looking at the cases, the appeals, and proceeding to preliminary termination of parental rights. That was a follow up on the legislation, the Court of Appeals legislation.

2:20:06 P. Ozanne

As to the change of equity review in delinquency proceedings was there a difference of opinion in the facts about that. How were you mollified on that one?

2:20:25 P. Gartlan

At one of the meetings Angela Sherbo and Gail Meyer were present. Angela Sherbo works at JRP and is an expert in juvenile law and she too was mollified at the conclusion of meeting. She was satisfied that Judge Brewer's approach would not really end up in different results because the way the legislation is worded the Court of Appeals has discretion to use de novo review if it wants to and Judge Brewer kind of has a global vision of how to implement this. It would be in conjunction with an ORAP rule. As presently contemplated, the ORAP rule would allow de novo review based on the appellant's assertion that the evidence was plainly contrary to, or unsupported by, the trial court's factfinding. The litigant in that position could ask the Court of Appeals to please review this case de novo. Judge Brewer made the case that after kind of a historical review of his caseload for the past 10 years, they found that the Court of Appeals had not really disagreed with the trial court findings. It wasn't really doing that much of a rehashing of all the evidence to come to a different fact finding, but the cases really had to do with, given the facts that were found by the trial court, has the legal standard been satisfied? It was more a sufficiency issue. These facts do not satisfy this legal standard.

2:22:20 P. Ozanne

Summary judgment kind of thought. Thank you.

2:22:26 P. Gartlan

Moving on to the last topic, we are having our May Daze CLE. We have two CLEs per year. Our May Daze is a week from this Friday, May 29. We have extended invitations to MCAD, the Marion County PD and appellate panel practitioners. That is about all I have. Our Commissioners are invited also.

2:23:01 Chair McCrea Thank you.

2:23:14 Hon. Elizabeth Welch Excuse me. Could you take 30 seconds and tell us what some of the topics might be?

2:23:22 P. Gartlan Sure. Because we have an appellate office we kind of gear it to appellate practitioners. One topic will be an update on appellate law for the past year. Another will be how to write an engaging petition for review. We will have an update on cases that have been argued in the Oregon Supreme Court that have not yet been issued, kind of a refresher to everybody about what is currently under advisement in the Oregon Supreme Court. We will have a presentation by Robin Jones in our office about the appealability of 138,083 motions which are when, let's say a year from now somebody says, "Hey my judgment is wrong." We can go back to the trial court and say, "Trial court, what you put in the written judgment doesn't reflect what you said orally. Could you please change the written judgment?" If the court does that then there is a question about whether that is appealable. The answer is typically yes. If the court denies and says, "No, I am not changing the written judgment," there is a question about whether that can be appealed. Currently under state law the answer is, no, that cannot be appealed. It is something that keeps appellate attorneys up late at night just bemused and bewildered.

2:24:53 J. Potter And it is Friday night.

2:24:59 P. Ozanne Is it going to be at Willamette again?

2:24:58 P. Gartlan No. It is going to be at Labor and Employment, a state agency on Union Street in Salem. I will be happy to send out a special notice for Commissioners.

2:25:10 Chair McCrea That would be very nice.

2:25:15 P. Gartlan Anybody is more than welcome to attend.

2:25:21 Chair McCrea Paul.

2:25:21 P. Levy Thank you. Three things also. First, we are in the midst now of a new Survey Monkey project. When you get Survey Monkey you too will be surveying the world on any subject you can think of. This is actually our diversity survey of public defense providers which we have been talking about doing for a long time. In large part because of Shelley Winn's technical assistance in putting together this survey, we have finally launched it. We are asking our providers to provide us with a wealth of interesting information about the diversity of the public defense work force. The survey closes next Friday. It is not an easy survey to complete, especially for large consortia and large public defender offices because we are not telling them how to get the information about the racial and ethnic diversity of their work force, because we didn't want to dictate a particular method of gathering that information that might infringe on the policies and procedures of the specific providers, but we are getting a good return rate on that. It will be interesting to report what we find out there as a baseline for our efforts to improve diversity. Speaking of surveys, attached to your materials is a summary of the results of our second annual statewide public defense performance survey. This is actually an article that I wrote at the request of JRP for their publication, the Juvenile Law Reader, and the results aren't terribly surprising. I not sure the results are terribly useful except to show that there is still a lot of room for improvement. Maybe there is a little improvement perceived by some in the juvenile dependency world. The response rate to the survey is still less than we

would like. The greatest utility for this survey and the first one we did, I think, are the comments that we get. There is a phenomenon that is occurring with our survey, which is that people will choose a ranking and then, given the opportunity to give comments, provide comments that are quite different from the ranking they provided. I don't quite understand why that is happening. The comments are very useful. Again, they tend to focus on compensation and on workload. They also talk, because we ask people in each judicial district, about particular issues and problems in those communities. It has been useful.

- 2:28:46 Chair McCrea So, Paul, you got a response from 136 people. Can you estimate how many requests went out?
- 2:28:55 P. Levy Shelley do you know that? We sent the survey to every circuit court judge of which there 200 or something. We got 95 judges to respond. We sent it to every elected district attorney. Eleven of those responded which isn't too bad. We sent it to the directors of each of the juvenile departments and got 16 responses. We sent it to the coordinators of all of the Citizen Review Boards and we had 14 responses which is a pretty good response rate from that group.
- 2:29:54 Chair McCrea Thank you. I was just curious.
- 2:29:53 P. Ozanne The limited utility of the survey would seem to me in part to be due to the fact that what I will call the "practice culture" from county to county is so different, in juvenile in particular. What people think is good somewhere is unique to that culture and ...
- 2:30:14 P. Levy The attachment that you have contains our statewide numbers. We can filter responses and get better information for county by county, but unlike the first survey where we asked about each provider in a county, this time we just asked generally about public defense services in a county or judicial district. It still gives us an indicator of where we are and where we are heading. It is really the comments that are most useful there. The last item is just an update for the Commission on the Oregon Public Ethics Law and just wanted to alert you to a couple of things. First of all, when the legislature is motivated they act fast and they amended the law on April 19. There are quite a few amendments but two that the Commission has bumped up against a few times in particular, the definition of what is not a gift and two changes there. One is admission and the cost of food and beverage at a reception, meal, or meeting held by an organization when a public official attends representing a governmental body. If you were to be invited as Commissioners to attend a reception, the cost of admission, etc., would no longer be a gift. That provision used to require that the guest be on the program in order for it not to be a gift. Now you just have to attend and show up for free food.
- 2:32:19 J. Potter In light of that ruling OCDLA would like to invite the Commission to our barbeque at the 30th annual conference.
- 2:32:30 P. Levy And now you can go.
- 2:32:30 P. Ozanne I have been reporting that as a gift.
- 2:32:31 P. Levy The other change, and a lot of this does affect the interaction between Commissioners and OCDLA, is that the reasonable expenses associated with attending a convention are no longer a gift if that is provided by a non-profit corporation. The provision used to say "a 501(c) that received less than five percent of its funding from for-profit organizations," which excluded OCDLA, and they have taken out that clause. If you are a speaker at an OCDLA program you can receive

from OCDLA the reasonable expenses in connection with that. Of course you have been able to receive from OPDS your costs in attending official functions. The only other change affects our executive director who has now been added to the list of officials who have to file annual statements of economic interest.

2:34:02 Chair McCrea Thank you, Paul. Ingrid, Kathryn, anything additional to report?

2:34:11 I. Swenson Lunch.

2:34:08 Chair McCrea Alright. Our next meeting is scheduled for June 18, from 9 to 1 at Inn of the Seventh Mountain in Bend. Any additional business? I would entertain a motion to adjourn.
MOTION: John Potter moved to adjourn the meeting;

2:34:35 J. Stevens Wait. I do have one. I need to officially tell you Happy Birthday.

2:34:42 Chair McCrea Thank you. We had a second.
VOTE: 5-0.

Meeting adjourned

Attachment 2

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Clackamas County
(June 2009)**

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. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Clackamas County undertaken in preparation for PDSC's public meeting in Oregon City on Thursday, March 12, 2009, a summary of the testimony taken at that meeting, a summary of the Commission's discussion of Clackamas County at the April 16, 2009 PDSC meeting, and a brief discussion of developments in the county since the March meeting.

PDSC's service delivery planning process

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

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

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

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

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

Background and context to the service delivery planning process

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

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in

its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these

cases. Those standards have now been approved by the bar's Board of Governors and adopted by PDSC as the standards to be observed by court-appointed attorneys. The work group also made additional recommendations to PDSC for improving services in this area of practice. Those recommendations were presented to PDSC at its March 2009 meeting. A service delivery plan for post conviction relief cases is scheduled for further discussion at the May 21, 2009 PDSC meeting.

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

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

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

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

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

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

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

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

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

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

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does

not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide quality services in each region of the state.

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

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

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by

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

public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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

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

³ Id.

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

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

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

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

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its

attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

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

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

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

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

This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative

advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

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

PDSC’s Preliminary Investigation in Clackamas County

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

In February 2009 OPDS Executive Director Ingrid Swenson, accompanied on some interviews by OPDS General Counsel Paul Levy and Clackamas County CBS Analyst Amy Jackson, visited with stakeholders in Clackamas County. In addition to talking to PDSC’s contractors in the district, they met or spoke by phone with six of the Circuit Court judges, a pro tem judge, the District Attorney and his chief deputy, the Citizen Review Board coordinator, two DHS managers, the Juvenile Department Director, the CASA director, and one of the Assistant Attorneys General assigned to the area.

The initial version of this report set forth the information obtained in those interviews and recommended areas of further inquiry for Commissioners at the March 12, 2009 meeting in Oregon City. The current version of the report incorporates information provided at and after that hearing, and summarizes the discussion that took place at the April 16, 2009 meeting. The final version of this report will include a service delivery plan for Clackamas County.

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.

OPDS's Findings in Clackamas County (Judicial District No. 5)

The Circuit Court and the District Attorney

There are eleven Circuit Court judges in Clackamas County. Judge Steven Maurer is the presiding judge. Judge Deanne Darling is the primary juvenile court judge. The Trial Court Administrator is Mari Miller. The County has seven specialty courts.

John Foote is the District Attorney and Greg Horner is his chief deputy. There are currently 29 deputies and the number of positions is expected to remain stable. While, as noted below, the defense bar rarely adds new lawyers, the District Attorney's office does have turnover in its staff and has become the point of entry for new attorneys seeking criminal law experience in the county.

Procedure in criminal cases

There are five special courts for criminal cases. The adult drug court is designed for defendants with significant, long-term drug or alcohol addiction. A guilty plea is required for the defendant to participate in the program. One Clackamas Indigent Defense Consortium (CIDC) attorney is assigned to cover the drug court. The mental health court is limited to defendants charged with non-violent offenses whose behavior is principally attributable to mental illness rather than substance abuse or anti-social behavior. There is also a DUII Court, a community court and a domestic violence deferred sentencing program. CIDC lawyers cover these courts as well.

A consortium attorney is present in court for felony and in-custody misdemeanor arraignments. Each case is generally assigned to a particular attorney on the same day as the arraignment. That attorney checks for conflicts, and if a conflict is found the case is reassigned to another consortium attorney.

Arraignments for clients who are in custody, either at the Clackamas County jail, at the Inverness jail in Multnomah County or in a state correctional facility⁴, are generally done by video. Only a few prisons (such as the Columbia River Correctional Institute) do not have video capacity.

Three of the Clackamas County courtrooms are fully wired for video appearances and there is a portable “polycom” unit that can be used in other courtrooms. While the capacity for confidential communication between attorneys and clients is limited, the video system is used principally for routine appearances.

The county uses a master calendaring system. There is a court liaison team which includes CIDC, the district attorney’s office, the bar president, the trial court administrator and the judges which addresses system issues on a regular basis. Based on the recommendation of this group the county has been using a “case manager” system for scheduling criminal cases since 2003. Except for serious cases such as Measure 11 cases, the parties are expected to resolve cases or set them for trial by the 35th day after the first appearance. The district attorney’s office is required to include a settlement offer when it provides discovery to the defendant. Motions must be filed 21 days before trial and are generally heard on Mondays. There is no trial docket call but lawyers are required to notify the court 24 hours in advance whether their cases will actually be going to trial.

The state issues subpoenas in only about 15% of criminal cases. The trial rates in Clackamas County, however, are higher than the statewide average.⁵

Clackamas County is growing and the court anticipates that the criminal caseload will continue to grow as well. Jail capacity has been an issue in the county. In 2005, the Circuit Court judges sitting en banc issued an order prohibiting the sheriff from closing additional beds. After the voters approved a levy in November of 2006 the Clackamas County Board of County Commissioners unanimously agreed to devote \$50 million towards construction of a new adult jail and to construct the first phase of an expanded jail at another site with a planned completion date of 2010. There are currently approximately 400 jail beds available in the county.

OPDS contracts with CIDC to handle 6,844 cases per year. CIDC is currently just slightly under quota. The district attorney’s office notes arrest rates have been fairly constant for the past eight years in Clackamas County even though the crime rate appears to be dropping.

⁴ Arraignments from the state institutions are usually on warrants.

⁵ From January 1, 2008 through June 30, 2008 the statewide trial average for felony cases was 5.4% and for misdemeanors, 4.4%. In the same period the trial rates in Clackamas County were 7.1 for felonies (39 to the court and 37 to juries) and 6.7% of the misdemeanors (53 court and 87 jury).

Procedure in juvenile cases

The Clackamas County Juvenile Court is located with other county offices in a group of buildings several miles from the County Courthouse. Mondays and Thursdays are the principal juvenile court days, although preliminary hearings are held daily as needed. There are two juvenile drug courts, the juvenile dependency drug court and the delinquency drug court. Both meet on Wednesdays and are staffed by Independent Defenders, Inc. (IDI) attorneys. Citizen Review Board hearings are held on Tuesdays.⁶

Attorneys are not present for preliminary hearings in juvenile dependency cases. Attorneys generally receive notice of their appointment, however, on the same day as the preliminary hearing. Dependency cases are scheduled for “judicial review of the petition” 30 days after the preliminary hearing. This hearing serves as a settlement conference. Once jurisdiction is established (either by trial or by admission) a review is scheduled before the Citizen Review Board at five months. Upon the court’s instruction, the CRB focuses its attention at this hearing on creating realistic concurrent plans to be implemented if the primary plans cannot. Since these hearings are scheduled with input from the attorneys, attorneys are almost always present. The court then conducts a review at approximately eight months and a permanency review at thirteen months. A second CRB review occurs prior to the permanency hearing at ten months. This hearing is scheduled at the time of the first CRB review, which, again, allows attorneys to participate in the selection of the hearing date. There are two DHS offices in Clackamas County, the North Clackamas office and the Oregon City office. Both DHS offices are reputed to do a good job of transitioning cases from the initial protective services worker to the on-going worker, both of whom usually appear at the dispositional hearing. There is an active CASA program in the county and individual CASAs are assigned in approximately 60% of the cases.

Ellen Crawford is the Juvenile Department director. There are twenty-three counselors who work under her supervision. This department makes extensive use of formal accountability agreements and other informal approaches based on a comprehensive case management system. Low risk youth are generally referred to diversion programs. Higher risk youth are referred to juvenile counselors who may still recommend a formal accountability agreement. There are three deputy district attorneys assigned to juvenile court cases. It is the district attorney’s office that files the petition after receiving the police reports from the juvenile department in those cases in which adjudication is sought.

⁶ Clackamas County is one of a very few counties where the Citizen Review Board has been able to schedule its hearings to accommodate attorneys’ schedules. Instead of having review dates scheduled automatically in accordance with the DHS calendar, the Clackamas Board schedules its hearings at the time of disposition when the parties and their attorneys are present. The second review is scheduled at the time of the first review. The Citizen Review Board of Washington County has also moved to this system and the Marion County CRB is exploring the use of a similar system in that county.

An attorney from IDI is present for delinquency preliminary hearings. At the preliminary hearing the court sets an “adjudication and disposition” hearing approximately 30 to 60 days later. If the youth wants a trial the attorney notifies the court of the need for a trial date. Few youth remain in custody pending trial. The county has access to fourteen detention beds at the Donald E. Long facility in Portland. Youth are rarely held for more than a few days.

The delinquency drug court currently has fifteen clients. The program serves youth who are fourteen to eighteen years old. The drug court team continues to refine the structure and operation of the court.

Probation violations are used sparingly in Clackamas County juvenile court, and only after other alternatives are exhausted except in cases of new criminal activity or a significant risk to public safety. Attorneys are notified when informal sanctions are imposed on their clients.

Public defense contractors

There are two public defense contractors in Clackamas County, the Clackamas Indigent Defense Consortium (CIDC) which contracts with PDSC to handle criminal cases, and Independent Defenders, Inc. (IDI) which contracts for juvenile and civil commitment cases.

CIDC

CIDC has 27 members. It has a board of directors, five of whom are permanent members. All members are currently consortium attorneys. The board was recently restructured when two of its permanent members resigned. Their positions were taken by two younger members. The board has a president who serves at the pleasure of the board. The current president is Brad Jonasson. Every year two members of the board are replaced with other non-permanent members. CIDC operates under written bylaws; executes written agreements with members and has a manual for attorneys.

Ron Gray is the administrator of the consortium. Mr. Gray serves on two advisory groups to OPDS, has served on site review teams, and, at OPDS’s request, prepared a list of best practices for consortia which is attached as Exhibit A. CIDC uses a portion of its PDSC funds for administrative functions and sets aside a certain amount to cover supplemental compensation for lawyers who handle particularly complex cases. Mr. Gray is assisted by Janan Billesbach, who has worked for the consortium for many years. Currently she is partly retired but continues to work half time from her home where she has a dedicated phone line and computer and is able to make consortium appointments on a daily basis.

The consortium president has assumed responsibility for creating an attorney evaluation process. He has assembled a committee which is working on a questionnaire to be sent to clients and a questionnaire to be sent to system representatives. Among the factors that will be analyzed in terms of attorney performance will be trial rates.

The work of the consortium was reviewed by an OPDS site team in 2004. OPDS has also conducted two statewide surveys that included Clackamas County. In the most recent of those surveys, the respondents were principally the local Circuit Court judges. They described the work of CIDC on average as good. Comments noted that the range of skill varied from one attorney to another and that there was some frustration with the less skilled attorneys.

Comments received by OPDS staff prior to this review from members of the local criminal justice system indicated that: CIDC has a lot of very good, experienced attorneys; they maintain a good relationship with the district attorney's office and the court; the county is fortunate to have them; Ron Gray is responsive to concerns from the bench and court staff; the consortium is able to provide mentoring when attorneys need it; the judges' workload is very high in Clackamas County and it is very helpful to have a provider that is as flexible as CIDC; it would help to have more attorneys; members cooperate with the court to make the system work, as does the district attorney's office; CIDC has also been a "partner" in the creation and operation of the treatment courts. Although there is a range of quality, on the whole it is very good with only a couple of attorneys who are problematic. CIDC attorneys are, on average, significantly more experienced trial attorneys than deputy district attorneys in the county.⁷

IDI

There are currently eleven attorneys in the consortium. Most of them have been part of the consortium for more than 20 years⁸. The consortium has a board of three members, one of whom is not a consortium member. The consortium has hired a former DHS worker who uses her expertise as a child welfare specialist to assess child clients' circumstances, advise attorneys about appropriate services for children, review DHS files and otherwise assist attorneys in representing children. The consortium does not sponsor trainings for its members. Members are active participants in juvenile court system-wide meetings and trainings, however.

Marty Cohen is the administrator of the consortium. Concerns about performance by consortium members are brought to his attention. He handles

⁷ Only 4 of CIDC's attorneys were admitted to practice within the last 15 years; more than half the members have been practicing for 25 years or longer.

⁸ One of the senior attorneys is currently training a new lawyer in juvenile representation however.

delinquency cases and staffs the juvenile drug court. He and the attorney with whom he shares office space both have a significant private practice.

In view of the declining juvenile caseload⁹, Mr. Cohen has advised other members of the consortium to take on private cases.

OPDS conducted a quality assessment site review of IDI in 2007. Responses to the 2008 statewide survey indicated that representation provided by this group varied from good to excellent in both dependency and delinquency cases. Caseloads were deemed to be “about right to somewhat too large” in dependency cases and “about right” in delinquency cases. Specific comments noted that most juvenile lawyers were involved in other kinds of practice and that too often they met clients at the courthouse, did not meet with foster parents and didn’t have sufficient contact with clients.

Comments received during visits to the county by OPDS staff prior to this review indicated that the juvenile attorneys are “top notch” and do a great job; some of them have too many court appearances although this is getting better as the caseload declines. (It was acknowledged that their income from public defense cases has declined and that they are probably required to do other kinds of cases. It was also noted that they do a good job of making sure that someone appears for them if they cannot be present for a hearing, although the substitute attorney does not always have the needed information.) One commentator said OPDS should make sure attorneys understand the extent of their duties to clients, especially with respect to contacting them and keeping them informed about the status of the case. It was also suggested that OPDS consider changes in how it compensates lawyers in dependency cases. Some attorneys believe they get paid only for attending hearings, not for continuing representation of the client while the case is open. It was also recommended that the consortium consider terminating one of its members. Marty Cohen is generally considered to be responsive to concerns about members and willing to intervene. Another commentator noted that some of the attorneys are very effective at getting appropriate services for their clients while others seem disengaged. Some attorneys meet with foster parents, others don’t. Some children are reportedly not seen by either their attorneys or their caseworkers.

One of the effects of limited attorney availability is the lack of representation at shelter hearings in dependency cases. DHS indicates that this is a disadvantage to the consortium’s clients because DHS cannot work closely with the parents until the parents have met with their attorneys and decided whether or not to contest the petition and whether or not to cooperate with DHS in service

⁹ All categories of juvenile cases appear to be declining in the county. In the calendar year 2008, the consortium received credit for a total of 2,574 cases.

planning. If attorneys were present at shelter hearings they could also argue against removal or in support of a particular placement.¹⁰

Many attorneys apparently do not have sufficient time to meet with their clients before the judicial settlement conference. While it is reported that attorneys are generally familiar with the case and the documents prepared by DHS, they often have not discussed the case with their clients before the court hearing.

Attorneys do participate on a regular basis in child safety meetings. Now that the Oregon Safety Model¹¹ is in place, decisions about placement are generally not made at these hearings but attorneys who are very committed, especially to child clients, nevertheless attend and participate. It was reported that it would be helpful to have one of the attorneys specialize in the representation of older children who will transition out of foster care to independent living.

In delinquency cases, the quality of representation is rated fairly high even though it was reported that lawyers don't always meet with their clients prior to the adjudication and disposition hearing and that there are few motions filed and few trials. It was also reported that the attorneys' level of experience and good working relations with the juvenile department, the district attorney's office and the court are appreciated.

OPDS's recommendations for further inquiry at PDSC's March 12, 2009 meeting in Oregon City

Based on the information provided to OPDS during its visit to Oregon City, OPDS recommends that the Commission consider the following in developing a service delivery plan for Clackamas County.

The structure

The current system includes two consortia, with overlapping membership, that handle criminal and juvenile cases, respectively. The structure appears to be working satisfactorily although a number of commentators point to the need for additional attorneys and for better quality monitoring.

Attorney evaluation

While CIDC attorneys are given credit for providing high quality representation in most cases, some of the judges express concern about the attorneys' availability, about the need to be bringing in and training new attorneys to eventually replace

¹⁰ It should be noted that despite the absence of attorneys at these hearings they can sometimes be quite lengthy when the court requires DHS to produce evidence of the need for removal and proof that reasonable (or active) efforts have been made to prevent removal as required by ORS 419B.150.

¹¹ The Oregon Safety Model approach to child protection was adopted by DHS in March of 2007.

current members, and about the need to consider removing some consortium members on performance grounds. As the Commission is aware from its service delivery reviews in other areas of the state, one of the weaknesses of the consortium model is that consortia often lack a system for evaluating the work of the attorneys and methods for addressing underperformance. It appears that CIDC is undertaking to create such a system. Ron Gray and CIDC have provided statewide leadership on quality assurance procedures. The Commission may want to follow closely the development of an attorney evaluation process in this county as a possible model for use by other consortia around the state.

Need for Additional Attorneys/Compensation

In Clackamas County, there is a significant discrepancy between the general assessment that the lawyers in juvenile cases are skilled and experienced and the frequent observation that they are not having timely and adequate communication with their clients.

In juvenile cases, the need for attorneys to handle cases in addition to their public defense caseloads may affect their availability for court hearings and the ability of some of them to provide appropriate representation. It appears that the principal dilemma for these providers is that PDSC's case rates do not permit attorneys to limit their caseloads and add new members without finding supplementary sources of income. Significant additional funding for juvenile representation as proposed in PDSC's Policy Option Package No. 100 and SB 450 sponsored by Sen. Jeff Kruse¹² may be needed to ensure that attorneys are meeting their obligations to their clients.

While the burden of high caseloads is understood, attorneys should not allow their caseloads to prevent them from attending shelter hearings, meeting with clients before court hearings, meeting with youth, child clients and foster parents, litigating motions to suppress and taking other actions that may be necessary for good representation.

If current funding undermines attorneys' ability to comply with PDSC contract provisions regarding timely contact with clients, representation at hearings and the like, the contractor needs to raise these issues with the Commission and with OPDS prior to and during contract negotiations.

Summary of Testimony at March 12, 2009 PDSC Meeting

Mari Miller, the Trial Court Administrator for the Clackamas County Circuit Court welcomed Commissioners and guests to the court. She noted that her staff was occupied with planning for Friday court closures. She said that the court has

¹² SB 450 proposes an increase in funding to PDSC specifically for the purpose of improving representation in juvenile dependency cases.

worked effectively with public defense providers to resolve issues before they occur. She noted that her court has the highest number of cases per judge in the state.

Chair Ellis said that the Commission is engaged in a process of reviewing the delivery of services throughout the state and has taken the approach that each community is different and its public defense needs may be different too. The Commission's two goals for public defense are quality and economy. He noted that Clackamas County is the only remaining metropolitan county that has a single provider system and the Commission would like to make sure that the single consortium model is the appropriate one.

Barbara Johnson testified that she is the Executive Director of the CASA program in Clackamas County. She said that she has met with the juvenile consortium administrator in the past to discuss issues that arise between CASA volunteers and attorneys for parents and children. She spoke to a number of experienced CASA volunteers to obtain their comments for the Commission. CASA volunteers commented that attorney caseloads are high and that, although attorneys can make a real difference, they sometimes lack passion, don't return calls, are less zealous when they represent children than when they represent parents, often meet their clients just before court and fail to bring any original information to the court. Attorneys don't regularly attend child safety meetings but do attend CRB reviews. Ms. Johnson suggested that a CASA be appointed in every case and that counsel be appointed only upon request of the CASA or other party. Ms. Johnson said that the decline in the dependency caseload in Clackamas County coincides with the implementation of the Oregon Safety Model and that the decline may be the result of the way the model has been implemented in the county.

Commissioner Welch noted that Oregon has a significantly higher rate removal for children from their homes than most states.

Mike Clancy and Gay Canaday testified that they were part of the original group of four lawyers that founded the Independent Defenders, Inc. (IDI), a consortium that is the sole contractor in the county for juvenile public defense cases and civil commitment cases. IDI has a rotating system for case assignments. Most attorneys handle both dependency cases (parents and children) and delinquency cases. Most civil commitment cases are assigned to Ms. Canaday. Consortium attorneys also cover the juvenile drug court. Most members of the group have been practicing for twenty years or more. Consortium members have brought in some younger attorneys recently, however. Mr. Clancy has mentored one of the newer members. He said the consortium needs to do a better job of bringing new people in.

Ms. Canaday said that consortium's eleven members bring with them different kinds of expertise. Some members have expertise in criminal cases or in

domestic relations cases; one member has expertise in social security benefits and Ms. Canaday has expertise in handling mental health cases. The benefit of having this expertise available probably outweighs the scheduling challenges that arise with attorneys who have other kinds of practices. She said that IDI attorneys love their juvenile work and that that is a key to good representation. She said that IDI has a board of directors of four members including three senior IDI attorneys and one CASA. The board meets quarterly and IDI members meet at least quarterly as well. She believes IDI attorneys get along well with CASA volunteers, who have a different perspective than the attorneys.

Mr. Clancy said that IDI had met with the CASAs to discuss their relationship and other issues. He said that attorneys sometimes have difficulty reaching their clients before hearings, despite efforts to do so. Time frames for hearings are short and don't always allow the attorney time to meet with the client. Some appointments occur just prior to hearing dates. Most attorneys send letters to clients immediately after receiving notice of appointment by fax.

Chair Ellis inquired how the consortium deals with members who have performance issues.

Mr. Clancy said that they use progressive sanctions. The organization lacks a full-time administrator and probably needs to have better procedures in place. Over the years there has not been a need for progressive sanctions because of the experience level of the attorneys. If there are problems, board members talk to the attorney about them.

Ruth Boen, who serves as administrative staff to IDI said that the consortium is responsive to complaints. After discussing calendar management problems with one attorney and providing him specific guidelines, the board sent him a letter setting forth its expectations. She also noted that in addition to the new attorney who was mentored and trained by Mr. Clancy, another young attorney received the same kind of training in another member's office.

In delinquency cases, Mr. Clancy said that there was a period of time when the district attorney's office was objecting to formal accountability agreements (FAA) even in cases in which DA approval was not needed. After a discussion with the juvenile department, circumstances have improved and juvenile court counselors will sometimes agree to FAAs without the district attorney's agreement. Another approach that attorneys for youth have taken is to ask that a case be set out for trial for a long enough period to complete needed services.

Mr. Clancy said that the perception some people reported about attorneys not having contact with delinquency clients was a misconception. Detained youth are held in Multnomah County which does make it more difficult for attorneys to see clients in person. In dependency cases, IDI has hired a retired DHS worker as an investigator who sees children in foster care and prepares a written report

that is provided to the court and DHS. DHS workers are not always seeing children as often as they are supposed to or seeing them outside the foster home.

Both Ms. Canaday and Mr. Clancy said that contact with OPDS has been satisfactory. Ms. Canaday expressed a desire to have access to a list of expert witnesses in termination of parental rights cases to supplement the short list that they are currently working from.

Judge Deanne Darling is the principal juvenile court judge in Clackamas County. She outlined the schedule of juvenile court hearings and noted that attorney availability is a major issue for her in trying to schedule juvenile court matters in a timely way.

She said that the IDI attorneys are very experienced, very efficient and very cohesive in terms of being willing to cover for each other. When lawyers cover for each other, however, they may not know the case. She said that it would help if lawyers in the juvenile consortium were not also taking cases from the criminal consortium because of schedule conflicts. She also suggested that consideration be given to creating a regional contract office that specialized in termination of parental rights. With respect to a public defender office handling part of the juvenile caseload, she said that the consortium has benefits with respect to the management of conflicts.

Judge Darling said that all but possibly one of the consortium attorneys is capable and well informed and that they do a good job of understanding the difference in their role when representing young children and representing older children. She believes they may need to do better outreach in order to have earlier contact with their clients and noted that it is rare that attorneys provide any first hand information or reports to the court regarding any of their clients.

Ron Gray, the administrator of the Clackamas Indigent Defense Consortium (CIDC), said that the consortium was started in 1983 and grew over time. The consortium now has 27 members who are on rotating lists for case assignments. There are separate lists for probation violations, misdemeanors, Ballot Measure 11 cases and homicides. Cases are assigned on a rotating basis, except that if an attorney with special qualifications is available a case may be directed to that attorney outside the rotation. Substitutions do not cost the state any additional funds in Clackamas County since only the second attorney is paid. There is a provision in the CIDC contract that permits attorneys to share the payment but it is rarely used, most attorneys believing it evens out over time. With respect to substitutions due to attorney/client incompatibility, the court usually lets a defendant know when the state will provide one more attorney but only one. Within the consortium there are three members who volunteer to accept appointments for these clients.

Mr. Gray noted that five of the current Circuit Court judges are alumni of CIDC. He said that currently the District Attorney's office perceives the defense as an enemy. CIDC was able to work more effectively with previous district attorneys.

Contrary to a statement in the draft report, Mr. Gray said that CIDC has brought in some new and younger lawyers. The consortium has an apprentice program for new attorneys. New attorneys have to find a mentor lawyer within CIDC to serve as a resource. Only some of the apprentice attorneys are given a position with CIDC.

Five or six of the 27 members handle just criminal cases. Other members have mixed practices and some serve as prosecutors and judges in municipal courts. For most CIDC lawyers 50% or more of their practice is in CIDC cases. This means that most members have a variety of skills that may be needed in particular cases. It also gives members a balanced view of the larger system and makes them more effective in settling cases.

Chair Ellis recalled that several years ago the United States Department of Justice explored the antitrust implications of CIDC being the exclusive contractor for public defense services in criminal cases in Clackamas County. The issue was not pursued by the Department of Justice but Mr. Ellis inquired whether having a single provider was the best model.

Mr. Gray said that the question for the commission should be whether that model provides quality representation. He said a good consortium needs an aggressive manager who is willing to confront attorneys who are not performing satisfactorily. The operation should also be economical for the state and if the state only has to send one check per month to the consortium, it is efficient for the state. Micromanagement by the state is not necessary. If the system isn't broken you shouldn't try to fix it. A public defender office was attempted in Clackamas County in the early 1980s. Consortia have lawyers with broader experience than public defenders and some public defenders have an adversarial relation with district attorneys.

Mr. Gray said that the consortium does not currently have a succession plan for his position, should he decide to retire. To be effective the administrator needs to be willing to be unpopular and he is not sure where his successor will come from but there are a couple of members of the group who might be good candidates.

The CIDC board of directors has five permanent and four rotating members. There was one outside board member but he retired recently and has been replaced by a CIDC member.

CIDC is working on a questionnaire for randomly polling clients about the performance of CIDC attorneys.

When a complaint is received about a CIDC lawyer, Mr. Gray usually consults immediately with the attorney. If the problem is not resolved Mr. Gray can take the matter to the board and the board decides whether or not the attorney can remain a part of CIDC. In two cases, the members resigned before the matter could be taken to the board.

Mr. Gray said that he and his staff have a good working relationship with OPDS staff.

Mr. Ellis expressed appreciation to Mr. Gray for his contributions to the public defense system as a whole.

Judge Maurer, the presiding judge of the Clackamas County Circuit Court, said that he and his colleagues have a high level of satisfaction with the operation of CIDC, especially their screening system for applicants, their level of competence and their commitment. Judges who are former CIDC members continue to have an investment in seeing that high quality public defense services are provided.

The court has been very comfortable with Mr. Gray's ability to address concerns and the mentoring that is provided by senior CIDC members. There have only been a handful of new members added because of the limited size of the group. The process for training new members is not too dissimilar from public defender office models although the public defender offices can provide a greater level of in house training and mentoring.

There will be a need to bring in more new lawyers as the older ones retire and at some point to bring in a new administrator. A more specific and comprehensive recruitment process will need to be implemented to replace retiring members. A public defender office has some advantages in terms of the incentives it can offer to a new attorney but the consortium model offers some incentives too, such as the benefit of having a portion of a new attorney's practice guaranteed, to cover office overhead.

On the whole, this county has preferred a single provider approach. The bench in Clackamas County has been very involved in public defense and has been able to work collegially with this group.

Commission Discussion at April 16, 2009 Meeting

Ingrid Swenson summarized the testimony presented to the commission at the March meeting in Clackamas county and noted that she and Kathryn Aylward had met with Judge Deanne Darling and Marty Cohen, the administrator of Independent Defenders, Inc. (IDI), to discuss some of the issues that had been raised about the juvenile consortium, including a proposal to limit the attorneys who would be appointed to represent children to those who had provided the

best quality representation. Judge Darling also recommended that PDSC consider contracting with a group of lawyers who specialize in handling termination of parental rights cases. Another proposal made at the meeting was that consortium staff appear at the shelter hearing if counsel cannot and make initial contact with the client, since delay in initial contact is seen as a significant problem. Judge Darling also suggested that the commission consider amending its contracts with providers to clarify the requirement of timely contact with clients.

With respect to Clackamas Indigent Defense Consortium (CIDC), Chair Ellis said that although it may be working well at the present time, in three or four years there might be difficulties since CIDC does not seem to be evolving. They are not bringing in new members. Intervention by PDSC may not be necessary now but might be needed in the future.

Commissioner Ozanne agreed and said that the structure of the board was particularly concerning. He said it might be appropriate for PDSC to become more proactive about board structure in defense organizations. The commission could direct that board members have staggered terms and that some portion of the board be comprised of newer members. Chair Ellis said that the most successful boards have been those whose members were appointed by external sources.

Commissioner Potter suggested beginning with small steps such as bringing in outside board members as Tom Crabtree's office has done.

Commissioner Welch asked if PDSC should include a requirement about the composition of boards in its contracts and Chair Ellis noted that encouragement to use best practices had been the Commission's approach in the past and that he is not certain that a contract provision is necessary at this time.

Commissioner Ozanne said that CIDC could be asked to create a model that could be used by other consortia.

Chair Ellis said that a third area of concern is CIDC's apparent inability to deal with underperforming attorneys. Commissioner Ozanne said that the failure to deal with this issue is usually an indication that the provider's quality assurance process needs to be reexamined.

Commissioner Potter asked if the RFP requested information about a provider's board. Kathryn Aylward responded that only the RFP for new contractors does.

Chair Ellis noted the absence of any representative from Clackamas County at this and other commission meetings and said that it may reflect the self-contained nature of the Clackamas County system. A transcript of last month's meeting and this meeting are to be sent to all consortium members and to

Presiding Judge Steven Maurer. Judge Welch observed that the district attorney had not participated in the March meeting either.

Ingrid Swenson and Kathryn Aylward said that CIDC has an active mentoring program for new criminal defense attorneys and that a new lawyer had recently joined the consortium after completing the mentoring program.

With respect to IDI, Commissioner Ozanne noted that members of that group had also been absent from PDSC meetings. Their small board is also concerning. With regard to quality of representation issues, it may be time to amend the qualification standards to require that lawyers actually follow performance guidelines, not just acknowledge awareness of them. The standards should be what the commission expects contractors to do. Commissioner Welch said that quality issues in juvenile cases are of particular concern in the rural areas of the state where lawyers may need to travel long distances to meet with child clients.

Additional Developments since March PDSC meeting.

Attached as Exhibit A are a series of questions sent to and responses received from Ron Gray regarding the operation of CIDC.

Attached as Exhibit B are a series of questions sent to Marty Cohen regarding the operation of IDI. Mr. Cohen will provide written responses to the commission for review at its June 18 meeting.

IDI member and board representative, Gay Canaday, inquired about attorney evaluation models that IDI might adapt for its own use. Several examples were provided.

It is expected that representatives of both consortia will be present at the June PDSC meeting.

Service Delivery Plan for Clackamas County

[This portion of the report will be completed at the conclusion of the Commission's discussions and deliberation.]

Exhibit A

EXHIBIT A – CIDC Questions and Responses

1. **Question:** *CIDC Board. Some recommended best practices for boards and commissions of non-profit organizations are for them to include outside members, staggered memberships and few, if any permanent, members. PDSC may wish to make a recommendation to CIDC on some of these best practices (for example, Commissioner Potter suggested that you designate a certain number of board positions for members with 0-5 years of experience, those with 5 to 10 and those with more than ten) and would like to be informed whether any of these practices have been considered by CIDC and, if so, why they were rejected.*

Response: The short answer to the question about practices on staffing a Board of Directors, is that we have simply operated under the same system for many years and it works. We do not limit our rotation on the Board base don years of experience. A new attorney could be ion the Board the first year of practice. We have a policy of encouraging all CIDC attorneys to spend time on the Board, regardless of experience levels, and this practice has given us a good mix of young and old over the years we have been in operation. We did have a non-criminal defense attorney on our Board for the first 24 years. He also worked on one of the committees. When it came time to replace that member, the Board took a traditional, "if it aint broke don't fix it" attitude. We did debate and did quite frankly battle over bringing in a non lawyer and/or non CIDC affiliated Board member. However, the idea made little headway. My impression, and I could be wrong, is that the Board had no idea what criteria would be used to recruit a non attorney Board member, and chose not to put in the work.

Follow-up Question: *The overriding concern I heard from our commissioners is that your current method of selecting board members may not be serving the best long term interests of CIDC. They would be interested in having a discussion about the merits of using outside board members and of eliminating permanent positions and staggering terms so as to be more inclusive of the broad range of your membership. If these issues have been discussed by your board, the commission would like to hear about those discussions and discuss the merits of them with you in June.*

Would you please send me a current copy of your bylaws and other rules or policies CIDC has adopted that govern the operation of the consortium.

Response: As to the Structure of the Board: I am happy to discuss this with you at the June meeting. As far as access to serve on the Board, we rotate 2 members every year, and have tried to get everyone on the Board who shows an interest. Other issues can wait for now.

2. **Question:** *What is your plan for bringing in new members to replace members who will be retiring in the next five years? Do you have a plan for replacing attorneys you expect to retire in the next 10 years?*

Response: Our method of replacement is not based on cycles of 5 or 10 years. We have a procedure for the Board to decide on open or abandoned positions, to advertise for applicants and a committee to evaluate applications. The efficiency of that system will be based on how much advance notice we get of retirements.

Follow-up Question: *I suppose the logical follow-up question would be, if you don't get a lot of advance notice and a significant number of members decide to retire around the same time, how would you bring in and train a sufficient number of attorneys to handle the caseload? It is not just an academic question since twelve of your members have*

been practicing for 30 years or more. (I know that in the current economic environment much of the workforce is working beyond minimum retirement age and lawyers probably even longer than average, but if the economy takes a significant turn for the better, there may be a lot of retirements that occur around the same time.)

Response: As to what to do in the face of a mass retirement ("migration"): We have yet to work out a specific program, but I will begin to cover the issue with the Board at our next meeting.

3. **Question:** *What is your succession plan for the administrator position?*

Response: We do not have a definite plan for the succession of the administrator. We have several competent members, a few of whom would take the job if recruited. Training would take about a month. But, I am still here to haunt you.

Follow-up Question: *We're glad you're still there and hope you stay a long time. I think the commission would be interested in the process that would be used to select a new administrator assuming there were willing applicants. Would there be any effort to confer with the bench and others at that point about who could best fill your shoes? Without outside input would the board and membership be tempted to select the person least likely to enforce quality standards and expectations?*

Response: As to the administrator: I have mentioned to the Board that any successor should be selected based on Board interviews of those interested, and feedback from the judiciary on ability to work within the present system. There would have to be a training period with me as well. That is about as far as the Board has taken the process.

4. **Question:** *What progress has been made on the development of an attorney evaluation procedure?*

Response: We have already designed and mailed out a client survey to a random sample of clients for all of our attorneys. The return rate from clients is low, as anticipated. We have yet to examine and evaluate the data. However, it will be a factor in the training and work we do with attorneys.

Follow-up Question: *I guess I may have misunderstood what kind of attorney evaluation process Brad Jonasson was working on. When we met in your office back in February, I assumed it was a more comprehensive evaluation than a client feed-back form that was being considered, with direct outreach to judges, district attorneys and others participants in the local court system for input on a regular basis, something like the process put in place by MCAD after its reorganization. Can you clarify?*

Response: As to attorney evaluations, we are drafting a judicial survey for each attorney, and a template for the Board to use to process both judicial and client information on each attorney.

Exhibit B

EXHIBIT B – Questions to IDI Administrator

1. IDI Board. Some recommended best practices for boards and commissions of non-profit organizations are that they include outside members (you already have one), a mechanism for bringing newer members onto the board, and few, if any permanent, members. PDSC may wish to make a recommendation to IDI on some of these best practices and would like to be informed whether you have considered adding board members, rotating board seats or making other changes in your board structure, and, if so, why they were rejected.
2. You have brought in two new consortium members recently. Was that part of a succession plan? Were they brought in by individual attorneys or by IDI? Who bore the burden of training/mentoring the new attorneys? Was this an effective way to bring in new lawyers? Are there other approaches being considered? Do you have a comprehensive plan for replacing attorneys as they retire or move into other areas of practice?
3. What is your succession plan for the administrator position?
4. Does IDI plan to implement an attorney evaluation procedure? Will it include soliciting information from others in the juvenile justice system about the performance of the attorneys? Will it include a process for removing attorneys with significant performance issues?
5. One of our commissioners is considering recommending to the commission that it develop a series of specific requirements/expectations of attorneys for children. It might require, for example, that an attorney for a child between the ages of 0 and 5 be required to observe the child in the residence after initial placement and then on a regular basis, to speak with the foster parent at regular intervals, to communicate with DHS, the CASA, treatment providers, and parents' attorneys on a regular basis, to maintain a file for each client in which the attorney periodically articulates why the child cannot be returned home or placed with relatives, lists the issues that the child's attorney has raised in conversations with the DHS worker, in CRB reviews, in court hearings, and what actions the attorney is taking to advance the plan for the child.

INDEPENDENT DEFENDERS, INC.

PO Box 1229
Lake Oswego, OR 97035
503-635-5805

June 10, 2009

Ingrid Swenson
Executive Director
Office of Public Defense Services
1320 Capitol St., NE, Suite No. 190
Salem, Oregon 97301

Re: Response to Commission's questions of April 24, 2009

Dear Ms. Swenson:

I have reviewed the questions sent to me on April 24, 2009. The our Board has met and discussed the issues which were raised by these questions. We have started the process of implementing some changes and are considering other adaptations to how we have been operating since our inception. We have always been a relatively small provider. We began with four attorneys. Three of the attorneys are still active in our consortium. They comprise the current board of directors, with an additional board member who is currently a CASA and has been a business owner. Although our consortium has grown from four attorneys to the current eleven, it is still a smaller provider in the Metro area. We have kept our area of expertise to Juvenile law and Civil Commitments. Over the past two years, for the first time in our history, we have had a reduction in the number of cases from what we have estimated in our contract. As we have always done, we have paid our attorneys on a per case basis. As we have had a decrease in our caseload, we have been able to have a sum available to reimburse the Commission as a result in the overage in our caseload. We have worked with our analyst in reconciling our numbers and reaching agreement as to appropriate adjustments in our contract.

1. As mentioned above, we currently have four board members. As a result of our meeting with you earlier this year, we have been searching for another public member, possibly someone involved in education or business. It is also likely that we will add to the board one of our member attorneys on an annual rotating basis. We have no "mechanism" for bringing in new board members. We have discussed possible

new additions with our current board and with the member attorneys.

2. Our caseload has decreased over the past two years. Although we have discussed bringing in new attorneys, with the decreasing caseload, it has been difficult to be able to add people during this time. We have added three attorneys over the past 8 years. Two of these attorneys were added as a result of attorneys leaving the organization and the need to keep the number of attorneys stable to handle the number of appointed cases. Two of the attorneys shared space with Clancy and Slininger and they mentored the attorneys and assisted them in learning juvenile law in Clackamas County. The third attorney had a number of years of experience practicing juvenile law in Multnomah County. He wanted to practice in Clackamas County. He initially shared office space with me and has now moved his office to Oregon City. We receive letters and emails from attorneys during the year expressing an interest in joining our consortium. It would appear from their resumes that they have experience in this practice area and may be able to “hit the ground running” if we needed to add attorneys. We have discussed this pool of attorneys, word of mouth referrals and if necessary advertising, if we need to add one or more attorneys in the future.

3. We do not have a succession plan for the administrator position. As mentioned, this is a small group. We have been lucky to have had only two administrative assistants during the life of our organization. Both have been very knowledgeable and have had the ability to work with the Court and the Commission or its predecessor. If I decide that I no longer want to perform the duties of administrator, our current assistant would be vital in assisting the new administrator in the performance of his or her duties. I am confident that many of the current attorneys in our contract could perform the duties of the administrator if they wanted to do so. It is my belief that my replacement would come from this pool. This is not a highly paid position as we have tried to keep overhead low and maximize the payment for services to our clients. It is not a full time position and would best be done by someone who is representing clients under the contract as well as administering the contract.

4. After the last meeting, we have begun to research what would be an appropriate comprehensive evaluation process. We have obtained evaluations from other consortia and would like to be able to incorporate from those a process that would meet the needs of our organization. We would like it to include input from others in the juvenile justice system. It would formalize the process which we already have in addressing performance issues of attorneys. This currently involves written and/or oral notice of the problem needing to be addressed, a plan to correct the problem and timetable to do so, and notice of the possible sanctions if the problem is not corrected.

5. It is appropriate to set some guidelines or expectations as to what should be done in various types of cases, as long as sufficient funds are provided to pay for the services which are expected. If an attorney is expected to go from Canby to Sandy to see a child in a foster home at the initial placement and at regular intervals during the case, then they should be compensated for the time spent to do this. The same is true of the other suggestions. I believe that some of these suggestions are being done by the attorneys in the consortium, although it may not be done consistently in every case

and by every attorney. There should be some leeway given to the attorney to perform the necessary duties in representing their client which take into account the specific issues in the case.

Very truly yours,

Martin R. Cohen

Attachment 3

**OPDS's Revised Draft Report to the Public Defense Services
Commission
on Service Delivery in Post Conviction Relief Cases**

(June 18, 2009)

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. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into service delivery in post conviction relief cases and a summary of the testimony received at the PDSC's public meeting in Salem on Thursday, February 14, 2008. The final version of this report will contain PDSC's service delivery plan for post conviction relief cases.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management widely supported by the state's judges and

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

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

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

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

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

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

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

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

“Structure” versus “Performance” in the Delivery of Public Defense Services

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public

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

agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

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

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

Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

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

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

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

PDSC and have organized themselves in the following ways:

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple

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

defendants or former clients, no county can operate with a public defender office alone.³ As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

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

³ Id.

conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case.

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

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

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

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

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of

this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

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

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

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

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

OPDS's Preliminary Investigation into Delivery of Services in Post Conviction Relief Cases

The primary objectives of OPDS's investigations into particular areas of practice are to (1) provide PDSC with an assessment of the strengths and weaknesses of service delivery in those areas for the purpose of assisting the Commission in its determination of the need to change the structure or operation of the system 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 public defense delivery system begins with a review of an OPDS report like this.

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

On February 14, 2008 from 9:00 a.m. to 1:00 p.m., PDSC held a public meeting in Salem at the Labor and Industries Building. The purpose of that meeting was to (a) consider the results of OPDS's investigation into post conviction relief as reported in the preliminary draft report, (b) receive testimony and comments from interested officials and other individuals regarding the quality of the service delivery, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Post Conviction Relief Cases.

The initial draft of this report was intended to offer guidance to PDSC's guests at its February 14, 2008 meeting, as well as to the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense delivery in post conviction relief cases. This revised draft report is intended to provide a framework to guide the Commission's discussions about the condition of service delivery in this area of practice and the

range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the delivery system. In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice system is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan

A. Description of Post Conviction Relief

What is post conviction relief?

Post conviction relief (PCR) is the principal means by which a convicted person may challenge the lawfulness of a criminal conviction or the proceedings that resulted in the conviction. It is often the only avenue for seeking redress for fundamental miscarriages of justice that may not appear on the record. Consequently, it is an important component of Oregon's public defense system even though it represents only a small portion of the public defense caseload.⁴

PCR is a remedy reserved for situations in which other remedies are not available. A petition for post conviction relief may not be filed when a motion for new trial, a motion in arrest of judgment or direct appellate review remain available.⁵ A criminal judgment must be final before a petition for post conviction relief may be filed. All formerly available common law post-conviction remedies except habeas corpus were abolished upon enactment of Oregon's post conviction relief act. ORS 138.540.

What are the grounds for relief?

ORS 138.530 requires the court to grant post conviction relief if one or more of the following grounds is established by the petitioner:

- A substantial denial of the petitioner's federal or state constitutional rights in the trial or appellate court proceedings that rendered the conviction void
- Lack of jurisdiction by the court to impose the judgment
- A sentence in excess of that authorized by law or an unconstitutional sentence
- The unconstitutionality of the statute under which the petitioner was convicted

⁴ There were 536 post conviction cases in Oregon in 2008 out of a total of 170,306 trial-level non-death penalty public defense cases.

⁵ A petitioner is not required to pursue an appeal before filing a petition for post-conviction relief but when an appeal has been taken, no ground for relief may be asserted in the PCR petition unless it was not and could not reasonably have been asserted in the appellate proceeding (except where the appellant was indigent and was denied counsel and the ground for relief was not actually decided by the appellate court). ORS 138.550.

The most frequent circumstance in which relief is sought is upon the petitioner's claim of ineffective assistance of counsel. Among the other circumstances in which relief has been granted are cases alleging faulty guilty pleas, governmental misconduct, denial of adequate defense resources, and the mental incompetence of the defendant.

What forms of relief are available in PCR?

The post conviction court is authorized to provide a variety of forms of relief including release from custody or supervision, a new trial, modification of the sentence, or "other proper and just relief." ORS 138.520.

What is the appropriate venue for PCR proceedings?

ORS 138.560 provides that proceedings must be commenced in the circuit court of the county in which the petitioner is imprisoned. If the court finds that the hearing can be more expeditiously conducted in the county of conviction, the court may order the case transferred to that county. SB 45 (2003) amended the venue statute to provide that the court may deny a motion for change of venue when a petitioner in a PCR proceeding is transferred to a state institution in another county.

How are proceedings initiated?

PCR is a civil proceeding in which the petitioner carries the burden of proof by a preponderance of the evidence. The proceeding must be initiated by the convicted person, except that in some death penalty cases they may also be initiated by a person with a significant relationship to the convicted person. The petitioner may request appointment of counsel by filing an affidavit stating inability to pay. Once appointed, counsel may move to amend the petition as filed by the petitioner within 15 days following appointment or as otherwise allowed by the court. ORS 138.590.

What is the deadline for initiating proceedings?

There is a two-year statute of limitations for post conviction relief actions that begins to run when the conviction has become final for purposes of appeal. ORS 138.510. The time frame for relief under 28 USC 2241(d)(1) of the federal Antiterrorism and Effective Death Penalty Act, however, is only one year and while the statute is tolled once the petition for post-conviction relief is filed, if an Oregon petitioner does not file the state petition until after the federal statute has run, the petitioner (except under rare circumstances) is barred from relief under the federal act.

What are some of the other pitfalls to be avoided in state proceedings which may limit or defeat federal claims? (These will be described in more detail in the oral presentation.)

- Exhaustion of state remedies (Requires a petition for review in the Oregon Supreme Court if the Court of Appeals upheld the denial of the PCR request)
- Procedural default rule and the doctrine of independent and adequate state grounds
- Presentation of facts and proper statement of federal claim

How are PCR hearings conducted?

ORS 138.620(1) requires that the petitioner be present at any hearing on the petition (other than a hearing on a defense demurrer or other legal issue) but the court may order that such appearance be by telephone or other communication device and this is the most common means of appearance. ORS 138.622 permits the court to approve the appearance of any of the parties, counsel for the parties or witnesses by telephone or other communication device approved by the court. The statute prohibits this alternative form of appearance for petitioner or petitioner's counsel, however, unless the facilities used enable the petitioner to consult privately with counsel during the proceedings. Evidence at the hearing may be in the form of affidavits, depositions, oral testimony or other competent evidence. ORS 138.620(2).

What is the appropriate role of the client in PCR proceedings?

In state post conviction cases the client is ultimately responsible for raising all appropriate issues, *McClure v. Maass*, 110 Or App 119 (1991), *rev. denied*, 313 Or. 74 (1992). ("A petitioner's failure to bring counsel's refusal to raise an issue to the trial court's attention in the first post-conviction proceeding bars subsequent post-conviction litigation on that issue.")

How should an attorney prepare for a post conviction proceeding?

The following outline is derived from materials prepared by Wendy Willis, a former Assistant Federal Defender, as part of her presentation in March 2002 at an Oregon Criminal Defense Lawyers Association seminar on post conviction relief. This outline is provided only as a very basic summary of the components of representation in PCR cases. As noted below, an Oregon State Bar work group developed performance standards that were approved by the Board of Bar

Governors in March of 2009 for attorneys practicing in this area.

- Preparation by counsel:
 - Meeting with client
 - Review of written materials (including transcript; court file, state's file, trial and appellate attorneys' files, bar files on attorneys, jail records (including medical records)
 - Investigation (trial team, client, client's family, witnesses, law enforcement personnel, jurors, DNA evidence, appellate counsel)
 - Consultation with appropriate experts (forensic experts, mental status experts, legal experts, statisticians or social scientists)
- Discovery – Oregon Rules of Civil Procedure govern in PCR cases
- Pleading – framing the issues, preserving claims, exhaustion and default
- Preparation of client for deposition and hearing
- Post conviction hearing: evidence and methods of proof
- Findings of fact and conclusions of law
- Appeal and petition for review - role of appellate attorney

B. Quality Concerns

Concern about the overall quality of representation in post conviction relief cases is not a new issue for PDSC. Since the early days of the Commission the problem has been discussed and a number of possible solutions offered. There are, of course, some attorneys who provide the highest quality of representation in these cases and who have won relief for their clients from a variety of sentences. Unfortunately, however, the quality of performance is very uneven and it is therefore appropriate for the Commission to consider what steps can be taken to improve quality statewide.

Indigent Defense Task Force III Report

In May 2000 the Oregon State Bar's Indigent Defense Task Force III Report expressed significant concerns were about the quality of representation being provided in post conviction relief cases. The Task Force noted that its members were especially concerned about inadequacies in representation in post conviction cases since post conviction relief is supposed to provide a forum for monitoring the adequacy of representation in other types of cases. It found that PCR cases were handled almost exclusively in a relatively few judicial districts where state prisons are located and that small firm contractors in these areas handle a disproportionate amount of the work and that, as a result relatively few judges and practitioners have firsthand experience with these cases. Judges in these areas and the state Indigent Defense Services Division reported significant difficulty finding competent attorneys willing to accept the cases at the rates offered. Funding for these cases was considered grossly inadequate. The Task Force reported on its interview of Steven Wax, the Federal Defender for the

District of Oregon. Mr. Wax's perspective is a uniquely broad one since his office represents persons convicted in state courts who seek relief in federal habeas corpus. He noted that post conviction cases are even more under-funded than trial level representation since trial level cases are often negotiated by way of plea so that providers assume that a certain percentage of cases will be resolved without trial. But this assumption does not apply to post conviction cases, virtually all of which go to trial since there is no procedural mechanism for negotiated resolutions. Every post conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office had found, however, that few post conviction cases in state court were investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Mr. Wax noted that the problem is exacerbated by attorneys' reliance on the *McClure v. Maass, supra*, standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. Of course few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may have been legally inadequate. He also noted that issues not raised in the state court proceedings were becoming increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. It was recommended to the task force that increased funding, additional investigative resources, additional education and greater oversight be provided in post conviction relief cases.

C. Possible Solutions

In a status report on April 19, 2002 the Task Force reported that no remedy other than the creation of a statewide entity would be able to provide competent and economical representation in post conviction cases. It noted the advantages of a single specialized office where lawyers could develop the expertise to handle PCR cases in an efficient manner, like the Oregon Department of Justice has done in the defense of these cases.

The PDSC created its own workgroup in June of 2002, chaired by the Vice-Chair of the Commission, Shaun McCrea, to explore solutions to the problem. Among the proposals explored were the drafting of performance standards, and the consolidation of representation at both the appellate level and the trial level. No formal request was apparently made to the bar to create a work group on performance standards until 2005. At that time a bar group was already working on updating performance standards in juvenile and criminal cases and the bar suggested that the post conviction relief project be postponed until the completion of the earlier project. In March of 2007 a formal request was made to the bar to create a task force to develop performance standards for post conviction relief practitioners. The proposal was approved and task force

members were appointed.⁶ That task force completed its work and proposed a set of performance standards that have now been approved by the Oregon State Bar and are available on its website⁷. A summary of the testimony of Dennis Balske, the chair of the group, describing the role of the new standards at the March 12, 2009 PDSC meeting is set forth below.

Consolidation of representation has also been pursued. Post-conviction relief appeals (in other than death penalty cases) are now being directed almost exclusively to the Oregon Appellate Consortium, a group of highly experienced appellate attorneys. PDSC has proposed in several legislative sessions a budget policy package that would create four full time-equivalent positions at OPDS that would be devoted to PCR trial level representation.⁸ These packages have not been approved. As an alternative, OPDS has attempted to identify a group of well-qualified private providers to concentrate on PCR representation at the trial level. Currently two Salem practitioners are devoting a significant amount of their professional time to these cases.⁹

Other efforts at improving representation have come from the Oregon Criminal Defense Lawyers Association, which continues to sponsor a post-conviction relief seminar every two years¹⁰, and from the Federal Defender's office which offers advice and assistance to attorneys working on these cases and provides speakers and program materials for OCDLA's seminars. The Bar's Criminal Law CLE volume includes a chapter summarizing the post conviction relief statutes and case law co-authored by Chief Justice Paul J. De Muniz, Federal Defender Steven Wax, Assistant Attorney General Lynn Larsen, and PCR attorneys Douglas Park and Andy Simrin.

Unfortunately, despite the efforts that have been made, OPDS continues to receive reports about quality concerns from a variety of sources including the Federal Defender, PCR trial judges, Department of Justice attorneys, Appellate Consortium attorneys, the Client Assistance Office at the bar, clients, and at least one correctional officer.

OPDS is also advised that some of the judges who hear post conviction cases on a regular basis exacerbate the problem by discouraging or attempting to prevent

⁶ Task Force members were: Dennis Balske, Tony Bornstein, Noel Grefenson, Lynn Larsen, Harrison Latto, Paul Levy, Ingrid MacFarlane, Mark Olive, Rita Radostitz, Matt Rubenstein, Marc Sussman, Hon. Youlee You.

⁷ <http://www.osbar.org/docs/resources/ConvictionReliefProceedings/CSPCR3.pdf>.

⁸ In the 2007 session, PDSC's Policy Package No. 102 sought an increased allocation for the Legal Services Division of \$835,293 to add three Deputy Public Defender 1 positions and one Senior Deputy Public Defender 2 position. A reduction in the allocation to the Public Defense Services Account of \$531,840 would have meant a net impact of \$303,453 to fund the package.

⁹ In addition, the Marion County Association of Defenders continues to represent a significant number of clients in PCR cases.

¹⁰ OCDLA included a review of the new performance standards for post conviction relief cases in a March 2009 CLE in Salem.

full review of the issues raised in these proceedings. It is hoped that improved representation might result in effective challenges to these practices.

Although neither the federal nor the state constitution require appointment of counsel at public expense in post conviction cases, in the past when the legislature has considered the elimination of the right to representation, the Department of Justice, among others, has advised against such action.¹¹

Testimony provided by invited guests and others at the Commission's February 14, 2007 meeting highlighted additional concerns and included additional recommendations for improvements. In addition to the measures previously recommended for consideration - enhanced compensation, a continued effort to centralize services either at OPDS or through contract providers, and additional training opportunities for attorneys - presenters at the February 14 meeting identified changes to statutes, rules and practices that might impact quality.

Summary of Testimony at February 14, 2008 Meeting

At its meeting on February 14, 2008, the Commission heard testimony from attorneys Noel Grefenson and Marc Sussman, both of whom represent petitioners in trial level PCR cases.

Mr. Grefenson said that he had been asked by PDSC in 2006 to enter into a contract to handle PCR trial level cases, that he agreed to such a contract, that he currently receives approximately five appointments per month and has about 30 active cases in his office at any one time.

After accepting this assignment he met with the paralegals at the prisons and offered to assist them in getting the materials they needed to do their work. They agreed to let him know if his clients were expressing dissatisfaction with his representation. He has received only one bar complaint since 2006.

Upon receiving an appointment in one of these cases, his office sends the former attorney a release of information from the client and begins gathering records that are then scanned and organized. He receives cases from all parts of the state. Investigating cases that arise in other parts of the state can be difficult. Petitioners have a right, and if they will later be seeking relief in federal court, an obligation, to ensure that all viable claims are raised. Prison inmates often lack the skill to do that.

¹¹ In 2003, for example, the Department of Justice testified in opposition to HB 2092 which would have eliminated the right to counsel in post conviction cases. The bill was referred out of the House Judiciary Committee without recommendation and was sent by prior referral to the Ways and Means Committee where it remained upon adjournment. In March of 2003 appointment of counsel in all PCR cases was suspended as part of the Oregon Judicial Department's Indigent Defense Budget Reduction Plan and was not resumed until July 1, 2003.

ORCP 17 requires lawyers to certify only meritorious claims, but the case law holds petitioners responsible for not raising any other issues that they might claim as a basis for relief. For lawyers this creates a dilemma. In order to maintain a good relationship with his clients an attorney may not be able to filter out the groundless claims from the meritorious ones. Some cases are resolved quickly when the inmate realizes that if he is successful in overturning his plea agreement the result will not be a dismissal of the case but a return to court to face all of the charges again, including those that were dismissed. Other cases are huge cases with thousands of pages of transcript. If an attorney gets bogged down with too many cases, the attorney may just file claims without setting forth the evidence to support them.

Mr. Grefenson receives \$2,100 per case and post conviction work is approximately 50 to 75% of his practice. He does not have an investigator on staff but hires them as needed. He does not use an investigator in many cases. His staff does contact some witnesses directly. He obtains documents from the District Attorney's office and from trial counsel. He gets medical and crime lab reports when they are involved. He does not use the Oregon Rules of Civil Procedure to request production of documents. He does not often take depositions of witnesses and uses affidavits instead. Although there is a hearing in every case, most of the time he does not call live witnesses.

In Marion County, PCR cases are assigned to all of the judges except those at the annex and to one of the criminal judges. The case remains with the original judge throughout the proceeding. A status conference is scheduled in each case. Counsel notify the court when the case is ready to proceed to trial and the court schedules a hearing date. The average case is resolved within approximately eight months. The judges seem to treat these cases no differently from other cases. The petitioners are unlike the plaintiffs in other cases since they sometimes contact the court directly and express concerns about the actions taken by the court.

In the division of the Attorney General's office that handles post conviction cases the attorneys are easy to deal with.

It has not been difficult to get approval from OPDS for funds for investigation or for experts but Mr. Grefenson requests them only when he needs them.

Mr. Grefenson believes the quality of representation statewide is average and could be improved. One change he would make would be to standardize some of the procedures since different courts have different approaches. One court gives the attorney 30 days to file an amended

petition, others allow 90 or 120 days. A complex case designation would allow the attorneys to separate out the cases that need more attention.

A central PCR office would be a positive development. Among other things it could install a video system to permit more contact with clients.

Mr. Sussman said he had come to this work from a slightly different direction. He has practiced law for more than 30 years and started doing post conviction cases about 13 or 14 years ago. Those cases are now about 25% of his practice, not including the capital post conviction cases he does under his death penalty contract. If an attorney puts a lot of effort into a case, word can get around and other inmates start calling you. Post conviction has become a significant part of his practice. He gets fewer calls from prisoners in Marion County than from eastern Oregon prisoners. Having been both a public defender and a private practitioner, he knows that attorney caseloads have a lot to do with the kind of representation people get. In his retained work he can select the cases he wants to handle and sometimes declines to take a case that doesn't have merit. In some areas he is comfortable recommending that prisoners accept appointed counsel but there is a huge disparity in the range of quality of representation that people get in these cases. The approach to representation outlined by Wendy Willis in the Commission's materials for the commission meeting describes his own approach to preparation of these cases.

The interplay between the state post conviction and the federal habeas timelines is very important to his practice. Most PCR cases revolve around the issue of ineffective assistance of counsel. In order to obtain relief you have to show that counsel made a serious error or admission and that the client was prejudiced. It is not enough to show that trial counsel didn't call a witness, you have to show what the witness would have said and that it would have affected the outcome of the case. The attorney has to look at PCR cases from two perspectives – that of the trial lawyer in reviewing what was done and not done, and that of the appellate lawyer in reviewing the record and applying legal standards to the issues. He uses an investigator in almost every case because that has been one of the most fruitful areas of post conviction practice. He investigates and consults with experts and calls those experts and witnesses at trial. In eastern Oregon there is pressure to present cases on paper. Marion County judges will accommodate live witnesses. It has been a good idea to use retired judges to handle cases in eastern Oregon because they have time to review all the materials but typically those judges are in Salem in a hearing room at the Department of Justice and the petitioner and his lawyer are in a prison on the other side of the state. It is hard to get a witness to a hearing room to testify in most cases. He relies on

affidavits for tactical reasons in some cases and on depositions, which may be held anywhere in the state.

If PDSC moves in the direction of setting up a statewide office to handle post conviction and it is adequately staffed and has appropriate resources it could provide more uniformly competent representation.

Mr. Sussman said that one thing that has to be considered with PCR cases is that the cost will be driven by fact that the case is tried in the county in which the petitioner is imprisoned even though the underlying offense may have occurred on the other side of the state. The system might be more efficient if venue lay in the county in which the conviction occurred.

Judge James Hargreaves testified that he is a senior judge from Lane County who had never tried a post conviction case until he assumed senior status five years ago. He has now tried hundreds of post conviction cases filed by prisoners in the three prisons in Umatilla and Malheur Counties. When he began trying these cases he was appalled at the poor quality of the legal work. He had been a judge for 20 years and had never seen such poor practice. There is a culture in both counties that accepts poor practice. Umatilla County, in particular, still has a very big problem. He filed a bar complaint against one of the attorneys.

The legal community in both counties is so small that it is difficult to find attorneys to take the cases. Even the firms that do good work in other cases don't do much better than anyone else in these cases. The standard procedure in both counties was for a prisoner to file a petition which included a laundry list of complaints about what his trial lawyer had not done. After counsel was appointed an amended petition would be filed by the lawyer that generally recited the same list, including misspellings. Lawyers disregarded ORCP 17 which requires them to certify the merit of the claims. Prisoners are concerned that if they don't submit the laundry list they cannot get their cases into federal court.

Periodically a new claim will be filed by one inmate and then all of the other petitions from that prison will include the same claim. Lawyers are concerned about angering their clients by not complying with their demands regarding the claims to be filed. Angry clients threaten attorneys, threaten their families, file bar complaints and sue their attorneys. The culture that has developed is a "go along, get along" approach. Occasionally an attorney puts some real effort into a case.

Ninety percent of the cases probably lack merit; 10 percent require a serious look and only three to five percent have merit, although it is true that you can't know which cases have merit if they never get developed

because so few are investigated. Most cases in Malheur and Umatilla Counties are tried via television. The judge (who is usually a senior judge, not one of the judges from the court where the matter is pending) is located in a hearing room in Salem with the Assistant AG. The petitioner and his counsel are usually in one of the prisons. All of the exhibits are provided to the judge before the hearing. Only occasionally is live testimony presented at the hearing except for brief testimony by the petitioner. It is a paper trial and that is the only way these cases can get done.

Beginning March 14, 2008 new rules will be going into effect in Malheur and Umatilla counties. Judge Hargreaves worked with both sides to develop rules that comply with the PCR statutes. The rules are set forth in a document he wrote entitled "The Pleading Edge." Among other things the rules will require that the petitioner make a prima facie case before he is allowed to go forward. There will be a 120-day period within which the amended petition must be filed. He hopes the new process will weed out meritless cases at the pleading stage. The judge made presentations on the new rules to the legal assistants at all three eastern Oregon prisons. The main issue the prisoners wanted to discuss was the poor quality of representation they receive from court-appointed counsel. The legal assistants were recommending that prisoners represent themselves. Judge Hargreaves urged them to get counsel to assist them in complying with the new rules.

Attorneys could be more effective in cases if they used expert testimony instead of just relying on the transcript. OPDS needs to have a system of peer review. All these trials are recorded and copies of the CDs could be reviewed. The practice in Umatilla and Malheur is extremely poor. People should not get contracts without being reviewed.

Lynn Larsen has been with the Department of Justice (DOJ) for more than 18 years. In his experience, because of the number of these cases, the trials have always been paper trials. DOJ currently has 650 PCR cases in the office, which represents all of the felony PCR cases in the state. The trial division used to handle the death penalty PCR cases as well but these cases have now been transferred to the Appellate Division. There are six lawyers in the trial division. They received 40 new cases this month. They see spikes in case numbers when new Supreme Court opinions are issued. Statewide there are around 17,000 criminal prosecutions per year. There are 1100 appeals and 400 post conviction cases filed every year. Most of the cases used to be in Marion County but now about half are there and half in other counties, primarily Umatilla and Malheur. The trial division also handles all of the federal habeas cases as well.

The AG attorney deposes the petitioner in almost every case once counsel has been appointed and an amended petition filed. All of the depositions are done by phone. It is expensive for DOJ to take the depositions when the cost of a court reporter is approximately \$3.00 per page. Some cases are settled but DOJ tries to get agreement from the DA's office since they have gone to a lot of trouble and expense to prosecute the case. Even though they don't have the burden of proof the state deposes the petitioner so that the issues can be narrowed before trial. The state also submits the record of the case so that a reviewing court has an adequate record on which to proceed. Parties submit their trial memos at the same time so neither side knows what the other side will be saying. The better practice would be to require the petitioner to submit a memo and allow the state to respond (which Judge Hargreaves indicated will be the practice under the new pleading rules in eastern Oregon.) The Department of Corrections and the courts have both set up video connections for the trial of these cases.

The practice in Umatilla County when he first started handling cases there was not very good. Trial memoranda were seldom filed. The petitioner would attend the hearing and the attorney would generally ask some of the same questions that had been asked in the state's deposition. In order to improve the quality of representation standardizing the process would be helpful. Status conferences like those held in Marion County could be used to set time frames for pleadings and the trial. A peer review process is something that the Commission or OPDS could do. But it really boils down to a question of time and money. The fewer cases an attorney has, the more time there is to work on each case. DOJ has objected to legislative proposals to remove funding for appointed counsel in PCR cases principally because it is easier to litigate a case with counsel. DOJ does not want innocent people in prison.

Erin Largesen is an AAG who handles PCR and habeas appeals. She has a background in civil practice and was surprised to see how poorly developed the record sometimes is in these cases. There is often only a trial file and no external evidence. She was also surprised by the lack of the use of civil discovery tools, the lack of attachments to the petition, the simultaneous filing of trial memos and the lack of issue selection. The lawyers appear to need more training in civil litigation. Standardization of practice and additional resources would also be helpful. The creation of a unit within OPDS would offer not only the peer review component but would add the benefit of having two attorneys looking over a case.

Chris Mullmann is with the Client Assistance Office of the Oregon State Bar. In the last two years the bar received 2,210 complaints. Seven hundred and eight of those or 32.85 percent came from inmates. A significant proportion involved PCR cases. The issues raised by inmates

generally do not amount to ethical violations although they may constitute ineffective assistance of counsel. The bar generally informs complainants that the lawyer's conduct does not fall below the level of competent representation although it might be constitutionally defective. There was one PCR attorney in eastern Oregon who had 130 bar complaints. He knew what he had to do to meet the bar's ethical standards. The bar now refers complainants with complaints about the quality of representation provided by court appointed counsel to OPDS and also provides OPDS with a weekly report of new bar complaints. This year, out of 2800 complaints that the Client Assistance Office received, approximately 365 were sent to Disciplinary Counsel for further action. Most practitioners are sole practitioners and most complaints are about sole practitioners. His impression is that sole practitioners who share space with attorneys in a similar practice seem to have fewer complaints than those who are entirely on their own and lack support staff.

Steven Wax is the Federal Defender for Oregon. He has handled or supervised more than 3,000 federal habeas cases all of which came from the state system. The culture in the prisons, among the defense bar and on the bench have all combined to create the problems that exist in the system today. There needs to be communication between the bar and OPDS and between OPDS and its contractors. The law which requires the petitioner to identify the issues needs to be changed. But regardless of whether the law is changed, OPDS needs to get qualified lawyers to do the work and then monitor their performance. The issues which need to be focused on in PCR representation are issue identification and issue development. The attorneys can't identify the issues unless they investigate and gather the necessary materials. Part of the problem is that these cases are treated like a continuation of the criminal case. They are civil cases where the petitioner is the plaintiff. OPDS should use lawyers who understand both criminal law and civil practice. Simultaneous pleadings also present a problem. The AG should not be taking depositions of the petitioners in these cases. Identification of the claims should come from the petitioner's attorney. If the AGs continue to take petitioner depositions, the petitioners' attorneys should be active participants.

Caseloads need to be appropriate. Federal defenders are assigned 25 new cases a year and have 50 to 60 cases in their caseload at any given time. Cases in the state system don't last as long so if they receive 25 new cases per year they might have 30 or 40 at a time. There also needs to be a sufficient number of investigators and paralegals. If OPDS establishes a PCR unit of 12 lawyers it would also need approximately 12 support staff.

Drew Chilton is a co-director of the Oregon Appellate Consortium and handles non-capital post conviction appeals. The Attorney General's office is highly professional and does good work. As an appellate attorney Mr. Chilton reviews the post conviction file and generally the most informative document he finds in that file is the AG's trial memo. There is a big difference in the quality of representation at the trial level in cases in Marion County as compared to those in the eastern Oregon counties. In Marion County attorneys like Noel Grefenson and Olcott Thompson do excellent work. Five years ago the representation he saw in Umatilla and Malheur Counties was an unmitigated disaster. Today it is merely a mitigated disaster. Some of the causes are the small size of the legal community in Malheur County, the desire by the court to expedite PCR cases, and the lack of meaningful investigation. Additional resources would improve the system but other things could help as well including changing the venue statutes to have cases heard in the county in which the conviction occurred. The quality of representation is consistently better in cases tried in the county of conviction. Both the lawyers and the judges are more attentive. A properly operating PCR system provides a useful check on the quality of performance of trial and appellate counsel.

OPDS staff and members of the commission discussed the difficulty of finding well-qualified attorneys to handle PCR cases. Commissioner Greenfield asked whether OPDS would receive proposals if it were to simply issue an RFP for these cases. Kathryn Aylward indicated that she did not believe OPDS would receive any proposals. It would also be difficult to recruit attorneys for a PCR unit at OPDS. Paul Levy described his experience with a PCR firm in Indiana. He noted that in Oregon very few PCR attorneys, except in death penalty cases, seek approval for non-routine expenses for investigators and experts in PCR cases. He reported that the bar, at the request of OPDS, has established a workgroup to create performance standards for attorneys in PCR cases. The group has met and is scheduled for a second meeting in March. In addition to creating performance standards the group is interested in making recommendations for improvements. Ingrid Swenson said that although concerns with the quality of representation in PCR cases were well known to OPDS, the system problems identified at the hearing were not. She noted that OPDS had tried to address quality concerns but had few options.

Steve Gorham testified that Judge Hargreaves's rules will prevent petitioners from having their day in court and are meant to exclude litigants from the process. The Attorney General's office handles cases professionally unless they believe they are going to lose. A central PCR office is a good idea if you provide sufficient resources.

Summary of Testimony at March 12, 2009 PDSC Meeting

Dennis Balske, who served as the chair of the Post Conviction Relief Task Force that was created by the Oregon State Bar to prepare written performance standards for attorneys in post conviction relief cases, testified that the standards that the group developed are comprehensive and should serve as a road map for lawyers new to the field. They can also assist judges who may not understand the extent of the attorneys' obligations in these cases.

The task force recommended that PDSC create an office that specializes in PCR representation. Other approaches are unlikely to succeed.

Chair Ellis identified some of the obstacles to improving representation in this area of practice and agreed that a specialized office, as proposed by the Commission in its current and previous budget requests, would be the best option.

Kathryn Aylward was asked whether a contract office could provide the necessary services. She said that that effort had been made but that individual contract attorneys have not been willing to create such an office.

Mr. Balske said PDSC would not be able to attract the best quality lawyers to this work because the level of compensation provided is not sufficient.

Commissioner Potter inquired whether an attorney taking a high volume of those cases wouldn't be able to put more effort into the meritorious cases and, by averaging those cases with the non-meritorious cases, on average receive a reasonable rate of compensation.

Mr. Balske said that a lawyer can't determine whether a case is meritorious without putting in a significant amount of time and PDSC's current rate of \$2500 per case is not nearly sufficient to do that.

Summary of PDSC Discussion at April 16, 2009 Meeting

Ingrid Swenson said that, since performance standards have been adopted by the bar, the next step is to provide comprehensive training on the standards. She suggested that the commission continue to seek funding for a post conviction relief unit at OPDS in future legislative sessions and noted that it would not be possible to use currently authorized positions at the Appellate Division for this purpose since attorneys cannot be spared from that division and additional positions will not be forthcoming. In addition most of the appellate attorneys lack trial experience.

Chair Ellis inquired about the number of public defense attorneys currently handling post conviction cases. Kathryn Aylward said that there are five contractors who do primarily PCR cases and approximately fifteen others who have some PCR cases included in their contracts. Chair Ellis said that it is preferable to have the work done by specialists, like the Department of Justice.

Peter Ozanne said the current model is unsustainable and that it may be time to inform the courts and others that elimination of PCR or court appointed counsel in PCR cases might be preferable. Peter Gartlan said that the right to counsel in PCR cases is statutory and PDSC is required to provide counsel in these cases. If the state system fails to provide an adequate process, the federal courts could decide to hear these cases under its habeas jurisdiction, which would be far more expensive for the state.

Chip Lazenby said that if the legislature doesn't fund a function then there is no obligation to provide it.

Paul Levy noted that PDSC's case rates in PCR cases are higher than the rates in most other categories of cases and that investigation costs are covered separately.

Kathryn Aylward said that the PCR caseload has fallen off dramatically and since there are only a few providers involved she and her staff can have direct discussions with each of them during the contract renewal process about compliance with performance standards.

Peter Ozanne said the service delivery plan should articulate quality standards and should support the creation of an FTE based post conviction relief office that can effect a complete change of culture.

Proposed Service Delivery Plan for Post Conviction Relief Cases

On average, the quality of representation provided by public defense attorneys in non-death penalty post conviction relief cases continues to be unsatisfactory.

The Oregon State Bar's Post-Conviction Relief Task Force made two recommendations for improving representation in its December 12, 2008 report to the bar. Its principal recommendation was that, "The Office of Public Defense Services should develop a specialized group of attorneys with expertise in post-conviction cases to represent petitioners, comparable to the trial division of the Oregon Department of Justice, which handles the cases for the state." It also recommended that PDSC amend its qualification standards to require knowledge of and adherence

to the performance standards and that training on the performance standards be provided.

At its meeting on May 21, 2009 PDSC approved an amendment to the qualification standards requiring that to be approved to represent financially eligible persons at state expense, an attorney must have “read, understood and agree[d] to observe applicable provisions of the current edition of the Oregon State Bar’s Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases....” In addition the amended standards now require that attorneys seeking appointment in post-conviction relief cases have attended and completed a legal education and training program on post-conviction relief proceedings within two years prior to appointment.

As reported to the commission at the May 21 meeting, the Oregon Criminal Defense Lawyers Association is tentatively planning a one day training on the new performance standards in March of 2010.

With respect to the recommendation that PDSC develop a specialized unit of post conviction relief attorneys within OPDS, PDSC proposed the creation of such a unit in its budget proposal for 2009-2011 as well as in previous budget proposals. The PDSC budget, as approved by the Joint Ways and Means Committee, however, includes neither funding nor position approval for such a unit.

Without funding for a specialized unit, PDSC will continue to seek improvement in the quality of representation provided to public defense clients in post conviction relief cases through the contract process. PDSC directs staff, using the resources available, to secure contracts with the best qualified public defense providers with whom it is able to come to agreement through its RFP process. OPDS staff will also continue to work with CLE providers including the Oregon Criminal Defense Lawyers Association to ensure that adequate training in PCR representation is available.

PDSC will revisit the delivery of services in post conviction relief cases in the spring of 2010.

Attachment 4

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To: Joint Committee on Ways and Means – Subcommittee on Public Safety
From: John Borden, Legislative Fiscal Office (503.986.1842)
Date: June 2, 2009
Subject: HB 5040 – Public Defense Services Commission

	2005-07 Actual	2007-09 Legislatively Adopted	2007-09 Legislatively Approved	2009-11 Essential Budget Level	2009-11 LFO Recommended Budget	% Change from EBL
General Fund	183,534,420	214,885,309	215,263,430	235,774,872	212,197,385	-10.0%
Other Funds	316,795	604,619	631,568	676,845	512,049	-24.4%
Total Funds	\$183,851,215	\$215,489,928	\$215,894,998	\$236,451,717	212,709,434	-10.0%
Positions	56	64	68	78	69	-11.5%
FTE	55.05	63.25	65.85	77.07	69.00	-10.5%

A Public Defense Services Commission's Recommended Budget

The following are changes to the essential budget level (EBL) for the Public Defense Services Commission. The Commission's EBL is \$236.5 million, of which \$235.8 million is General Fund and \$.7 million is Other Funds. The EBL includes a mandated caseload adjustment totaling \$19.4 million General Fund.

Commission policy packages above the EBL are excluded from the below recommendations and therefore not included in the Legislative Fiscal Office's budget recommendation.

B Legislative Fiscal Office Recommendations

The Legislative Fiscal Office (LFO) recommends a budget of \$212,709,434 Total Fund and 69 position (69.00 FTE) for the Commission for the 2009-11 biennium. The General Fund portion of the budget totals \$212,197,385 and the Other Funds portion totals \$512,049.

Other statewide adjustments to agency budgets are unknown at this time. Any additional adjustments will be made in an omnibus measure at the end of the Legislative Session.

The LFO recommendation includes a single budget note for the Commission. There were no technical adjustments for the Commission's budget beyond those already included in the EBL.

The following adjustments to the Commission's essential budget level to ensure statewide expenditures balance to projected revenues.

Appellate Division - Reductions to EBL

Package	Title	Amount			LFO Recommendation
810	Reduce Mandated Caseload Adjustment (elimination)	(\$910,297)	GF	(6)/ (5.52)	Approve
811	Additional Program Reductions	(\$273,082)	GF	(1)/ (1.00)	Approve
	Division Total	(\$1,183,379)	GF	(7)/ (6.52)	

Public Defense Services Account - Reductions to EBL

Package	Title	Amount	Fund-Type	Psn./FTE	LFO Recommendation
810	Reduce Mandated Caseload Adjustment (50% reduction)	(\$9,179,835)	GF	--	Approve
811	Additional Program Reductions	(\$13,149,226)	GF	--	Approve
	Division Total	(\$22,329,061)	GF	--	

Contract and Business Services Division - Reductions to EBL

Package	Title	Amount	Position	FTE	LFO Recommendation
804	Roll-Up of 2007-09 Reductions	(\$164,796)	OF	(2)/ (1.55)	Approve
811	Additional Program Reductions	(\$65,047)	GF	--	Approve
	Division Total	(\$229,843)	TF	(2)/ (1.55)	

C Budget Notes

The Commission has a single budget note:

The Commission is instructed to report to the 2010 Special Session of the Legislature on current caseload trends and any resentencing costs required by legislation enacted during the 2009 Session.

D Appropriation Measure Amendment

The Legislative Fiscal Office recommends a General Fund budget of \$212,197,385 and 69 positions (69.00 FTE) for the 2009-11 biennium for the Commission.

E 2007-09 Biennium Disappropriation

The Commission has identified \$51,400 in General Fund administrative savings for the 2007-09 biennium. The Legislative Fiscal Office recommends that these funds be disappropriated in HB 5040. This disappropriation will not impact appellate or trial-level representation. These funds would otherwise be reverted back to the State General Fund at the end of the biennium. Disappropriating the funds at this time makes them available for other statewide priorities.

The legal citations are noted below:

- (1) Appellate Division = \$26,500 [section 1(1), Chapter 596, Oregon Laws 2007]; and
- (2) Contract and Business Services Division = \$24,900 [section 1(3), Chapter 596, Oregon Laws 2007]

*as a current biennium action, this disappropriation is not reflected in the attached ORBITS report.

F Subcommittee Motion on Budget Measure and Amendment

Co-Chair, I move the -1 amendment to House Bill 5040 be adopted;

Co-Chair, I move House Bill 5040, as amended by the -1 amendment, be moved to the Full Joint Committee on Ways and Means with a “do pass” recommendation.

G Key Performance Measures

The Legislative Fiscal Office (LFO) recommends approval of the Commission’s proposed Key Performance Measure changes and related targets with the exception of KPM #11 – Capacity for Providing Quality Representation. LFO does not recommend approval of this KPM. LFO will work with the Commission to evaluate the need for additional Key Performance Measure changes during the 2009-11 interim.

H Key Performance Measure Recommendations

Co-Chair, I move that the Subcommittee approve the Legislative Fiscal Office recommendations related to the Commission’s Key Performance Measures and targets.

I Attachments

- 1. HB 5040 original
- 2. HB 5040-1 amendment
- 3. Oregon Budget Information Tracking System Report
- 4. Key Performance Measure Report
- 5. LFO Analysis of the Commission’s essential budget level

Attachment 5

A Survey of Training Opportunities for Oregon Public Defense Providers

Prepared by Paul Levy, General Counsel
Office of Public Defense Services
June 18, 2009

Introduction

From its inception, the Public Defense Services Commission has recognized that attorney training is essential to meeting its statutory mission, pursuant to ORS 151.216(1), of providing cost-efficient public defense services consistent with state and national standards of justice and constitutional requirements. Even prior to assuming full responsibility for the provision of trial level representation, the Commission received recommendations to consider mandatory training requirements for public defense providers, and to ensure adequate funding for cost-efficient training.¹ Other early recommendations identified the need to develop a basic skills training program for new attorneys to be coordinated by the Office of Public Defense Services and mandated by PDSC contracts.²

These recommendations reflect the central role of training in both state and national standards of justice. Among the American Bar Association's "Ten Principles of a Public Defense Delivery System" is a requirement that training be available and required for counsel and staff providing defense services, which should include "systematic and comprehensive training appropriate to their areas of practice...."³ Similarly, the National Legal Aid and Defender Association, in its "Guidelines for Legal Defense Systems in the United States," has long called for systematic and comprehensive training programs for defender organizations.⁴ In the area of juvenile justice, the National Juvenile Defender Center has identified, among its "Ten Core Principles," the need for public defense delivery systems to provide and require "comprehensive, ongoing training and education for all attorneys and support staff involved in the representation of children." In the area of dependency representation, national standards also "recommend that States require training before a lawyer accepts assignment as attorney for child, parent

¹ *Operational Review of Oregon's Public Defense System* (May 2002), available at:

<http://www.ocdla.org/pdf/operationalreview.pdf>.

² *Report to the Public Defense Services Commission: Recommendations to Improve Oregon's Public Defense Contracting System*, Prepared by Peter Ozanne and Geoff Guilfooy (September 2003), available at:

<http://www.ocdla.org/pdf/guilfooy-ozanne-latest.pdf>.

³ *ABA Ten Principles of a Public Defense Delivery System* (2002), available at:

<http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. See also, *ABA Criminal Justice Section Standards, Providing Defense Services*, 5-1.5, available at:

http://www.abanet.org/crimjust/standards/defsvcs_blk.html#1.5.

⁴ *NLADA Guidelines for Legal Defense System*, 5.7-5.8 (1976), available at:

http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#fiveeven.

or agency.”⁵ In Oregon, the Oregon State Bar (OSB) performance standards for counsel in criminal, delinquency, dependency, civil commitment and post-conviction cases require, as a prerequisite to representation, that counsel “obtain formal and informal training in the relevant areas of practice....”⁶

While the Commission has not adopted a comprehensive plan providing for and requiring the training of public defense providers, it has addressed training requirements in a number of contexts. First, through its Qualification Standards for Court-Appointed Counsel,⁷ the Commission has required that all attorneys approved to accept court-appointments in public defense cases “agree to observe” the applicable provisions of the OSB Performance Standards which, as noted above, include training requirements. The qualification standards for some case types also include their own specific training requirements. Second, in every one of the many Commission service delivery reviews it has examined the availability and suitability of attorney training, making recommendations regarding training in some instances. As a part of its review of the delivery of services in death penalty cases, the Commission formally adopted a representation plan obligating OPDS to work with other organizations in creating training opportunities for lawyers involved with death penalty cases. Finally, the Commission has promoted a list of “best practices” for the state’s public defense providers, which include a number of recommendations for training new lawyers and staff and also for other on-going training.⁸

During the course of its regional service delivery reviews, the Commission has heard concerns that insufficient training may be affecting the quality of public defense services in certain practice areas and in some geographic area of the state. The lack of basic trial skills training, especially for new lawyers, is often cited as a concern. And while educational programs are generally available for most practice areas in which public defense services are provided, concerns are also heard that some lawyers who should be attending these programs are not doing so.

⁵ *Standards for Legal Representation of Children, Parents and the Child Welfare Agency*, U.S. Department of Health and Human Services, Administration for Children and Families, Children Bureau, available at:

<http://www.acf.hhs.gov/programs/cb/pubs/adopt02/02adpt7.htm>.

⁶ *Oregon State Bar Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases*, General Standard 1.1, available at:

http://www.osbar.org/surveys_research/performancestandard/index.html. Standard 6.1, available at the same location, include the requirement for post-conviction cases.

⁷ Available at: <http://www.ojd.state.or.us/osca/opds/CBS/index.html>.

⁸ The “best practices” recommendations are available at:

<http://www.ojd.state.or.us/osca/opds/CBS/documents/best%20practices%20list.pdf>.

Training Opportunities Available to Oregon Public Defense Providers

Focusing on non-death penalty representation, the following are some of the educational and training programs available to Oregon attorneys and staff:

Oregon Criminal Defense Lawyers Association (OCDLA)⁹

Most of the discussion and recommendations before the Commission regarding training have recognized the central role played by OCDLA in providing a wide range of educational programs for criminal defense attorneys and juvenile law practitioners. Until recently, however, the organization did not routinely offer any trial skills programs. The OPDS Executive Director and General Counsel both currently serve, and have served for many years, on OCDLA's Education Committee, which plans the group's seminars. Among the programs offered each year are the following:

- **New Lawyers Seminar.** The one-day program, held each January, usually touches on the major stages of representation in a criminal proceeding, from client interviews, investigation, motions, plea negotiations, jury selection, opening statements, direct and cross-examination, closing argument, and sentencing. These are usually "talking head" presentation and do not involve skills training, which typically involve lectures but also require participants to prepare for a demonstration of some trial skill, followed by a critique.
- **Trial Skills College.** For the third consecutive year, in February 2010 a skills training program will be offered, modeled after the curriculum of the National Institute of Trial Advocacy, which assisted in the presentation of the program in 2008. The initial program also involved a session to train local attorneys to teach NITA-style programs. The two-day program usually focuses on a few critical stages of trial, and is best suited for attorneys who have at least a few years of experience.
- **Juvenile Law Seminar, Death Penalty Seminar, Investigation and Trial Preparation Seminar.** These "subject matter" programs are held once each year, although topics in each subject may also be presented at other programs during the year.
- **Public Defense Management Seminar.** This annual program is planned and presented in conjunction with the staff of OPDS, and includes a meeting of the PDSC.
- **Post-Conviction Seminar, DUII Seminar, Sex Crimes Seminar, and Search and Seizure Seminar.** With the exception of the Post-Conviction program, which has

⁹ The schedule for OCDLA programs is available at: <http://www.ocdla.org/seminars.html>.

usually occurred every other year, these programs are not on an established schedule but are usually the focus of a seminar every two or three years.

- Annual Conference, Summer (September) Seminar, Sunny Climate Seminar, and Winter Conference. These annual programs occasionally focus on a particular topic or area of practice, but often involve presentations on a variety of subjects, usually including those relevant to juvenile law practice.

Oregon State Bar (OSB)¹⁰

Although most of the OSB programs focus on areas of civil practice where there is not a right to appointed counsel at state expense, the OSB Criminal Law Section and the Juvenile Law Section each plan annual seminars on subjects of interest and use to public defense providers. The New Lawyers Section also hosts hour-long “brown bag” lectures that include topics such as “how to pick a jury,” and “conducting direct and cross-examination.” In addition, other programs focusing on appellate advocacy, ethics, evidence, constitutional law, family law and other areas may be of use to attorneys providing public defense services. The OSB also holds an annual trial skills training program that uses a civil law case to develop trial skills.

For many years, the OSB has offered and continues to offer video “replays” of its programs at various sites around Oregon. The organization now also has a series of live and pre-recorded one-hour programs that listeners access over the telephone, and also offers online access to audio and video presentations of past programs.

Juvenile Law Training Academy

Held annually since 2005, the two-day academy programs focusing on dependency representation are a joint venture of OPDS, OCDLA, the Oregon Judicial Department’s Juvenile Court Improvement Project (JCIP), the Juvenile Law Section of the Oregon State Bar, the Juvenile Rights Project, and the University of Oregon Law School, with the involvement of a number of other organizations. The OPDS Executive Director has served as the principle academy planner, convenes the workgroup that plans the seminars, and has secured grant funding from JCIP for the program. While the cost of the program has increased over the years, it remains significantly less expensive than comparable programs, thanks to the grant funding and the volunteer efforts of the workgroup participants. Registration is handled through OCDLA, and can be completed online at its website.

¹⁰ The schedule of OSB seminars is available at: <http://www.osbarcle.org/>.

Juvenile Court Improvement Project (JCIP)¹¹

JCIP is a federally-funded project of the Oregon Judicial Department that seeks to improve court practice in juvenile dependency cases. JCIP is well-known for its half-day “road shows” on practice and legal developments held around the state (often with simultaneous video broadcasts in multiple locations). Although the programs are provided at no cost, they have not been well attended by public defense providers. The upcoming series this Fall will include an afternoon “provider-only” component devoted to the representation of parents, which is being planned by attorneys from the Juvenile Rights Project, as part of their new PDSC contract-funded Juvenile Law Resource Center.

JCIP also sponsors an annual comprehensive program on dependency proceedings entitled “Through the Eyes of a Child.” Although this program is open only to judicial officers, it is followed by a “model court day” on dependency cases that is open to attorneys.

Oregon Law Schools

Each of the Oregon law schools offer a variety of continuing legal education opportunities, occasionally also presenting special symposia on topics of interest to public defense providers. In particular, the following entities are specifically dedicated to providing programs for lawyers:

- The Oregon Law Institute (OLI)¹² is the continuing education department of the Lewis & Clark Law School in Portland. OLI’s programs on appellate practice, family law, evidence, trial practice and litigation can be of use to attorneys providing public defense services. OLI offers online access to past programs.
- The Center for Law and Government (CLG),¹³ at the Willamette University College of Law, offers conferences and symposia that focus on its mission of studying and understanding governmental relations. The programs can have relevance to public defense matters.
- The Oregon Child Advocacy Project (OCAP),¹⁴ a program of the University of Oregon Law School, focuses on child advocacy and the law. OCAP offers an annual program of interest to attorneys for children and parents in dependency cases.

¹¹ The JCIP website is at: <http://www.ojd.state.or.us/osca/cpsd/courtimprovement/jcip/index.htm>.

¹² The OLI website is at: <http://www.lclark.edu/org/oli/>.

¹³ The CLG website is at: <http://www.willamette.edu/wucl/clg/index.php>.

¹⁴ The OCAP website is at: <http://familylaw.uoregon.edu/child/events/>.

OPDS Appellate Division

Appellate Division attorneys frequently plan and lecture at OCDLA and OSB programs, and also appear at “brown bags” presented by public defense providers. The Appellate Division also offers two programs, one in the Spring (May Daze) and one in the Winter (Holidaze), that usually focus on appellate issues and practice. These programs are open to attorneys outside of the Appellate Division.

Immigration Law

Many of the “state and national standards of justice” cited above and other authorities expect criminal and juvenile law practitioners to provide their clients with accurate information about the immigration consequences of decisions facing clients in court proceedings. While this has been a subject of many presentations during OCDLA and other seminars, two recently available sources of information and training are:

- The Defending Immigrants Partnership (DIP).¹⁵ Access to DIP resources is free at its password-protected website, which is devoted, in its words, to “necessary collaboration between public defense counsel and immigrant law experts” to ensure that criminal and juvenile delinquency dispositions avoid or minimize immigration consequences for noncitizen clients. In addition to an extensive library of reference materials, the DIP website offers a series of free online video trainings on immigration law fundamentals.
- The American Immigration Lawyers Association, Oregon Chapter (AILA).¹⁶ This group has occasionally sponsored seminars aimed at educating criminal defense attorneys about the immigration consequences that arise from their cases for noncitizen clients. Although not a training presentation, the group has recently posted “practice advisories” for criminal defense attorneys, which is the product of a project sponsored in part by OPDS.

National Criminal Defense College (NCDC)¹⁷

Each year NCDC offers two summer sessions of its comprehensive two-week trial skills program. The college reserves several places in its program each year for Oregon attorneys with at least several years of experience in criminal defense. Although the program is held in Macon, Georgia and involves considerable expense for registration, travel, and lodging, many Oregon attorneys have attended the program, which they invariably describe as excellent. OCDLA has usually offered some scholarship

¹⁵ The DIP website is at: <http://defendingimmigrants.org/>.

¹⁶ The AILA practice advisories of Oregon criminal defense lawyers are available at: http://www.ailaoregon.com/index.php?option=com_content&task=view&id=86&Itemid=80.

¹⁷ Information regarding the college is available at: <http://www.ncdc.net/tpi/index.html>.

assistance that is allotted to OCDLA member attorneys by NCDC, which may have additional financial aid available.

County Bar Associations¹⁸

Local bar associations vary greatly in the services they provide, including whether and how often they sponsor educational events. Some associations have excellent presentations, such as the Washington County Bar Association, which has on its upcoming schedule presentations on immigration law for criminal defense and juvenile lawyers, an update on victim's rights legislation, and search and seizure (presented by Justice Rives Kistler).

In addition to gatherings under the auspices of a county bar association, in many communities public defense attorneys will gather to discuss issues of common concern and for occasional educational programs, whether in the form of a local "bench/ bar" meeting, an informal association of local DUII lawyers, or a hosted meeting of public defense providers.

Public Defense Contractors

The Commission's service delivery reviews, in their description of the type of entities providing public defense in Oregon, include an expectation that public defender offices and large consortia will provide internal training functions. The evidence, from Quality Assurance Task Force peer reviews and other inquiries, is that formal internal training programs are not happening routinely, even among some larger public defender offices. On the other hand, some providers are well-known for their training opportunities, including ones that are made available to lawyers who are not a part of the entity offering the training. Such providers include:

- Metropolitan Public Defender (MPD). The firm offers frequent "brown bag" presentations in both its Portland and Hillsboro offices, some of which are open to attorneys from outside the firm. MPD is also well-known for its trial skills training program, conducted at least once a year and occasionally more often, in which new attorneys and practicing law students receive skills training in all aspect of criminal law representation. The firm has traditionally offered space in the program to persons outside the firm, although total enrollment has usually been limited to less than 10 participants.
- Marion County Association of Defenders (MCAD). The group offers trainings each Spring and Fall that are open to non-members.

¹⁸ A list of local bar associations, including the websites of some, is available at: <http://www.osbar.org/members/localbars.asp>.

- Public Defender Services of Lane County. The firm recently began a series of presentations that are open to other attorneys in the community.
- Juvenile Rights Project (JRP). JRP is a recognized leader in dependency representation in Oregon, and its staff has participated in many educational efforts on this subject. As noted, through its new Juvenile Law Resource Center, JRP attorneys are participating a joint presentation with the JCIP “road shows” and likely will organize or sponsor other juvenile law trainings.
- Others. It is beyond the scope of this report to survey all providers regarding current and planned training programs, although ones in addition to those listed above undoubtedly exist.

Law Student Training Programs

The recruitment and training of law students who may be interested in providing public defense services is also important for the future of public defense. A number of firms in Portland and Salem employ and train law students who are eligible to practice under the Oregon Supreme Court Rules on Law Student Appearances. In addition, the following programs also involve law student training:

- The Criminal Defense Clinic is a University of Oregon Law School program operated by the Public Defender Services of Lane County.
- The Clinical Internship Seminar in Criminal Law is a Lewis & Clark School of Law program co-taught by attorneys from the Metropolitan Public Defender and the Multnomah County District Attorney.
- The Willamette University College of Law Externship Program partners students with practicing attorneys. The Public Defender of Marion County currently “employees” four volunteer students, who receive course credit for their work.

National Association of Criminal Defense Lawyers (NACDL)¹⁹

Many Oregon attorneys providing public defense services are members of NACDL, and some have travelled out-of-state to attend the organization’s programs. Occasionally, though, the programs come to Oregon. In 2005, NACDL held its annual conference in Portland, and on November 4-7, 2009, the group will hold its Fall Meeting and Seminar in Portland.

NACDL is also among the growing number of organizations that are making access to past programs available online.

¹⁹ The NACDL website is at: <http://www.nacdl.org/public.nsf/freeform/publicwelcome?opendocument>.

Other National Organizations

The following are among the national organizations offering training that is directly relevant to criminal and juvenile law:

- National Association of Counsel for Children.²⁰ This organization seeks to improve the delivery of legal services for children involved in both delinquency and dependency cases. A four-day annual program addresses a variety of topics related to these issues, and an annual five-day program is devoted to trial skills training in delinquency, dependency, criminal and private custody cases.
- National Juvenile Defender Center. Mentioned earlier, this organization advocates for improved policy and practice in juvenile delinquency proceedings. Its major training event is an annual invitation-only Juvenile Defender Leadership Summit. In 2007 the event was held in Portland and open to all Oregon attorneys providing representation to youth in delinquency cases.
- National Legal Aid and Defender Association (NLADA). Also mentioned earlier, NLADA offers a variety of training programs for criminal and juvenile court defense counsel, including an ambitious annual conference.

“Remote learning” Opportunities

As suggested in a number of places above, organizations are increasingly providing online access to training opportunities in the form of either audio-only programs or audio-and-video programs, in both a live and prerecorded format. Some organizations also use the “podcast” format for such presentations. While it is beyond the scope of this document to identify the programs that may be available, the following is an example in addition to those already cited:

- The North Carolina School of Government collaborates with the North Carolina Office of Indigent Defense Services to create and present training manuals, programs and online resources. The School’s Indigent Defense Education website²¹ offers access to a wealth of motions, forms, briefs, reference manuals and free online training sessions.

Recommendations

Despite the many and varied educational and training opportunities for attorneys providing public defense services in Oregon, the patchwork of programs is probably not

²⁰ The website is at: <http://www.naccchildlaw.org/>.

²¹ The website is at: <http://www.sog.unc.edu/programs/indigentdefense/index.html>.

the “systematic and comprehensive” approach described by national standards of justice. The Commission may wish to consider addressing the issue of training in some of the following ways:

- Conduct a more extensive “service delivery” review to receive additional information and recommendations.
- Consider making attendance at relevant subject matter trainings a requirement for all attorneys providing public defense services.
- Direct the formation of a workgroup to explore additional training opportunities, including a more “comprehensive and systematic” approach, especially to new lawyer training.
- Direct OPDS contracting staff to explore expanding the training capacity of particular contractors around the state who would have identified and achievable regional training obligations.
- Direct OPDS General Counsel, the author of this document, to continue the preliminary work begun with the above list of education and training opportunities, to ensure that all public defense providers are aware of all training opportunities.

Attachment 6

OPDS QUALITY ASSURANCE TASK FORCE SITE VISIT SUMMARY

June, 2009

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

7. **Douglas County** – September, 2005. Site team: Paul Levy (Multnomah County), chair; Gary Berlant (Josephine County); Jeni Feinberg (Jackson County); Carole Hamilton (Coos County); Jennifer Kimble (Crook, Jefferson Counties); Janet Miller (Multnomah County) Bert Putney (Jackson County)
 - a. **Umpqua Valley Public Defender** – criminal, juvenile, and civil commitment cases
 - b. **M.A.S.H.** – criminal, juvenile and civil commitment cases
 - c. **James A. Arneson, PC** – criminal and juvenile cases
 - d. **Richard Cremer** – criminal and juvenile cases

8. **Multnomah County Juvenile Contractors** – January, 2006. Site team: Leslie Harris (University of Oregon, chair), Mike Clancy (Clackamas County), Daphne Mantis (Lane County/statewide appeals), Jennifer Nash (Benton County), Holly Preslar (Josephine County), Tahra Sinks (Marion County), Karen Stenard (Lane County)
 - a. **Bertoni & Todd**
 - b. **Alan Karpinski**
 - c. **Ronnee Kliewer**
 - d. **Juvenile Rights Project**
 - e. **McKeown & Brindle**
 - f. **Metropolitan Public Defender**
 - g. **Multnomah Defenders, Inc.**
 - h. **Native American Program Oregon Legal Services Corporation (NAPOLS)**

9. **Linn County** – March, 2006. Site team: Jim Hennings (Multnomah and Washington Counties), chair; Janan Billesbach (Clackamas County); Jeff Carter (Marion County); Steve Krasik (Marion County); Valerie Wright (Deschutes County)
 - a. **Linn County Juvenile Defense Consortium** – juvenile cases
 - b. **Linn County Legal Defense Corporation** – criminal and civil commitment cases

10. **Lane County Juvenile Contractors** – June, 2006. Site team: Sibylle Baer (Multnomah County), chair; Dan Cross (Washington County); Valerie Eves (Deschutes County); Dick Garbutt (Klamath County); Liz Sher (Multnomah County); Dean Smith (Washington County)
 - a. **Lane Juvenile Lawyers Association**
 - b. **Public Defender Services of Lane County**

11. **Lincoln Defense Consortium** – September, 2006. Site team: David McDonald (Multnomah and Clark Counties) chair, Andrew Chilton

(Multnomah County), Ron Gray (Clackamas County), Greg Hazarabedian (Lane County), Stuart Spring (Multnomah County), Mark Taleff (Linn County)

12. **Independent Defenders, Inc.** (Clackamas County juvenile provider)—February 2007. Site Team: Jeff Carter (Marion County), chair; Lissa Kaufman (Multnomah County); Inge Wells (Lane County); Christine Herbert (Jackson County); Clare Bruch (child welfare specialist, Jackson County).
13. **Metropolitan Public Defender** (Multnomah County, adult criminal)—April 2007. Site Team: Kathryn Wood (Benton County), chair; Bert Putney (Jackson County); Lisa LeSage (Multnomah County); Gordon Mallon (Harney, Grant Counties); Tom Sermak (Lane, Marion Counties); Ellen Pitcher (Federal courts).
14. **Benton County Legal Defense Corporation**—July 2007. Site team: Robert Elliott, chair (Washington County); Kelly Skye (Marion County); Jack Morris (Hood River, other counties); Greg Hazarabedian (Lane County); Robin Wolfe (Multnomah County).
15. **Columbia County Indigent Defense Corporation**—December 2007. Site team: Robert Suchy, chair (Yamhill County); Angel Lopez (Multnomah County); Sandra Vallejo (Multnomah County); Louis Miles (Marion County).
16. **Lane County Adult Criminal Contractors**—September 2008. Site Team: Jim Hennings, chair (Multnomah County); Ann Christian (Clark County, WA); Steve Krasik (Marion County); Krista Shipsey (Multnomah County); Meredith Allen (Marion County); Paul Beneke (Jackson County).
 - a. **Public Defender Services of Lane County**
 - b. **Lane County Public Defense Panel**
17. **Crook/Jefferson County**—October 2008. Site Team: Robert Elliott, chair (Washington County); Jennifer Nash (Benton County); A.V. Lonny Smith (Hood River, Wasco, Sherman, Gilliam, and Wheeler Counties); Lea Ann Easton (Multnomah County); Scott Baldwin (Douglas County).
 - a. **22nd Circuit Defenders**
 - b. **Madras Consortium**
 - c. **Crabtree & Rahmsdorff**
18. **Klamath Defender Services**—September 2009 (planned).

Attachment 7

**The Public Defense Services Commission’s Guidelines
for Public Defense Attorneys in
Drug Court Programs**

D R A F T

To ensue that individuals who are eligible for drug court programs receive legal representation that is consistent with ethical, statutory and constitutional standards, PDSC adopts the following five guidelines for court-appointed attorneys who represent clients eligible for drug court programs. The primary purposes of these guidelines are to ensure: (1) that public defense clients make knowing, intelligent, voluntary and attorney-assisted decisions about whether to participate in a drug court program, and (2) that clients who participate in such programs receive effective representation during the period of their participation.

Guideline 1. Defense counsel shall establish and maintain an attorney/client relationship with the client.

Commentary

Although drug courts use a collaborative model to support clients who elect to participate in them, Oregon’s Rules of Professional Conduct govern the relationship between the client and the attorney in drug courts as they do in any other criminal proceeding, and counsel may not, for example, agree to the imposition of certain sanctions or disclosures of attorney-client communications in the course of representation without the client’s consent.

As noted by the National Drug Court Institute in “Ethical Considerations for Judges and Attorneys in Drug Court,” May 200, at page 21: In drug court cases, “defense counsel protect the participant’s due process rights while encouraging full participation. Defense counsel’s two duties reflect the normal, bidirectional nature of legal representation. With a participant in drug court, defense counsel explains the court’s processes, prepares the participant for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court. Within the drug court team, defense counsel ensures that the client’s perspective is heard and respected, the client’s rights are protected, and the court’s procedures are followed.”

Guideline 2. Before an eligible client decides whether or not to participate in a drug court program, defense counsel shall investigate and review the evidence with the client; provide the client with discovery materials, discuss the materials with the client; and determine and address whether the client’s circumstances,

such as immigration status or a mental health condition, could affect the client's decision to enter into a drug court program.

Commentary

Article 1, Section 11 of the Oregon Constitution provides, "In all criminal prosecutions, the accused shall have the right to be heard by himself and counsel..." This constitutional right to counsel would be meaningless without an adequate opportunity for counsel to inform himself or herself about the nature of the charges against the defendant, the factual and legal circumstance of the case and the background of the defendant.

The following Oregon State Bar Principles and Performance Standards for Counsel in Criminal Cases (the Oregon Standards) require defense attorneys to carefully review charging instruments, police reports, and relevant background information with defendants. The Oregon Standards also require counsel to conduct necessary independent investigation or consultation with experts in appropriate circumstances before advising their clients concerning participation in drug court programs.

STANDARD 1.1 – Prerequisites for Representation

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness, and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy to the client.

STANDARD 1.2 – General Duties and Responsibilities of a Lawyer to Clients...

Upon being retained or appointed by the court, a lawyer should contact the client as soon as practicable and maintain regular contact thereafter. A lawyer should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Oregon Rules of Professional Conduct.

STANDARD 1.3 – Role of the Lawyer

Except as provided by Oregon Rules of Professional Conduct 1.2(b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation in accordance with ORPC 1.2 and shall consult with the client as to the means by which they are to be pursued in accordance with ORPC 1.4. When representing a client with diminished capacity, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

STANDARD 1.4 – Initial Client Interview

A lawyer should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning the lawyer's representation and the case proceedings.

STANDARD 2.7 – Independent Investigation

A lawyer should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Guideline 3. Defense counsel shall conduct a confidential consultation with the client regarding all matters relevant to the decision to enter drug court, including:

- a. the nature and purpose of drug court,
- b. the rules regarding eligibility,
- c. the nature of a therapeutic courtroom and the roles of the court, the prosecutor and others,
- d. the difference between adversarial and non adversarial processes,
- e. the fees that may be imposed by the drug court,
- f. the drug court agreement and any related documents,
- g. the requirements for successful completion of the program, including the nature and extent of required treatment, the frequency of court appearances, and any other requirements of the program,
- h. the consequences of complying or failing to comply with drug court rules, including any system of graduated rewards and sanctions, including termination,
- i. the legal consequences of successful completion or voluntary or involuntary termination,
- j. any rights the defendant will be required to waive to enter drug court, such as the right to speedy trial, jury trial, and any other right that the defendant will be required to waive,
- k. the nature and extent of any investigation that will be done,
- l. whether pretrial motions may be litigated,
- m. the client's alternatives to drug court, the advantages and disadvantages of each alternative, and the likelihood of success of the alternatives in view of the information available from discovery, from the client and from any investigation conducted in the case,
- n. the legal protections that have been established by court order or agreement with the state that protect the client from the use of statements made or confidential medical, drug treatment or other records disclosed in drug court from use in other proceedings,

- o. the expectation of the court that the client will be open and truthful with the court and staff about substance use, assuming that adequate legal protections exist,
- p. the role of defense counsel in the drug court setting,
- q. that it is the client's decision whether or not to enter and remain in drug court, and
- r. the attorney's advice on whether the client should enter drug court (based on the client's legal interests and interest in recovery).

Commentary

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements

A lawyer should:

1. *with the consent of the client explore... diversion and other informal and formal admission or disposition agreements with regard to the allegations...*
2. *...*
3. *fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;*
4. *keep the client fully informed of the progress of the negotiations;*
5. *convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;*
6. *continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and*
7. *not enter into any admission or disposition agreement on behalf of the client without the client's authorization.*

Oregon Rule of Professional Conduct 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The National Drug Court Institute's model rules for defense attorneys in drug courts provides: "Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary training regarding substance abuse and treatment and locally available treatment options."

Guideline 4. Defense counsel shall:

- (a) be knowledgeable about: controlled substances and the nature of addiction, available treatment options, the treatment of coexisting disorders, links between domestic violence and substance abuse, the reliability limits of individual drug tests, confidentiality protections for drug records, medical and other records, and

- (b) have the training and experience needed to accurately assess the merits of the charges against the defendant and any substantive or procedural defenses that might be available, to communicate effectively with drug court clients and staff, and to protect the client's right to due process throughout the proceedings.

Defense counsel shall participate in CLE programs and other types of training that allow the attorney to remain current on legal and other issues affecting drug court clients.

Commentary

“Critical Issues for Defense Attorneys in Drug Court,” Monograph Series 4, National Drug Court Institute, 2003.

STANDARD 1.1 – Prerequisites for Representation

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness, and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy to the client.

Lawyers for clients in drug courts should obtain adequate training in the following areas: cultural competence, treatment issues, reliability limits of individual drug tests, protection of due process rights, confidentiality protections for drug records, medical records and the like. Missouri defense attorneys' guidelines for representation in drug court, “Critical Issues for Defense Attorneys in Drug Court,” Monograph Series 4, National Drug Court Institute, 2003.

Guideline 5. Defense counsel shall seek to participate in the planning, design, and operation of the drug court program.

Defense counsel's participation in the design, development, and operation of drug court programs will promote institutional values of fairness and efficiency without jeopardizing clients' legal interests. Some of the client interests that defense counsel should advance are: the recognition that client participation must be voluntary, that unsuccessful participants should not be penalized for voluntary or involuntary withdrawal from drug court, that eligibility criteria should be broad and should not discriminate on the basis of race or gender or any similar protected trait or membership in a protected group; that defense statements made in negotiations and in drug court are not to be used outside the drug court setting, that clients' rights to confidentiality are to be protected and no disclosure or use is to be made of confidential materials outside the terms agreed

upon, that treatment or other program requirements should be the least restrictive necessary to achieve agreed-upon goals, and that costs and fees should not be unduly burdensome.

Commentary

Derived from "Ten Tenets of Fair and Effective Problem Solving Courts," American Council of Chief Defenders, National Legal Aid and Defender Association, and "Critical Issues for Defense Attorneys in Drug Court," Monograph Series 4, National Drug Court Institute, 2003.