

Members

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



Ex-Officio Member

Chief Justice Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

Wednesday, July 17, 2013
9:00 a.m. – 2:00 p.m.
Astoria City Council Chambers
1095 Duane St.
Astoria, OR 97103

MEETING AGENDA

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| 1. Action Item: Approval of minutes - PDSC meeting held on June 13, 2013 (<i>Attachment 1</i>) | Chair Ellis |
| 2. PDSC Budget Update (<i>Handouts</i>) | Nancy Cozine |
| 3. Legislative Update | Nancy Cozine |
| 4. Action Item: Authorization to Increase Guideline Transcriptionist and Interpreter Rate (<i>Attachment 2</i>) | Paul Levy |
| 5. Clatsop County Peer Review - Report and Testimony (<i>Attachment 3</i>) | Paul Levy
Invited Guests
Commission Members |
| 6. OPDS Monthly Report | OPDS Management Team |
| 7. Executive Session* - Commission Review of Statewide Service Delivery Plan; Phase 1 | OPDS Staff
Commission Members |

****The Executive Session will be held at approximately 12:00 p.m. pursuant to ORS 192.660(2)(f).***

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

Next meeting: July 31, 2013, 10:00 a.m. – 2:00 p.m. at the Office of Public Defense Services in Salem, Oregon. Meeting dates, times, and locations are subject to change; future meetings are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, June 13, 2013
9:00 a.m. – 12:30 p.m.
Seventh Mountain Resort
18575 SW Century Dr.
Bend, OR 97702

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Hon. Elizabeth Welch (By Phone)

STAFF PRESENT: Nancy Cozine
Paul Levy
Shawn Wiley
Amy Jackson
Caroline Meyer
Billy Strehlow
Shelley Winn

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

Agenda Item No. 1 Approval of minutes – PDSC meeting held on April 29, 2013

MOTION: Commissioner Potter moved to approve the minutes. Commissioner McCrea seconded the motion; hearing no objection, the motion carried. **VOTE 5-0.**

Agenda Item No. 2 PDSC Budget Update

Nancy Cozine summarized the PDSC budget recommendation that passed through the Joint Ways & Means Public Safety Sub-Committee on June the 6th. The budget, as drafted, includes current service level for both internal operations and contracting work. This means there is funding to cover all of the Commission's current functions; no furlough days. She clarified that furloughs are not a part of any agency budget package in the next biennium. Additionally, the budget bill as drafted includes an increase of a little over \$2.1 million for public defender providers, hourly providers, and investigators. Ms. Cozine also mentioned that there was a budget note requiring the Commission to examine its current key performance measures.

Paul Lipscomb asked whether the increases provided to public defender offices would also be given to consortium groups. Ms. Cozine indicated that the policy option package request did

not include additional funding for consortium providers, but noted that this has been identified as a topic for further discussion when building the budget for next biennim.

Commissioner Potter shared his view that this is a very good budget compared to what has been provided in previous budget cycles. Ms. Cozine agreed, and expressed her appreciation to public defense providers and OCDLA members, many of whom offered strong support for the PDSC budget, as well as appreciation for the support from Sub-Committee Co-Chairs, Senator Winters and Representative Williamson.

Agenda Item No. 3 Amendment of Proposed 2014-15 Contract Language

Nancy Cozine provided background information about contract section 5.9, which requires contract administrators to attend management conferences in 2014 and 2015. She explained the rationale behind this provision as a desire to have providers be very connected to conversations about strategic planning and the direction of public defense in Oregon. She noted that while it seemed like a good idea at the time, continued conversations lead to some additional thoughts.

Commissioner Potter noted his potential, real or perceived, conflict of interest created by his position of Executive Director of OCDLA, which has organized the Public Defense Management Conference for 23 years. He expressed his concern that the language seemed a little too restrictive and didn't recognize the 23 years worth of management seminars that had preceded it, and the cooperation between OCDLA and OPDS in planning the seminars. He provided the alternative language that uses a "velvet hammer" approach, in hopes that it would be a better starting point in terms of bringing public defense providers to the conference.

MOTION: Commissioner Lazenby moved to approve the amendment; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.** Chair Ellis noted for the record that there was a quorum excluding Commissioner Potter's aye vote.

Agenda Item No. 4 Planning for October Public Defense Management Conference; Possible PDSC Retreat

Ms. Cozine summarized her thoughts on strategic planning for public defense, noting the attached letter from Senator Devlin and Representative Buckley which demonstrates the legislature's interest in "Performance Management and Outcome-Based Budgeting." The Commission engaged in a lengthy discussion of the meaning of "outcome" in this context, the difficulty of defining the data points that accurately measure desired outcomes, and the risks associated with using a data-driven model that encourages providers to manage to a limited set of objective criteria rather than to overall quality. Chair Ellis supported the notion of making a good faith effort to apply the outcome based budgeting model to public defense, but also noted skepticism given the difficulty of identifying appropriate measures and the risks associated with too much emphasis on data. Ms. Cozine indicated that it would be important to start with something simple, using the example of employee retention within public defense. She noted that the lack of data statewide about when and why people leave public defense positions arose during the legislative session as something that would be a good thing to measure. She also emphasized the need to include contractors when trying to define appropriate measures, and the need to view these as something to augment, not replace, existing quality assurance mechanisms.

The Commission discussed whether to use a consultant to facilitate a conversation, and concluded that it would be preferable to start with a few data points selected by OPDS, with further discussion later in the process. Commissioner Lazenby expressed his view that a consultant might be needed once there is a better idea of the desired direction, and cautioned against adopting measures that capture efficiency but ignore quality. Chair Ellis offered his thoughts on some indicia that would include a focus on quality. For example, the percentage

of providers who attend more than the minimal CLE requirements, or the percentage of young providers with meaningful mentoring relationships. Commissioner Lazenby suggested that OPDS staff work closely with the Ways and Means leadership and staff to get an understanding of what they would like to see accomplished. Commissioner Potter concluded by noting that if the desired measures are identified early in the process it will allow contractors to collect the information as they go so that it is not too burdensome.

Agenda Item No. 5 Overview of Contracting Process & Priorities

Paul Levy began by explaining that the basic contracting procedures will remain the same as in past contracting cycles. It will begin with input, today, from Commission members and providers. Proposals are due on June 17 for non-capital contracts; July 15 for death penalty/mitigation contracts. The Commission meets on July 17 and July 31 to review the statewide contracting plan. Unlike in past years where all four analysts presented in one executive session meeting, two analysts will present to the Commission on July 17, and the other two on July 31. He explained that those are executive sessions because the meeting includes discussion about confidential documents; contract proposals that are not yet subject to public disclosure. Mr. Levy noted that this process was developed when the Commission questioned contract agreements that they were supposed to approve, but had no information about how the contract agreements were reached. He explained that the Commission will not be asked to make decisions in or immediately after the executive sessions because that approach is not supported under public meetings law. The executive sessions are simply an opportunity to update Commission members on the process used when analyzing contract proposals; the rationale applied is that which is discussed and established later today. Mr. Levy indicated that relatively little change is expected during this contracting cycle, though there may be a need for some change in the mix of contractors or in the caseload mix in some jurisdictions to account for caseload changes or particular local circumstances. He noted that there may be some recommendations to shift caseload to public defender offices because these offices have a fixed structure, no opportunity for supplemental income, and fixed expenses that aren't alleviated with layoffs. He explained that their viability is threatened if they do not get a sufficient caseload to support their operations.

Chair Ellis asked about the breakdown of public defender offices in the state. Ms. Cozine indicated that public defender contractors represent 32.5% of the caseload, consortium contractors represent 52%, and law firm contractors are 12.9%. Non-contract, hourly paid handle 2.6%. Chair Ellis suggested that the Commission would revisit contracting priorities after hearing from providers.

Agenda Item No. 6 PDSC Contracting Priorities

Chair Ellis invited providers to offer their comments. Lane Borg started by suggesting that the Commission begin the contracting process by reaching agreement with the larger contractors first. He explained that in the past, he has been the last and there is no room for negotiation at that point. Mr. Borg continued by commenting on the earlier discussion about the use of data. He expressed his belief that data is useful, drawing attention to application of the scientific method, which begins with a proposition, then measurement and evaluation. He suggested that clients get better representation and better outcomes when a lawyer has good communication with the client; that we all know that anecdotally, and the Bar will tell us that lack of communication is the number one reason for disgruntled clients. He suggests that we should at least try to measure that, but that we shouldn't do it just for the Legislature – we should do it because the rest of the world doesn't care about public defense clients and we shouldn't be striving for merely adequate. He continued:

We should be striving for excellence. We should be striving for effectiveness and we shouldn't be afraid to ask those questions and to have those difficult discussions. I think that we get into the situation where we feel so beleaguered.

We feel so beaten down by everybody in the system that we are not critical of each other. Frankly we need to be a little bit more critical of each other. We are spending a lot of money and we should be expecting outcomes. This has been the 50th year of *Gideon*. We have been talking about the promise of *Gideon* and we are just giving people a pass and saying, 'Well, you know, we are not going to question you. Everybody thinks you might be doing crappy work but we are not going to question you.' That is wrong. We are doing a disservice. You know the judges aren't going to question that. The DAs aren't going to question that. As long as it is cheap enough the Legislature is not going to question that. So the only way we are going to make it better is if we question it. You know what you are already doing it. You have been doing it in the juvenile area for quite some time. It is upping the game. It is upping the bar. I realize it has impact on all of us as contractors and the responsibilities that we have to do. Then we need to make our case back to you that it is going to cost more and you have to pay for that and then you make that case to the Legislature. But we don't up the bar. We don't up the game unless we do it ourselves because nobody else cares about this. Thank you.

Greg Hazarabedian, Lane County Public Defender, spoke on behalf of institutional defenders in timber dependent counties who are in financial crisis due to caseloads that have dropped significantly. He explained that the district attorney's office has laid off staff and ceased to file many types of felony crimes (misdemeanor crimes were abandoned long ago), and that with overhead costs, the viability of the public defender office is threatened. His firm was reduced from 22 to 16 lawyers over the course of the last year, but his overhead costs remain the same. He suggests that Lane PD and others in timber dependency counties are not going to survive without some recognition about the costs that are not related purely to caseload.

Angela Sherbo presented on behalf of Youths, Rights & Justice, noting that this was the fifth time that either she or Mark McKechnie appeared before the Commission or the legislature in the last couple of months solely on the issue of the inadequacy of the compensation of the state's public defender community. She stated that the public defender organizations need and deserve the Commission's attention and prioritization at this point or they won't survive. She emphasized the value that public defenders provide by offering high quality representation and by acting as an institutional presence at local, state, and national level conversations that impact public defense clients and guide standards of representation. She described the circumstances surrounding lawyers' decisions to leave due to the low pay: One person went to take care of parents because he couldn't do that on the YRJ salary; another person left because she wanted to adopt special needs children and couldn't afford to do that with the YRJ salary; another person left because she needed to pay her law school debts; one more is on the verge of leaving so that she can retire. She noted that attorneys with 10 to 15 years experience are making half, literally half, of what the DA on the other side of the case is making: YRJ attorneys make \$61,000 and the DA with equal experience and an equal debt load makes \$120,000. She notes that year after year, this is not sustainable, and there is a need to create some funding structure that is not entirely caseload driven.

Tom Crabtree began by emphasizing the need to increase funding for public defenders statewide, but asked that the Commission first address compensation issues at YRJ, noting that their salaries are woefully inadequate. He acknowledged that YRJ provides expertise in juvenile practice for everyone in the state, and that though he has been practicing juvenile law for 25 years and knows it fairly well, he goes to Angela or Julie at YRJ when he needs advice. Mr. Crabtree went on to encourage the Commission to look at ways to structure contracts that are not entirely caseload dependent. He described the many appearances outside of court hearings that lawyers must attend in order to adequately represent their clients, and explained that while public defenders don't get compensated for this representation, a private bar attorney representing one of the parties, paid on an hourly basis, does get paid for those hearings. He explained that lawyers at family court treatment team meetings, held at the

courthouse, ordered by the court, of which there are four to ten a month lasting approximately two hours each, are not being paid for that work. He also requested that the Commission eliminate contract section 9.1, which requires contractors to refund 100% or 85% of the money associated with a drop in caseload, as it doesn't take into account the firm's fixed costs and creates a significant hardship for public defender organizations.

Steve Gorham began by reminding Commission members that 52% of the public defense caseload is handled by consortium providers, and that they cannot be left out of the mix when addressing issues of inadequate compensation. He encouraged consortiums and public defenders to work together with equanimity and mutual respect. Mr. Gorham concluded by encouraging the Commission to give all capital providers the same contract rate, and to make that rate as high as possible.

Paul Lipscomb began by expressing his support for Lane Borg's position on excellence, efficiency, and the need for measurable goals. He went on to request increased compensation for consortium providers, explaining that in Marion County there is a pay differential for the public defender office. He requested that available discretionary funding be directed to consortium providers. Chair Ellis explained that historically public defenders are paid more on a per case basis for two reasons. One is that public defender offices do have a harder time managing fluctuations in caseload. The second is that public defender offices perform many functions that are not easy for consortia to accomplish - involvement in community planning, training, brief distribution, etc. Mr. Lipscomb noted that in Marion County, MCAD lawyers do participate on committees and perform additional services; Chair Ellis acknowledged the excellent strides made by MCAD over the last many years.

Chair Ellis provided a historical context for the current situation, noting that when the PDSC first started managing contracts, the model was that private providers, either the law firm or the consortia, had a private practice component and could change more rapidly and with less impact when caseload dropped. He noted that the model has changed, as the Commission has pushed consortia members to be specialists, recognizing that criminal defense today is a sophisticated field that isn't an easy addition to a general practice. He acknowledged that many consortiums have become, essentially, full time provider entities that are less able to handle declining caseloads than they were in the past. He asked Mr. Borg to offer his thoughts on how the Commission should manage this change in circumstance. Mr. Borg responded by clarifying that in Multnomah County the consortia/public defender difference is about 15%, and that in addition to all of the other services, his office also has staff investigators. By his calculations, it takes about two and a half hours of investigation time on misdemeanor which means that he is actually paid less than the consortium. He went on to emphasize that, although there are not instances of abuse in Oregon as there are in other states, the audits and transparency required through incorporation as a nonprofit organization builds in a level of accountability that is not present within the consortium construct. Chair Ellis asked whether Mr. Borg was suggesting that consortiums and law firms open their books for inspection by the Commission. Mr. Borg said that he was not, that he was just highlighting a potential vulnerability. Commissioner Lazenby pointed out that the Commission contracts for a certain number of cases with each provider, and there are quality assurance mechanisms in place, so that while the concern may be real in other states, it is more theoretical in Oregon.

Chair Ellis asked Mr. Borg to explain a bit more about how the Commission should contract with public defender offices to have a component that is fixed costs and then a variable component. Mr. Borg stated that his fixed costs amount to about 15% of the contract amount. If that could be paid as a flat rate, then you could lower the case rate so that during reconciliation there aren't such wild swings. Mr. Hazarabedian also encouraged the Commission to do something contractually that would recognize the fixed costs of public defender offices that cannot be covered through privately retained work. Chair Ellis acknowledged this, but also noted that the Commission is not responsible for ensuring

employment for every lawyer current providing services. Commissioner Lazenby pointed out that the Commission must be mindful that caseloads cycle back up and when they do, public defenders will need to be in a position to rebuild capacity. He identified this as a legitimate policy concern for the Commission.

Commissioner Potter encouraged contract providers to ensure that their contract proposals build in what the providers need to sustain their practices, and Commissioner Lazenby followed up by commenting upon the importance of contractors building a sense of value for the services they provide. Mr. Borg talked about Representative Williamson's pay parity bill, and the profound impact that testimony in support of the bill had on legislators in the room, and on all of the lawyer legislators who understood that our model is not sustainable with the current compensation structure. He commented that with the eCourt implementation court hearings in juvenile cases will decline, creating another detrimental impact, particularly on juvenile providers.

Jennifer Nash offered her perspective as a consortium member from Benton County, which handles about 1,900 cases per year, and has seven lawyers providing public defense services in all case types. Her consortium will reduce caseloads in 2014-15 and increase to nine or 10 lawyers. Ms. Nash expressed her wholehearted disagreement that consortiums are not in a position where they are providing leadership roles in the community, explaining that she is on many committees that provide training to other lawyers and DHS caseworkers. She emphasized the fact that there is no way they could run their business as a 100% provider, noting that most of their attorneys have practices that are not related to criminal or juvenile law because it is necessary in order to pay overhead costs – rent, PLF, insurance, retirement. These costs are not covered by public defense funds; they are paid for through private cases. She indicated that there are consortium providers who don't want to have a retained caseload, but they must. She concluded by remarking that if the Commission doesn't want that to happen, the Commission must try to increase compensation over time so that public defense lawyers can avoid the necessity of taking private cases.'

Chair Ellis thanked all of the providers for their comments. Mr. Levy summarized the requests, beginning by acknowledging the viability of accomplishing Mr. Gorham's request for equality in death penalty provider rates. He identified the second point of discussion highlighting the difficulty of sustaining public defender offices when caseloads drop as a far more complex challenge. He also pointed out that it creates a debate between consortia and public defender offices when disparate case rates are misinterpreted as reflecting a judgment about the value of the work that is being done, when that is not at all what is intended. It is meant to reflect the essential role of public defender offices in the jurisdictions where they exist and a commitment to sustaining those organizations. Unfortunately the difference in cases and case rates creates the illusion of a disparity which simply is disparity in structure and financing and not a reflection on the relative worth of one lawyer's work over the others. Adopting a new model is necessary, but not necessarily in this contract cycle. In looking at historical documentation of the Commission's view regarding the structure of public defense, the Commission has consistently done two things. First, it recognized the central role, value, and importance of public defender offices and adopted a commitment to sustaining those organizations. Second, the Commission has declined to debate about which is better, a public defender office or a consortia, as this debate is not necessary - we need both. The ABA principles on best practices for the delivery of public defense services say you must have a strong private bar component to the public defender system. He concluded by indicating that OPDS needs to find a way to sustain public defender organizations to whatever extent possible given available resources.

Chair Ellis suggested that the additional money dedicated to public defender compensation be structured in a way that would make the variable risk match the variable costs. Mr. Levy indicated that it would be a possibility, and also noted that there may be locations where there are too many contractors for the caseload, and indicated that OPDS has already begun frank

discussions with some of those contractors. Commissioner Lazenby noted that the Legislature's interest in outcome based budgeting might create a difficult situation for the Commission if it wishes to retain a case rate model, as the Legislature will be looking for outcomes rather than cases processed. Mr. Levy acknowledged that work needs to be done with regard to our contracting process and our ability to be responsive to the Legislature and the contractor community.

Agenda Item No. 7 OPDS Monthly Report

Shawn Wiley provided an update for the appellate division, starting with a mention of the annual MayDaze CLE, which was a very successful half day program focused on mental health issues. He also reported that both bills submitted by the Appellate Division passed and were signed by the Governor; one provided a DNA testing appeals provision; the other created additional rules around the timing of an amended notice of appeal. He noted that the Juvenile Appellate Section added a new attorney, Sarah Peterson, who is very skilled and knowledgeable, and that Shannon Storey will be giving a presentation at the ABA National Parent Representation Conference in July. He also described the Appellate Division's new pilot externship program, which allows the office to provide training for two Willamette University Law School students. If it goes well, the program will be expanded to include additional law schools. He concluded by noting that Appellate Division attorney Alice Newlin-Cushing argued before the Supreme Court during today's Commission meeting, and that another attorney, Neil Byl, also argued a case earlier in the week.

Mr. Levy explained recent improvements in the processing of non-routine expense requests, noting that more information on this would be shared with the provider community at the annual management conference. He then reported on the office-wide diversity program on May 30, which was a very successful presentation. Commissioner Lazenby asked about the presenters; Ms. Cozine offered to forward the materials that were sent to staff.

Agenda Item No. 8 Padilla Project Report

Alex Bassos, the Director of Training and Outreach for Metropolitan Public Defender (MPD), and Stephanie Engelsman, MPD's primary immigration attorney and Padilla Project supervisor, shared information about the way they are providing immigration advice to attorneys throughout the state. The program currently has .5 FTE to provide consultations to any attorney in the state who needs to know the impact of a potential conviction or adjudication. The premise of the project is that the attorney giving advice should specialize in both immigration law and criminal cases. Ms. Engelsman is committed half-time in the major felony section; the other half for immigration consultations. The program has been enormously successful. Mr. Bassos explained the process and volume of services provided, and reviewed the materials handed out at the meeting - one is an example of the sort of thorough material that Ms. Engelsman provides; the second is a survey sent to those who asked for a consultation, about a quarter of whom responded, which demonstrates somewhere between 80 and 90% satisfaction, depending on the question. He noted that there is nearly a unanimous belief that the program needs to be continued and expanded. Ms. Engelsman summarized her work and the sometimes immediate and critical need for immigration consultation. She also provided excellent examples of families who have been helped tremendously through the work of the Padilla Project, citing instances in which clients were afforded reasonable plea offers by very hardnosed district attorneys who were swayed by the enormous and unreasonable consequences of a conviction for the original charges.

Chair Ellis expressed his appreciation for the presentation and his support for the project.

MOTION: Commissioner Potter moved to adjourn the meeting; Commissioner Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Meeting Adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, June 13, 2013
9:00 a.m. – 12:30 p.m.
Seventh Mountain Resort
18575 SW Century Dr.
Bend, OR 97702

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Hon. Elizabeth Welch (By Phone)

STAFF PRESENT: Nancy Cozine
Paul Levy
Shawn Wiley
Amy Jackson
Caroline Meyer
Billy Strehlow
Shelley Winn

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

Agenda Item No. 1 Approval of minutes – PDSC meeting held on April 29, 2013

0:11 Chair Ellis Call the meeting to order. Let me just caution this is not the greatest acoustics so we will have to do our best to hear each other. Judge Welch are you on the phone?

0:28 Hon. Elizabeth Welch I am.

0:32 Chair Ellis We, therefore, have a quorum. The first item is the minutes from the meeting of April 29, 2013. Are there any additions or corrections? If not, is there a motion to approve?
MOTION: John Potter moved to approve the minutes. Shaun McCrea seconded the motion; hearing no objection, the motion carried. **VOTE 5-0.**

Agenda Item No. 2 PDSC Budget Update

0:59 Chair Ellis Okay, Nancy, we have been waiting with baited breath for the budget update.

1:06 N. Cozine Good morning Chair Ellis, members of the Commission. Our budget past through the Public Safety Ways & Means Sub-Committee on the 6th of June. The budget as drafted includes current service level for both internal operations and our contracting work. Current service

level, as you know, includes everything that we are doing right. The current service level that is built into our operations, and into the professional services account, does not include the furloughs that we had in the last biennium. So those days that were furlough days have been restored into the new current service level. The budget as currently drafted allows us to operate as if we did not have furlough days last year. So those were built back in. The same was done on the executive side. Furloughs are not a part of anyone's budget package in the next biennium. Additionally, the budget bill as drafted includes a small increase for public defender providers, for hourly providers, and for investigators. That increase is a little over \$2.1 million. So have not yet been able to calculate how that will affect each of our public defender providers. We first need to calculate out what it would be with CSL and then plug in those increases. It is good news. It is not as much as we had asked for. We had asked for about \$4 million for that package, that is policy option package 102, but we did get something and in this budget cycle we were very thankful that the recommendation was to include that increase. Our budget was actually posted for tomorrow to move through the full Ways & Means Committee. It will not be happening tomorrow. It will actually be happening next week. We expect it to move through as currently drafted. There was one more note in that budget package. There was a recommendation that was adopted, a budget note, that this Commission examine its current key performance measures, and have a discussion about whether we can adopt additional performance measures that would better reflect some of the goals of the Commission. This ties in with the conversation on our agenda that I would like to have later about looking at strategic planning and our key performance measures. I will delay further discussion of that until later in the agenda, but if you have any questions about the budget.

- 3:47 Chair Ellis I thought there was another piece that if the Sentencing Commission recommendations are adopted we might get some additional funding?
- 4:00 N. Cozine You know that is theoretically possible at this point. As of this week that sentencing reform package really has run into some difficulties. There have been a lot of negotiations back and forth. We are in a waiting posture. The savings that they had originally hoped to achieve through this package have been largely reduced. So we are in a waiting posture on that. We are not in a position to know whether anything comes from that.
- 4:33 Chair Ellis Any other questions?
- 4:37 C. Lazenby The forecasts have been trending up, and in previous times when the forecast trends up, they sometimes say, "Well, if these forecasts continue we may be able to revisit your request." I am taking it that is not happening in this biennium. If they get an improved revenue forecast and they get more monies to spend, they are not going to revisit our request.
- 5:00 N. Cozine They have not overtly stated any intention to revisit our budget later if additional funding becomes available.
- 5:15 Chair Ellis And they did not do this biennium what they did last biennium, which is say here is your money but a chunk of it we will hold back and you have to come to the E-Board and demonstrate you need it later in the biennium.
- 5:25 N. Cozine That is correct. There were no hold backs this session. We have our full current service level with furloughs restored and step increases. It is a good budget.
- 5:41 Chair Ellis The agenda says we get some handouts on this topic and I didn't get any.
- 5:48 N. Cozine I will circulate those later. I apologize.
- 5:51 Chair Ellis Okay. Just checking. Any other questions. We have got a lot of providers here and you are certainly welcome to weigh in on this.

- 5:59 P. Lipscomb I heard that there might be an increase for public defenders. I wonder if that covers consortiums also?
- 6:05 N. Cozine The question was whether or not policy option package 102, which provides an increase for public defender providers includes consortium providers? Unfortunately it does not. This was a discussion that this Commission had quite extensively at two separate meetings. The difficulty of building policy option package that builds in increases for consortium providers is that because of the mix of privately retained cases and public defense cases, it is very difficult to build a policy option package that adequately answers the legislature's questions about allocation of resources. I think that is a discussion that we could have, and again it ties into the later conversation I would like to have about strategic planning and key performance measures, but as we move into the next biennium it is clear to me that this is a conversation that people would like. How we structure our policy option package around increases for consortium.
- 7:11 Chair Ellis Do we have some discretion within the other funding?
- 7:16 N. Cozine To the extent that the current service level funds give us the ability to prioritize there may be some flexibility there, but in terms of the way that the policy option package was drafted, it was drafted with great specificity, so a discrete amount for public defenders. So a discrete amount for hourly attorneys and a discrete amount for investigators.
- 7:53 Chair Ellis Any other questions? I do want to thank the provider community. I think there was really good support at the legislature this year. I think Nancy you and Kathryn, retired Kathryn, did a terrific job. It is not everything we want. It is not everything we will continue to keep pressing for, but as they say in the medical profession, "First do no harm," and that seems to have been achieved. I think it is a not bad outcome.
- 8:35 J. Potter I think it is even better than that. I think we did more than do no harm. There is more money in the system. Even if you had only gotten current service level it added a fair amount of more money into the system. In my mind, at least, that is a major step forward. We have had years where that has not been the case.
- 9:00 N. Cozine Thank you. I agree. I also want to thank the provider community. There was a lot of support for our budget from our members, our providers, and from OCDLA members. We also had some champions in the legislature this session. It should be noted that we have a lot of support from our sub-committee co-chairs, Senator Winters and Representative Williamson, It is in large thanks to them that we have the budget that we have.
- Agenda Item No. 3 Amendment of Proposed 2014-15 Contract Language**
- 9:28 Chair Ellis Okay. The next item is the amendment of proposed 2014-15 contract language. This is Nancy and Paul and John you are a presenter on this.
- 9:43 N. Cozine So as a background, we had a conversation at our last meeting about adding in a new provision to the contract that would require public defense providers to attend the management conference. It wouldn't apply to this 2013 conference, but it would have applied to both 2014 and 2015. The rationale behind that is also a later agenda item, but we seem to be at this sort of critical juncture in public defense where we need providers to be very connected to the conversations we are having about strategic planning and about the direction of public defense as it moves forward. To the extent that we have regions where we don't have a single provider at the management conference, it becomes difficult, I think, to create that statewide message. In adding the language that is currently in a contract in section 5.9, and you have that as attachment 2, my intention was not to be entirely heavy handed, but really to try to get people in a room so that we could have a really productive conversation

that takes into account the needs in all the different regions. It seemed like a good idea at the time. As we continued to have conversations following that meeting, Commissioner Potter had some additional thoughts about the way that the language was drafted and the potential outcome of making it entirely, seemingly, mandatory. I think Commissioner Potter should express his own concerns and views on this.

- 11:37 J. Potter As I stated at the last meeting clearly there is a potential, whether real or imagined, conflict of interest that may color my thinking on this. In reviewing the language after we voted on it, it struck me that the language was a little too restrictive and that the change in the language didn't recognize the 23 years worth of management seminars that had preceded it and the cooperation that had gone on between OCDLA and OPDS. So I drafted up this different language that uses a velvet hammer approach maybe rather than a jack hammer approach. It suggests that the PDSC expects that contractors will attend a management conference, whether put on by OCDLA, OPDS, or any other Oregon State Bar approved. The fact of the matter is we know that we are still going to, if this language were approved, we are still going to put these things on together jointly. That is the culture of the state, but I wanted it to be a little clearer and also to take some of the burden off OPDS in having to do it themselves. Because the way the original language is written it directs OPDS only to do it, which means they are in the business of putting on these seminars, literally putting them on and doing all the negotiating and doing all the financing and taking all the risks. This language, I think, spreads it out. It is a little softer.
- 13:24 Chair Ellis Any comments?
- 13:31 S. McCrea I agree with Commissioner Potter.
- 13:29 Chair Ellis Judge Welch any comment on that?
- 13:37 Hon. Elizabeth Welch No sir.
- 13:41 Chair Ellis To me it seems like a perfectly fine thing to do. I notice the old language didn't have OPDS doing it, it had PDSC doing it. Other than you we are not terribly qualified to do it.
- 13:57 N. Cozine I will note that we still envisioned OCDLA actually doing that work, but the language of the contract isn't clear.
- 14:03 Chair Ellis Is there a motion to approve the proposed amendment?
MOTION: Chip Lazenby moved to approve the amendment; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**
- 14:12 Chair Ellis I think the record should show a quorum excluding Commissioner Potter voted in favor.
- Agenda Item No. 4 Planning for October Public Defense Management Conference; Possible PDSC Retreat**
- 14:28 Chair Ellis Item 4, planning for the October Public Defense Management Conference; Possible PDSC Retreat. Nancy.
- 14:40 N. Cozine So attachment 4....
- 14:48 Chair Ellis Should be 3.
- 14:48 N. Cozine Thank you. I included the attachment and I am trying to capture my thoughts on this topic so that you had some background information heading into the conversation. As I mentioned moments ago, it seems to me we are at something of a critical juncture in public defense. This Commission has been in operation for 10 years. We have made a lot of headway in

improving and creating a predictable funding structure for public defense across the state. As the attachments from Senator Devlin and Representative Buckley demonstrate, there is a push from the legislature right now to move to something called, "Performance Management and Outcome-Based Budgeting." This concept ties in also with that discussion of key performance measures and with strategic planning. Many executive branch agencies have been using the services of consultant groups to help tie together their strategic plan, their desired outcomes, and their key performance measures. To map those out in a way so that their daily decisions are supporting, at every step of the way, those identified outcomes. While I think that this Commission has identified its desired outcomes and has done a very good job making decisions to support those outcomes, it seems like we are at a point where we might benefit from moving towards something of this model that is being utilized in the executive branch where we actually map out

16:33 Chair Ellis

What does the word, "outcome" mean in this context?

16:41 N. Cozine

Such a great question because you get to define the outcomes. In public defense you certainly don't want to look at outcomes as the outcome of trial, but we need to have a conversation about what we want our outcomes to be. We have some outcomes built into our strategic plan. We want to improve public defense across the state. We want to have a dependable system that has adequate funding. We want to have diversity within our system. We want to make sure that people can afford to stay within public defense. We have had conversations about these. These are the kinds of outcomes that we have stated that we would like to have. We have in our strategic plan strategies to try to achieve those outcomes, but we haven't really had a very in depth discussion about where we are right now and where we want to be in 10 years in quite some time.

17:47 Chair Ellis

I am still trying in my mind to capture that concept. Are we talking about timing so that the appointments are timely? That people show up on time. It is not the defense that causes delays. Is it that sort of measure?

18:01 N. Cozine

Well that could be the measure. That is such a great question. As an example, in a conversation that I think would we like to have with contractors and with this Commission, and that is why I suggest that perhaps we start at the October management conference with contractors present and then we move into a retreat at some point following that with Commission members. Do we want to consider something like adopting a goal of reducing substitutions of attorneys and start trying to measure that? Right now we don't have the data to measure that kind of outcome, but is that something we want to move toward. Do we want to move toward a more data driven model. When I say the data driven model, I am not suggesting that we abandon our other quality assurance mechanisms. I think our peer reviews and our system reviews are still critical components, but to the extent that we want to start relying on data to help inform the way that we make our decisions, I think there is room for a lot of conversation around that. It is not immediately clear, I think, to everyone that measuring something like substitutions of attorneys would necessarily be the right measure for the kinds of outcomes we want. That is why that I think it is a pretty detailed conversations. I think there are many things that we could potentially measure. Things like the filing of motions, substitution of attorneys, client contact and the frequency thereof, but I wouldn't want to be in a position of dictating what we decide those measures are. I would want to build our measures as part of a more collaborative process with both the contracting community and the Commission.

19:52 Chair Ellis

I am not opposing this but I am going to inject a note of skepticism. In my other life, now I am in the NGO world, we are trying to do good things and we are constantly being told that we need to have measurement of impact. That is so easy to say and it is so hard to capture. I always use the reference in the Vietnam War they used to have a lot of data on impact and it would be things like number of sorties and bombs dropped and all that, which seemed to please the military, but it didn't measure at all what the political leadership thought we were

trying to accomplish. The other note of caution is if you get too wetted to objective criteria of the purport to measure things, people game the system and start only working towards those objective criteria. What I really care about, and I think everybody here cares about, is quality of representation. That isn't always measurable by some data point.

- 21:15 N. Cozine Right. I absolute agree. That is why I say it is one piece of what we might look at. I can give you two examples of things in this session where it could have been helpful for us to have some detailed information and why I think it is important that we include our contractors in the conversation. In our discussions with the legislature during this session one of the challenges that we explained that we have been facing is the difficulty in retaining younger lawyers who have high debt load. In our meetings with the co-chairs the questions were well how many people have left and why did they leave? We don't capture that. We have over a 100 contracts statewide. We don't have the data to support our anecdotal stories. That kind of data wouldn't be terribly hard to build, but to try to collect it in the middle of session was impossible.
- 22:25 Chair Ellis I can certainly see the desirability of crafting information requests to our providers to try to capture things like that. That is fine. The other thing it is obvious that the legislative leadership is kind of attracted to this impact measurement concept. I don't want to snub our nose at them even though we are technically not subject to it. I think a good faith effort to try to speak that language is fine subject to all the skepticism I have already indicated.
- 23:03 N. Cozine I feel like if we were to adopt something we want to start with something very simple. Things like employee turnover and reason for leaving, but if we don't ask our contractors to collect that up front it is really hard for them to then backtrack....
- 23:15 Chair Ellis And you don't have a baseline if you don't start asking.
- 23:20 N. Cozine Right. As I say I would not feel comfortable adopting something without having a really detailed conversation with our contract providers. I think they know what we need to be measuring and have some ideas and we need to start there.
- 23:41 Chair Ellis Now there is a cottage industry out there of consultants in the field of test of measurement in the non-profit world, which this is part of. Do you have a thought whether we ought to tap into that resource?
- 24:00 N. Cozine I started to look at various consultant groups that provide these types of services. I have not taken an in-depth look in the sense that I haven't contacted anyone. I haven't priced it. I will need to do that. I will also say that we can try and guide the conversation on our own. I think we will be more productive if we have a consultants group.
- 24:26 Chair Ellis Some people have real religion on this evidence based objective testing. So is the question whether the Commission is favorably disposed to having a retreat post-October management conference with this as the subject?
- 24:49 N. Cozine That is one question. The other question is does this Commission support the idea of bringing in a consultant group to guide the conversation at both the management conference and at a retreat, or is this something we would rather start as more of our discussion with the thought of bringing in a consultant later down the line if that is something that looks necessary.
- 25:09 C. Lazenby I don't think we are able to answer the question whether or not a consultant would be effective. In my view of this reading these letters is that we are going to be kind of on both sides of the looking glass here. Both sides are perfectly legitimate. The legislature is looking to determine whether or not we are spending money efficiently and whether there are other ways they can allocate monies that will make the system more efficiently in terms of the way dollars are spent. Gathering that kind of data and being able to provide it to the legislature is

good because it gives us a little bit of leverage to sort of say you need to spend money on us to make this sort of thing happen. So the provider community has that. I don't want to see us get at odds, though, with the primary goal of the Commission which is to ensure quality representative. I think those are two separate processes. We can do some of the same things, but we shouldn't default over to this vogue stuff that is going on right now of outcome based stuff. We don't control the supply side in our business, right? We don't control the quality of the context in which we have to operate because there are other folks that do that in terms of the way they charge and what county you are in and all these other things. We are a little bit having to be responsive to that. I think this is a great opportunity for us if we do it right. I don't think the question on the front end is just should we have a consultant or not. I think we need to decide where we want to go. That will give us an answer of whether or not we have a consultant that can lead us there. Maybe we need to have a facilitation around these issues of the process issues. I think it is going to be very difficult for us to keep from interweaving those two sides of mirror where we are responding to what the legislature wants in a very legitimate way, but they are not really asking the quality questions that we are primarily charged with doing in the business. That is the challenge for us.

27:23 Chair Ellis

There are ways to at least capture some indicia of focus on quality. For example, what percentage of providers do more than minimal CLE? What percentage of our young providers have meaningful mentoring relationships? I can see a lot of ways that you could try to capture something that ties to quality and then start measuring any changes up or down in that. I think the thing that would be really interesting is to try to work up a questionnaire that would go to the providers to try to capture that kind of information to get a baseline so that we then can start about our we doing better in these things that are objectionable measureable. I know one we had as a KPM was time of payment and was there a delay both on the extraordinary expense and the basic fees. We went off the charts good on that because that is something that is objective. Everybody agrees that it is a good thing to have prompt payment. At least nobody in this audience was taking the other side of that debate. There are some of these that I think we would all agree that that is a legitimate, objectively based criterion. In the appellate group this business of how long it takes between settlement of the record and filing of the opening brief. It always seems to me way longer than it should be. That is one that has fluctuated some. It is better now than it once was, but it is still, at least in my thinking, where it ought to be. That is an objectively based measurement of quality. But the challenge is to craft those questions in a way that we are really doing that. I would very much favor senior staff at OPDS doing their own effort at crafting that. If that requires bringing in a consultant who would kind of say you could do it better this way or that way, fine. I would prefer not to have one of these consultant facilitators driving the discussion with a lot of charts on the wall because they don't know defense. That is just not a very successful structure.

30:16 C. Lazenby

You don't like putting your blue dots here and your green dots there? Mr. Chair, I think the example that you gave though it shows precisely the peril that I am pointing out. Because an outcome based from a legislative budgetary, managing efficient money standpoint is great. You have shortened up the period of time between the settlement of the record and the time that the brief is filed and that makes the courts more efficient, but that data in and of itself doesn't say anything about quality. It doesn't say anything about the quality of the brief. In fact there is a danger if you rely too much on the shortened time frame that you start damaging quality.

31:02 Chair Ellis

It has some relationship to quality if you are the defendant and you are in custody.

31:11 C. Lazenby

I understand that. I understand that. But at the same time if you just look at that time frame as the data point that you want to determine whether or not that is the outcome that you want, there is a danger of you losing this qualitative analysis that we need to keep in mind as well. There is a balance there. We have done that. When we looked at that within the organization and said we really need to shorten that up and people were in consensus with that. I think

Pete and others did a great job of riding herd on the quality that ended up happening there. I am just saying that as we go down this road we will encounter a number of things like that where there will be clear data points that people will want to point to that will seem more efficient, but we have to be mindful that we are not losing quality.

- 31:59 Chair Ellis Uncharacteristically I am going to agree with much of what you said. There is another one that I think a lot of people would think we ought to capture, I think we should capture, and that is turnover. But that doesn't necessarily mean high turnover is bad or low turnover is good. We had an interesting discussion at breakfast on this very topic. So there are a lot of data points that I think we would all be interested in seeing. I think go ahead and design a draft questionnaire and get input from any of the provider community people who want to help on that without deciding ahead of time that this data really reflects quality. It may or may not.
- 32:51 J. Potter I agree. I have the exact same concerns that both the previous speakers have talked about. There is a little bit of a skeptic in me when I look at things that say outcome based performance and you are trying to align it up with a person driven system, a client driven system. I doubt that in this room we could get an agreement as to what a win was in a case. Because a win is defined so many different ways.
- 33:25 N. Cozine Right. I think what we have to look at things like when you talk about turnover; turnover you are right in and of itself isn't a bad thing unless it is one client who has had four separate attorneys during the course of one single case. It is complex.
- 33:43 J. Potter We are having a retreat afterwards and I am all for gathering information. I agree with the chair. I don't think we need a consultant at this first go around.
- 33:56 Chair Ellis A win is a result that is better than what you could have gotten by other means.
- 34:05 J. Potter *Pro Se.*
- 34:06 Chair Ellis In the civil world a win is you did better when you went to trial than the last offer you had before trial. So is there consensus
- 34:23 C. Lazenby Can we put that to a vote.
- 34:20 N. Cozine My marching orders, as I understand them, is we will go ahead and try and identify some points that we think would be helpful in terms of our conversation with the legislature, and in terms of measuring our efficiency that might also have some overlap with quality but not in terms of measuring outcomes of case.
- 34:50 Chair Ellis I don't think anybody is arguing outcome of case.
- 34:51 J. Potter We have been grappling with this since the statute was passed.
- 34:55 C. Lazenby Do we need to draw some of the Ways & Means staffers into this so that they might be able to enlighten us as to what they might find to be useful data points?
- 35:11 N. Cozine I certainly think that we could. I know that we have a new LFO analyst. When he was looking at our key performance measures during our first meeting with him he asked why we don't have one that touches upon the performance of your contractors. That is sort of where this conversation - that was one of the drivers of the conversation - the repeated question about key performance measures that measure not just internal operations, and the appellate division - what about contractors?
- 35:46 Chair Ellis I would also invite every commissioner to send Nancy your thoughts as to questions you like to have the answers to.

35:56 N. Cozine I think that would be very helpful.

35:57 S. McCrea I agree with everything that has been said. I wasn't up her checking my email. I was looking at the statutes, 291.201 to 291.222. We are currently not subject to those provisions. I am a little reticent about putting ourselves in a position where we make ourselves subject to those. I have no problem with us exploring and pursuing and trying to do things better and to facilitate our ability to get the money we need for our budgets and meet our statutory mandate about high quality at the best cost. I am just a little nervous here.

36:42 N. Cozine That is exactly why I point out in the memo that we are not subject to this. I think where the challenge comes for us is when the sub-committee is hearing from every single executive branch agency data points and supported outcome, and then we come in and we don't have anything identifiable. We have had the discussion about why we don't. That becomes the difficulty. We may well have the conversation and decide that really we are in a context that makes it almost impossible to identify good measure. That will be the outcome of our conversations.

37:25 S. McCrea We are on the same page, Nancy. I just don't want to become the lemming leaping over the cliff.

37:31 Chair Ellis Okay. Do you have the direction you need on that?

37:31 N. Cozine I do.

37:32 Chair Ellis Any comments from the broader group?

37:37 ?? As a provider my concern would be talking about these data points. Somebody is going to have to collect that data and it is going to come through the administration. That will be a burden in my office. I will have to assign to staff to it. If you are going to mandate gathering this data (inaudible).

38:07 Chair Ellis I think you are certainly right on the first point. This will be forthcoming. You will be asked to provide it. I am guessing there won't be a line item in your appropriation that says, "Extra money because you had to answer a questionnaire."

38:27 ?? The data points you are talking about are a little more than just answering a questionnaire. We are going to have to go back in the records and see what the outcomes of cases were. See how many attorneys were appointed to that person. The data points you are talking about are not just well I think this is what is going on.

38:44 N. Cozine To respond to that I think that is why we need to have a good conversation with our contractor community, and we also want to talk about collecting data moving forward and not something going backward. That is the challenge that we have right now. We haven't really identified anything that we would want our contractors to collect systematically. So contractors may very well collect data, but we haven't given any direction as to what would be helpful to us. We wouldn't want contractors to be in a position where they have to dig back through records, especially when many records aren't electronic. It would be incredibly burdensome.

39:20 C. Lazenby So it is going to be forward looking for the most part?

39:23 N. Cozine Right. Where you can identify something, contractors aren't given enough notice that they can do it without it being too burdensome.

39:35 J. Potter I think that may be some of the directions of all the contractors. You are getting a sense of what this is about and what we are trying to do and how it is going to help us in the legislature

and Ways & Means. As managers of these contracts you probably have it in your head anyway. You have a sense of how many people have left your office and why. How many people do or don't go to CLE's and why? Whether or not there are mentors involved with any of your lawyers and if not, why not? The stuff we have talked about so far, and hopefully with input from you, would be objective information that shouldn't be much of a burden.

40:17 Chair Ellis

Any other questions or comments?

40:18 L. Borg

My comments that are later in the agenda are kind of going right to this point. I will talk about it then.

40:30 Chair Ellis

Alright. Anything else on the planning side? I think you did get support that a retreat would be a good idea. You did get support to craft this questionnaire. I think it was not clear whether you should go out and start trying to find a consultant, but it is fine, I think, with the Commission if you start canvassing that market and see if there is somebody that we would like to have. We haven't said yes yet.

41:07 N. Cozine

Okay. In terms of a retreat I would guess, perhaps, December or is that too - I would think about sending out some dates for the Commission to consider.

41:16 Chair Ellis

Right.

41:17 N. Cozine

Is December too far past October?

41:23 Chair Ellis

Whatever works.

41:23 J. Potter

Early December before the 15th.

41:33 N. Cozine

I will work on some dates and send them out to the Commission.

41:35 Chair Ellis

Okay.

Agenda Item No. 5

Overview of Contracting Process & Priorities

41:35 Chair Ellis

Item 5 is Paul and the analysts on overview of contracting process and priorities. This is our first post Kathryn retirement meeting.

41:52 P. Levy

Yes. I am the interim cheerleader of our contracting session. I will explain why I choose that term in a moment. I want to clarify a couple of other things since I have been asked by a number of people already. This is not a passport. It is my MCAD notepad. So what I want to do right now is mainly remind you about the contracting process that we have used in, I think, the past two cycles. Just so we are more or less on the same page, but and saying this the basic outlines and procedures of our contracting are not changing from what you and the contractors are familiar with. Indeed, how we operate internally is not changing in a significant way. As Kathryn was fond of saying including at her going away festivities at our office, is that she invested a lot of time and effort training the four analysts in doing contracting to the point where they were perfectly capable of doing it and did the lion's share of it. In this go round they will definitely be doing the lion's share of the contracting. They have all the technical expertise dealing with our spreadsheets and our databases. So they are the heart and soul of our contracting. They have been and they will continue to be. The process that we are using is one that is familiar. We will hear from you, from contractors, about concerns, priorities, and to the extent that those are articulated and we can come away from this meeting having a better idea of what you want us to do. We take that information. We take legislative directives. We take the final budget number that we get when our budget is finally through the legislature and get to work in coming up with an understanding of what we can afford and how we can afford to contract. The process works like this. Today we hear

from you. We hear from providers. This afternoon and tomorrow the analysts will be meeting in a retreat to fine tune their processes and talk about how they are going to use the information you have given us in contracting. A lot of it is really nitty gritty work in dealing with spreadsheets and databases. You have seen the fruits of this with statewide contracting spreadsheet. Proposals are not due until a couple of days more. On June 17 for non-capital contracts. July 15 for death penalty/mitigation contracts. We have a July 17 Commission meeting and a July 31 Commission meeting. Prior to those Commission meetings the analysts will complete construction of a statewide contracting plan that they would use to conduct negotiations with contractors. They will present that plan to you. Unlike in past years where you heard from all four analysts in executive session one meeting, for a variety of reasons we are going to have two analysts present to you on July 17, and the other two on July 31. Those are executive sessions because they are talking about confidential documents, contract proposals that we have received that are not yet subject to public disclosure. The public meetings laws permit executive sessions for the discussion of such documents. What we will be doing there is informing about how we have been going about constructing our plan and the logic, reasoning, and the processes behind how we are approaching contracting. This is responsive to a concern from the Commission a number of contract cycles ago that when you were asked to approve contracts and given one sheet of paper with a 100 or so contracts and a number on it. We said, "Please say yes." You said, "What have you done? What does this mean and where did it come from." We are explaining that to you in two executive sessions. We are not asking you to make decisions either in or immediately after the executive sessions. The public meetings law doesn't permit that. We are not asking you to engage in policy choices and decisions. In executive session, or immediately after, we are not going to ask you to make policy decisions based on discussions in executive session. We are explaining to you, updating you, and informing you about what we are doing. We are going to be guided by the discussions here and then there will be occasion for the Commission also to have a public discussion of the contracting. So July 17th you will hear from two analysts and then July 31st from the other two. There is also a September 12th PDSC meeting where we expect to present the plan for death penalty contracting in executive session. Then October 25th is when we expect to present to you all of the proposals and ask the Commission to approve them. That is the basic outline of the process and it is essentially what we have used before and what you are familiar with. As far as our contracting and our priorities, we are, as I said, guided by first of all by the legislative directive. We are guided in part by what the final number is and the amount of money that we have to work with, and we are guided by your expressions of priorities. We expect relatively little change in how we do contracting as far as who we will contract with and how those relationship will be conducted. There may be a need for some change in the mix of contractors or in the caseload mix in some jurisdictions to account for caseload changes or particular local circumstances. This will be reflected in what we present to you. This is primarily likely to be an issue in jurisdictions with public defender offices where the caseload simply cannot sustain all current contracts. There may be a limited number of instances where this is the case, or where the caseload mix needs to be adjusted in some way in order to sustain public defender offices. As you are well aware that is because public defender offices have a fixed structure and fixed expenses that even with layoffs, which public defender offices have and probably will in some instances continue to sustain, there basic viability is threatened if they do not get a sufficient caseload to support their operations. It is really, likely to be very few jurisdictions where this is actually a necessity, but we may be recommending that in our proposals. But beyond that we are really wanting to hear from you and from the contractors about their and your priorities for contracting. That is the outline. That is all. Are there any questions about that?

51:46 Chair Ellis

Guide me on what you see occurring on the item 6? I thought I understand that that will involve many of these same questions with other presenters.

52:08 P. Levy

Historically at this meeting in odd number of years we hear from contractors about how they think the Commission should contract. To the extent that there is any flexibility in where we could put money? How we can adjust case rates? Contract values. You have heard from

contractors about that at this meeting. You will hear that shortly as soon as I yield the stage here. To the extent that what you hear then you can articulate what you have heard and articulate an expression of how you think we should approach our job and the analysts approach their job. That would be helpful.

- 53:11 Chair Ellis What I am trying to understand is shouldn't we maybe wait on any thoughts the Commissioners have until after
- 53:20 P. Levy Oh, yes, yes, absolutely. I am sorry. That is absolutely right. Not that it is part of presentation that you express your priorities, but that you next hear from the contractors and then at that point in the meeting have a discussion.
- 53:41 J. Potter Question. Paul, how many contracts are there? A hundred plus or minus?
- 53:43 P. Levy Yes.
- 53:43 J. Potter And how many public defender contracts are there? Ten?
- 53:46 P. Levy Plus or two, I think.
- 53:53 J. Potter So 10% of the total number of contracts are public defense contracts. What percent of the population, what percent of the cases, do those 10% percent. Is that clear?
- 54:10 P. Levy Yes it is. Roughly the answer is 34...
- 54:16 N. Cozine So just to clarify we have 11 public defense contracts, but only 10 public defender contractors because MPD has two separate contracts. So statewide is 10 with 11 counties being represented by that 10. It breaks out
- 54:51 P. Levy She is looking at our Ways & Means presentation.
- 55:00 N. Cozine So our public defender contractors represent 32.5% of the caseload. Consortium contractors represent 52%. Law firm contractors are 12.9%. Non-contract, hourly paid is 2.6%.
- 55:22 J. Potter I am sorry what was the law firm?
- 55:23 N. Cozine The law firm was 12.9.
- 55:31 J. Potter It just helps me put it in perspective.
- Agenda Item No. 6 PDSC Contracting Priorities**
- 55:33 Chair Ellis Shall we go to the provider group now? Lane, Greg, and Angela. We need one more chair up here. Steve, you didn't make the playbill but we will let you do it.
- 56:04 N. Cozine And Mr. Chair there may be other contractors who are interested as well.
- 56:18 Chair Ellis Okay. This is an awesome looking lineup.
- 56:33 L. Borg I guess I will start. Mr. Chair, thank you for the opportunity to talk to you today and to represent some information. There are about three different areas that I want to make comments on. One is just a specific on a sort of contracting process request that I would ask. I have talked to Nancy about this in the past. I have talked to other people. This isn't surprising or new or shouldn't be. I think it is important for the Commission to send a message that in this process that Paul laid out that you contract with the larger contractors first. I realize that in many cases this is public defender offices, but it also going to be

consortia. There are many counties in which the consortium is the major contractor. That is going to be the bulk of your work rather than coming in and filling everything out. That is not a negotiation. Being told well here is what it is. This is a negotiation and there is no wiggle room if you are a large contractor like myself. When we have these discussion there is nothing more to say that we can't give you anymore but we have signed a contract for \$100,000 to do 10 cases.

57:59 Chair Ellis

But doesn't that lead to the non-large contractors being put in a position that you are describing?

58:08 L. Borg

Yes it does. I am not going to apologize for that.

58:12 Chair Ellis

Just so I got the message.

58:12 L. Borg

I guess I am trying to come up with an analogy. Most people when they are going about their business you settle your big accounts first. You don't go buy dessert and then negotiate on a mortgage. I am not trying to trivialize them. When you are looking at relative size and you are looking at the larger providers that generally do a wide array of cases like in our instance where we do everything you can get a court appointed lawyer for short of appeals. So we are doing this broad array of stuff and if everything is all filled in when you come and talk to us there is really no negotiation room. There is no wriggle room. Okay, you are a large organization and we need to accommodate that. Maybe you disagree but I stand by the proposition. I think it should be bifurcated. I think they look at some threshold amount whether you are a 20% contractor or 25 of the mix. Go to them first before boutique or smaller contractors.

59:15 Chair Ellis

I am not trying to debate too much here. We have some capital defense providers. They are not going to fit in that large contract group but they are critical. We have PCR providers that doesn't fit in your description, but they also perform a pretty significant function.

59:38 L. Borg

They are already outside of that system. The capital contracts are all the same. They are negotiated in a completely different time track, and, no, I wouldn't be applying that to them. I am saying when you are talking about the same type of cases you are giving here. You are talking about the mix of misdemeanor, felonies, and juvenile cases. That is the comment that I had on the priorities that I was asking or urging a bifurcated process. Secondly, I would like to make a comment on thread earlier about the data. Maybe this will come across as controversial and people aren't expecting me to say this, but I think we should be going down that path. It is tough. It is hard. It is going to be asking some difficult questions, but in listening to the conversation earlier I guess my comment would be that this is not a bifurcated, this is not a binary system where you either look at data points or you look at subjectivity and in quality and analysis. Scientists don't do that. You start out in scientific method with a proposition. I think this and then you go out and try and test it. We can do that here. I think you have better representation and better outcomes if you have better communication with your client. Now we all know that anecdotally. You go to the bar and they will tell you that is the number one reason for disgruntled clients is communication. Well let's see if we can measure that. Let's see if we can try to figure that out. It doesn't mean that you just go measure something like your example of the Vietnam War and body counts and body drops that totally mislead what was really going on but it leads you to ask the question. It is a process of gather some data. Have a hypothesis. Gather some data. Go back and look at whether that data was valid or not. You have to know whether it is good data or cooked data. Then you ask questions. Do we think that this is what is going on? Does this lead us to the quality? But the reason why I think we have to go - and I wasn't even aware of the budget note that Nancy talked about earlier. It is not for that reason. It is because the rest of the world doesn't care about this. The judges are perfectly happen with the *Strickland* standard. We shouldn't be striving for merely adequate. We should be striving for excellence. We should be striving for effectiveness and we shouldn't be afraid to ask those questions and to

have those difficult discussions. I think that we get into the situation where we feel so beleaguered. We feel so beaten down by everybody in the system that we are not critical of each other. Frankly we need to be a little bit more critical of each other. We are spending a lot of money and we should be expecting outcomes. This has been the 50th year of *Gideon*. We have been talking about the promise of *Gideon* and we are just giving people a pass and saying, "Well, you know, we are not going to question you. Everybody thinks you might be doing crappy work but we are not going to question you." That is wrong. We are doing a disservice. You know the judges aren't going to question that. The DAs aren't going to question that. As long as it is cheap enough the legislature is not going to question that. So the only way we are going to make it better is if we question it. You know what you are already doing it. You have been doing it in the juvenile area for quite some time. It is upping the game. It is upping the bar. I realize it has impact on all of us as contractors and the responsibilities that we have to do. Then we need to make our case back to you that it is going to cost more and you have need to pay for that and then you make that case to the legislature. But we don't up the bar. We don't up the game unless we do it ourselves because nobody else cares about this. Thank you.

1:03:13 Chair Ellis Lane, thank you for that. That was very well stated.

1:03:14 G. Hazarabedian For the record, Greg Hazarabedian, Lane County Public Defender. I would like to speak on behalf of a constituency that my office is part of that may not have been present during previous contracting years. That is the constituency of people of particularly institutional defenders in timber dependent counties who are in financial crisis where the caseloads have dropped through the floor. I believe I am speaking of the same thing that Paul Levy referenced a few minutes ago. There comes a time where just looking at caseload doesn't work for an institutional defender. There are overhead costs. There is the viability of the office when downsized that gets to a critical mass as to whether the institution is still viable as it exists. My office had 22 lawyers a year ago from now. Right now we have 16. That is due to the budget cuts in Lane County that have caused district attorney positions to be laid off and the district attorney to be filing roughly 25 to 30 percent less felony cases than before. I say felony because they already gave up on misdemeanors several years ago and only file basically domestic violence and DUII in misdemeanor land for the most part. I am hoping that will be cognizance of - I don't think I am the only timber dependent public defender office that you contract with. I will have the nerve to speak for the rest and say that we need some of that \$2.1 million that the legislature gave to improve public defender compensation. We are not going to survive collectively as offices if we don't get some of the money that we are asking for in our RFP. It is your interest to see that we do survive because at some point in the future things will turn around economically because nothing stays the same, and you need us to be able to ramp back up and hire lawyers and still have facilities and infrastructure there to be able to grow when needed to respond to the demand that you will have. That is all that I really wanted to point out is that there are a few counties that are in a different posture than the rest of the contractors. Thank you.

1:06:04 Chair Ellis Angela.

1:06:03 A. Sherbo Thank you, Chair Ellis and members of the Commission. Angela Sherbo from Youths, Rights & Justice. This is the fifth time that either I or Mark McKechnie has appeared in front of you or the legislature in the last couple of months solely on the issue of the inadequacy of the compensation of the state's public defender community. I hope it will be the last at least for this year. I am sort of a new comer, a newbie, to the politics and policies of the system delivery. I know there are people behind me who may not like what I have to say. I am encouraged by how candidly Lane spoke, so I will speak candidly as well. The public defender organizations need and deserve your attention and your priorities at this point or they won't survive. I am not speaking in particular about my organization. It is a specialized juvenile defender organization. The only one you have and in some states you don't have one at all. So we are unique this in the state. We are not unique nationally. We are a small

group. I want to talk to you about two things. I want to talk to you about the value that we provide the state as a whole and the need that we have at this point from you. Because now the legislature has given you the money and the task of deciding how to allocate it. Here is what I think. We have talking about high quality representation. I don't think there should be or is a doubt in anyone minds that the structure of a public defender organization that is working well, like those of us at the table, bring to you and to the state very high quality for each of the individual we represent. Whether it is an adult charged with murder. Whether it is a child charged with a sex crime, a felony sex crime. Whether it is a dependent child. Whether it is a misdemeanor. There are two reasons for that. One is because that is what we are here for. That is our mission. That is our corporate premise. High quality representation for those who can't afford it themselves. It is not a business choice like the way it is in a private firm to simply say we will accept payment for this child from the state. We will accept payment for this client from the client. There is a difference - which is not to say and I agree with Lane. It is not to trivialize and it is not to denigrate the abilities and commitment of people in private firms who provide excellent service to their clients. It is a different organizational structure. We have different needs and there is a commitment there. It is a commitment by the people who enter. Some of them entered it a long time ago like myself. Some of them are trying to enter it now and can't because of their debt. So there is the individual representation. I think the public defender organizations also bring something to their community. They are the institutional presence at the local level, at the state level, and even at a national level with respect to the kind of work we do. My office is represented virtually any committee, work group, advisory board that is relevant to our work. We are members of statutorily created committees. We are on youth advisory boards. We are members of the Oregon Law Commission, the Oregon State Bar, Juvenile Section Executive Board, and we have been throughout. There is not a planning committee or any kind of lawyer training that we don't sit on and there hasn't been an attorney academy, a juvenile law CLE, and Oregon State Bar CLE that we haven't participated on in a variety of the gamete, special immigrant juvenile status, ethics, representation of teenagers and the teen brain research. We are there. The same thing with the bar standards. I think we are on the third generation of the Oregon State Bar standards, again with respect to juvenile because that is all I know. We have been a participate in developing those standards and revising them for well over a decade. So public defender organizations bring something to the community as a whole. They bring the ability to train the rest of the bar and it is something that is on top of you pay us to do which is representing individual clients. So instead of taking another paying client with that tiny bit of time that is left over on our weekend or early in the morning or late at night when we are not working on the cases that you pay us to we do that. I think that needs to be recognized. I want to answer one sort of question. I can tell you where people in my office went and why they went. One person went to take care of parents because he couldn't do that on our salary. One person left because she wants to adopt special needs children and she can't afford to do that on our salary. One person left because she needs to pay her law school debts. Another one is on the verge of leaving so that she can retire. When I was before you and before the legislature, I know that our middle level attorneys say in 10 to 15 years are making half, literally half, of what the DA on the other side of the case is making. Our attorney makes \$61,000 and the DA with equal experience and an equal debt load makes \$120,000. Year after year it is not sustainable. Those of us who came into this without debt and have been here for a long time and made the commitment and don't regret a minute of it. When we go there won't be that group of gray haired people with all of that institutional knowledge and history. The next level of people are the ones who are looking at not being able to retire. If they go we are left with a much less experienced statewide presence, and we are left unable to attract - able to pick from as large as pool, if you will, of the youngest attorneys. So I urge you to pay attention when you are coming up with a design how and whom you contract and negotiate with first. What sort of caseloads guarantees you can make to us whether there is a way that some of the contracting can be for our fixed costs rather than simply all on a caseload basis. I think what Paul said about caseloads - I know it is important in our community with respect to the juvenile cases. We are getting a smaller and

smaller percentage of them and we can't sustain what we are doing for you and for the state on that level. Thank you.

1:13:41 Chair Ellis

Tom.

1:13:49 T. Crabtree

Tom Crabtree. I'm a public defender in Bend. I echo the comments of my colleagues up here. Even though this might be against my own pecuniary interests, with regard to public defender salaries, I agree they need to be looked at statewide. But I would urge you to first look at Angela's outfit. Those salaries are woefully inadequate. One of the things that a service they provide around the state is the expertise in juvenile areas. I have been practicing juvenile law for 25 years. I think I know it fairly well. But when I have a problem I go to Angela or I go to Julie and get advice from them. That is a service they provide to attorneys around the state and I think they need to be compensated for that. The salaries that they are able to pay are pitiful for what service they provide juveniles in Multnomah County and attorneys around the state. My other comments relate to more mundane parts of the contracting process. Kathryn, God bless her retired soul, was a very efficient person and she had a policy that we cannot change the way we count cases to the legislature. She adhered to that as long as it meant we can't add an area. She subtracted ways in which we got case credits over the years but didn't add any. There is one particular type of case that we handle in Deschutes County and it occurs in several other counties as well. It is part of a specialty court, the family court process, that we have family court treatment meetings. These aren't the DHS touchy, feely meetings, but these are meetings that are required by the judges. We are court ordered to attend these meeting. The essentially take the place of contested hearings. We meet with all the parties. There is a court facilitator. There is a journal entry prepared as a result of these meetings. That data is entered in OJIN. These were requirements that Kathryn had said probably six years ago if you get that accomplished then I can give you credit for that but it has never happened. If there is a private bar attorney who is representing one of the parties and is paid on an hourly basis, she gets paid for those hearings. We do not. It would be simply acknowledging that family court treatment team meetings held at the courthouse, ordered by the court, are entitled to post-dispositional juvenile credit under 1.575 of the contract. We probably have, I would say, anywhere from four to 10 a month. These are about two hours in length. They are with court personnel, and as I said, we are court ordered to attend. Those are ones we are not being paid for now because of Kathryn's policy. Another part of the contracting process that I think goes to what Lane was talking about and certainly Greg's is 9.1 of the contract, the refund for a shortage. This is a legal fiction that it costs us somehow less to handle a smaller caseload than what we contracted for. This simply isn't true. If we have to lay off an attorney, I don't have a problem with refunding whatever portion of that salary wasn't paid back, but to say that I have to refund 100%, or 85%, which they often have negotiated for that is a fiction. I don't get to tell my landlord that I am only going to pay you 15% of the rent that I have paid for that. I can't say that I am only going to pay the electric company 15% of the electric bill that I have. There are a lot of fixed costs. Requiring us to repay 100 cents on a dollar or 85 cents on a dollar for every case that we come up with that is short of our quota, it isn't reality and it certainly hurts us significantly. The last contract cycle our office because of case counting and the mix of cases going to the private law firm, essentially, cost us \$168,000 for the contract. That is what I had to pay back. That was a significant financial hardship. I think it makes more sense to give a range of cases and say, "We figure you are going to be in this range somewhere." Don't seek repayment and eliminate section 9.1 of the contract for public defenders. We just cannot afford that. Thank you.

1:20:46 Chair Ellis

Steve, you look out of place up here. What was that old Sesame thing? One of these things is not like the other.

1:20:53 S. Gorham

That part is true. Steven Gorham. I am a death penalty. As you also know I was the former head of a consortium. I wasn't intending to say much about consortiums, but I guess I will. Especially when you look at the statistics you just got. That 52% of the caseload is a

consortium representation. A third is a public vendor. Everybody should be paid more and everybody should be equalized to a certain extent. You really can't just overload the PDs and forget the 52%, or two-thirds of the caseload is provided by other types of providers. That is really the only thing that I wanted to say about that. There is actually one more thing. When Angela says, and I am sure Lane and the other public defenders say that we go to the legislature and we do all these other things that is absolutely true. Why they may not get paid a lot for that they are getting paid for that. Angela, Lane, I'm sure, or at least I am guessing, doesn't have a caseload and not only are his administrative duties used for running MPD but it is also for these other things that he does. Now he may not be getting paid a lot for it, but he is getting paid for it. The worst thing in the world would be to have the consortiums or the private people having some sort of a war with the public defenders. You have to equalize it in some way. Frankly, it is great that the legislature saw at least some reason to boost the average for the public defenders. Let's hope the next time they come that we could afford a way to boost the others. What I really wanted to talk about is the death penalty contracts and I think it applies to the mitigation contracts. When you were all in Pendleton in October 21, 2011, there was a discussion, which I just frankly wanted to remind you all about, about the unequal amounts that are being paid for those contracts. I was hoping, and do hope that in this contract process it will be equalized. Kathryn has reasons why, you heard the reasons, I have a copy which I will give you all. I just brought one of the minutes. If you review those minutes there are really, frankly, not great reasons for the unequal amounts that were paid for those. They should be equalized in some way. Whether, unfortunately, some people get a little bit lower or everybody gets a little bit higher. I know Commissioner Stevens talked about quality as potentially - and maybe a couple of you did too, but maybe you should base it on quality. I am not sure there is really any way to do that. So if there is no way to base the difference on quality then it should be equalized. That is my pitch to you regarding this contract process.

1:24:45 Chair Ellis I am going to make a suggestion. Because you guys have come up with some really interesting comments. Why don't we take our morning recess and then I know I have a lot of questions and I am sure the other Commissioners do. I view this as just a really good interactive dialogue. Nobody is making decisions today, but you have been very provocative. Shall we take about 10 minutes and then we will come back.

(Break)

1:37:31 Chair Ellis Betsy, are you still listening?

1:37:31 Hon. Elizabeth Welch Yes sir.

1:37:50 Chair Ellis You should hear the round of applause that you are so diligent.

1:37:44 Hon. Elizabeth Welch It was more like guffaws than applause.

1:37:46 Chair Ellis I think it was surprise and disbelief.

1:37:55 Hon. Elizabeth Welch I understand.

1:37:55 Chair Ellis And the good thing is you are still there on the phone. The other live commissioners disappeared. What Judge Salomon use to do if you were late for court he would just start without you. Picture how you would feel coming in the back of the room and it is going on.

1:40:06 Chair Ellis Shall we resume. Paul Lipscomb has asked to join the panel. We welcome that and you may have some opening thoughts.

1:40:23 P. Lipscomb Let me just begin by saying that I heard Lane's on excellence and efficiency and the need for measurable goals were possible. I support it. I want to say that I think that not only myself but all the members of our consortium are very sympathetic with the concerns of PD offices statewide, but I have to say that as the Executive Director of MCAD, the Marion County Association of Defenders Consortium, I am disappointed to learn today that again, once again, the PD's offices are getting a little more from the common funds. We already feel like step-children. There is in our county, and I am not sure what the percentages are in other counties but I think it is probably similar, in our county there is already a 25 to 30 percent differential between what the PDs office is getting case by case on a case count basis and the particular type of case. It feels to us like we are doing the same work, on the same cases, in the same county, before the same judges and the same prosecutors. It is hard to the justification for that kind of extraordinary differential between what some people are paid for indigent defense in Marion County and what other people are paid for the same service. So to the extent that there is any discretionary funding in the budget that OPDS administers on your behalf, I would hope that you would direct them to send a little something to the majority of the people that do your work if there is any way that is possible to do.

1:42:49 Chair Ellis Thank you. Any other - let me just respond a little bit on what you said and then I am going to cross-examine Lane a little bit. We have historically paid more on a per case basis to PDs than to consortia, and that is really for two reasons. One is we do expect and it is built into the arrangement with the PDs, they are going to perform a lot of functions that it is really not easy for consortia to do. Angela touched on a lot of those. This is involvement in community planning. It is training. It is sharing of briefs and the likes. It is a whole range of activities that PD offices do because they are FTEs are able to do and they do do. It is very difficult for, at least, the typical consortium to provide. So that is part of the explanation why they have been historically given a higher comp rate on the same caseload. The other and this is where I am going to turn to Lane, because it is an issue that is very difficult as we have gone on.

1:44:27 P. Lipscomb Can I just correct something on that?

1:44:24 Chair Ellis Sure.

1:44:24 P. Lipscomb That may be true statewide but in our county our lawyers are doing that kind of work that you usually only expect PD offices to do. We are on all those committees. We are performing those same services.

1:44:47 Chair Ellis You have heard me say publically many times that MCAD has made enormous strides since whatever it was, 2005, that we had all the hearings in Marion County. We do appreciate that.

1:44:59 P. Lipscomb And we appreciate being recognized for that, Mr. Chair.

1:45:00 Chair Ellis Now. Here is the change that I observed has happened in the 10 years since the Commission got up and going. The model that we had 10 years ago was you can't do everything with a PD because you guys are subject to the unit on conflicts. So everybody knows you are going to have a shared caseload. The model that we started with was the PDs because they are FTEs they are much slower in their ability to particularly downward adjust in a downward caseload circumstance. The model was that the private providers, either the law firm providers or the consortia providers, they have a private practice component to what else they do and the hope is they can be kind of on the outer edge of the change and they can change more rapidly and with less impact. That model has had some change. A lot of what we have been doing is pushing consortia members, in particular, to be specialists. We have discouraged situations where consortia providers are only 20 or 30 percent of their practice is criminal. Criminal defense is today such a sophisticated field that you can't just do it as an add on to a general practice, you have to know what you are doing. What I think has happened, at least in a lot of parts of the state, is the consortium model has become essentially full time providers, which

means that a cutback there is no longer in contrast to PDs. When you cutback you are cutting back somebody who is largely 90 to 100% doing defense work, which to me trying to balance, and obviously that is what we are doing. We are not the legislature. We don't have the ability to come up with extra money. We are allocating within a finite pie. I just raising this with you, Lane, how do you see we should respond to this? I am a believer that public defense or criminal defense is a specialized field. Now those consortium members who private practice is fee paying criminal, fine. That really does work. But where you have consortium members who are essentially 100% of their practice is dependent on public defense and that is what they are doing. We have encouraged them to become specialists and come to meetings like this and do all the things that we have tried to do. How do you see us handling that?

1:48:19 L. Borg

That is a great question. Let me see if I can try and answer it. I want to make one comment. I can't speak for Marion County. I am speaking for Multnomah County. My understanding is that consortia/public defender difference is about 15%. I understand what you are saying about we are paid to go to these other meetings. But we also do investigation. I have calculated it and it takes about two and a half hours of investigation time on misdemeanor and so now I am getting paid less than the consortium. It is more than just meetings. There is actually expense that we would have to go and get a non-routine expense for if we didn't have investigators. At least in Multnomah County I think that is part of the price. I think that the real challenge and I spoke on this at the Pendleton conference that Steve was talking about. I think we take an assumption beyond what you were just saying. I think you accurately reflected what the history of it has been, but we also take an assumption that there are no conflicts. So consortia are these great institutions where we can just sort of send cases into the abyss and they can move them around and there are no conflicts. I think that this is just wrong. I think if you look at RPC 5.6 and 5.7, it says in their explicitly - it doesn't say law firms; it says law firms or organizations like law firms where you have supervisorial control. I think the Commission has rightfully moved forward with requiring such things as a business entity. Requiring such things as independent boards and all these things that are good practices, but the fact of the matter is that they are de facto public defender offices.

1:50:07 Chair Ellis

So your thought is that by requiring boards, which we have, and trying to...

1:50:18 L. Borg

It is moving in that direction.

1:50:15 Chair Ellis

We may shoot ourselves in the foot.

1:50:25 L. Borg

I think the lack of conflict analysis works when you have two equal consortia members that are in their own offices. Where I think you do have a conflict is if you have, and this is not as I understand the case in Salem where you have the administrator taking cases also. Once you have a situation where the administrator has a co-defendant with the person that they have authority over, I think you have a conflict. It is not exactly now they are a de facto firm. I am just saying that there is a conflict analysis and they do have to be sensitive to that. But the other part of it, the other really hard, I think, if you go down this path I think the hardest nut to crack is going to be, and I understand there is a really good reason for it. I am a capitalist too. Public Defenders are audited. It is transparent. You know how much Tom makes. You know how much I make. We turn it all in and for very good reasons we don't want to get into that kind of minutia crack into what are essentially private businesses that have maybe a mix of private cases and retained cases. Until you get to that it is always going to be a question. You are always going to be vulnerable to somebody saying, " Well, where is this money going?" I want to be clear I don't have evidence to impugn anybody in this state at all. But you look at what happened in Washington. Look at what happened in Mt. Vernon. That lawsuit is going on right now. Those were private contractors. They had two guys handling 5,000, 6,000 misdemeanor cases and there was another one, I think, out in rural Washington where you had one guy who was making \$300,000 handling 10,000 cases or some absurd number. You are vulnerable to that kind of a problem blowing up on you unless you can see

the books. Until you can crack that nut with all the issues around that with consortia or private firms, that is going to be vulnerability issue. That is going to be an issue. You are going to have that until you can crack it. It is going to be difficult to treat them the same way that you can treat public defender's office. We are audited. Our books are open. I don't want to say transparent. That has an implication that other people aren't and they are sinister. I am not saying that. I am just saying the business model is different. You don't get to look in there and see that so you have vulnerability. It is a exposure. I think that the way that you get there, and I am trying to answer your question, Mr. Chair, directly. You look at the model that we have done for the Commission. That OPDS has done. That we in the state have done around juvenile representation. We look at it and we go it is specialized. It is something you need to do more and just go out there are do good work and we are all great attorneys. We are making judgments calls, frankly, about saying that there is a right way to do it and there is a wrong way to do it. We are going to make people do that. We are going to hold people accountable. We are going to define what it is we want them to do. I am sure that that has had the effect of some people who dabbled at it no longer dabbling at it. Just saying I can't do that. I am not going to do that. I think we had that de facto in adult criminal with Measure 11. Measure 11 started with the sentencing guidelines. When Measure 11 came in I knew some very fine attorneys and I don't think she would be embarrassed, but Diane Stewart, who is now on the bench in Multnomah County, she just said that I had to stop practicing criminal law when Measure 11 came in because it was getting too complicated. If we define what we want, if we hold people's feet to the fire and we have accountability, I think you are going to see people saying, "I can't do that. I am not competent to do that." They will be out and won't be doing that anymore. Then we do have to own up. If people are de facto. If people are doing 100% criminal defense work whether they are in consortia or public defenders, then we - you guys, the state, all of us have to own that and say, "We are going to pay you a living wage to do that. We want you do that. We want you to stay doing that and we are going to do." I am head of the largest public defender's office, but I am not so married to the concept that it can only be public defender. I think public defenders are a great institution to be your core, to be the training grounds; we are just well suited to be like training hospitals to get people out there. But you do want people who are out in private practice. There are great attorneys who are in private practice that are doing great

1:55:17 Chair Ellis

A lot of them alumni...

1:55:17 L. Borg

A lot of them alumni of our office. If that is the case and they are doing 100% then we need recognize that. It is going to be tough. It is going to be a heavy lift because we have got to start looking at things that we are not comfortable looking at.

1:55:38 Chair Ellis

If others have something to say. I have one other topic. Angela, Lane, and Tom all, I think, were suggesting that we ought to revisit how we contract. If I can summarize what I thought I heard you saying. We contract both with the consortia and the other providers and with the PDs on a caseload basis. A lot of issues as to what should be counted as a case and so on. But I thought I heard you saying that because PDs are institutional, which was Lane's phrase, and they have fixed costs that maybe we ought to revisit how we contract with PDs and have a component that is fixed costs and then a component variable. I recognize that there is no bright line there because you probably think as your staff as fixed and in traditional accounting one would think of staff as more variable. Help me understand your thinking. You were pretty direct about this.

1:56:54 L. Borg

I submitted my proposal yesterday. I proposed this in there. I think what you can with these contracts is if you figure out overall what the contract is and take a portion like 15%. Because I don't think the reconciliation has ever been 15% even with Greg's situation. Just say that that is going to be your base. We are going to pay for that. In a sense you are doing that with me because we get paid for arraignment coverage or early resolution or something like mental health court. We get paid a flat rate for that. That doesn't count on the case count, but if you take a portion of it, say 15%, and say we are going to pay you that and then you could lower

some of the case rate so that what happens in the reconciliation is we are not dealing with such wild swings, and as Tom as talking about, the marginal savings from going down isn't as much because, yes, we look to periods where we can lay people off, or if I am trying to play catch up then I have to hire the staff even before - the caseload is there even before the adjustment is there. But the adjustments will be smaller. It will soften those ups and downs because we will be dealing with a smaller marginal case rate, but we recognize the base. Now you could do it in other models too. You could go through and identify the things the big items for us like rent and liability insurance. My liability insurance does not change when I lay somebody off. I could call Lloyds of London and say, "Can you send \$400 back." It is \$98,000 year. It is there. Those are fixed costs. We could take those and chump them out and what is that and then divide it by 24 payments. I think there are models. I think that there are ways to do that that are perhaps more accounting, but they would have the ability of making it not so scary to have the up and down like Greg dealt with and I dealt with a couple of years ago.

1:59:03 G. Hazarabedian I would just like to add for the record, Mr. Chair, that I am not digging a trough where I am going to be a million bucks in the hole at the end of this contract. We have already renegotiated our contract down substantially when our cases started going away in Lane County and that is what caused the layoffs. If I am any kind of business man I am going to have the money that I am receiving match the work that I am making and have the staff I have match the work that there is to do. We have already made that adjustment. I am not digging a trough where I am going to have to write a million dollar check at the end of the year which I wouldn't be able to do. I just want that to be clear to the record. That doesn't change my earlier remarks.

1:59:47 Chair Ellis Let me understand on your earlier remarks. I hadn't realized how extreme the situation has become in the timber dependent counties. But I don't think our job is to be the employer of last resort. Our job isn't to be sure that everybody who is out there gets plenty of work because I don't think the legislature would view it that way either. So is what you are saying where we have key providers, and you obviously are a key provider, experiencing unprecedented sharp downturn we should cushion that fall on the assumption that it will return and if it gets below a certain it threatens your survival.

2:00:40 G. Hazarabedian Although I didn't phrase it in the same way in the conversation that Lane just had with you, it is some degree that same concept and that is that I can lay off - we have had a combination of layoffs and retirements and unfortunately a death that resulted in six lawyers less today than a year ago, which is appropriate to our new caseload, but the rent or the mortgage is still the same and the power bill doesn't go a lot when you have one less fluorescent light bulb in an empty office not being used.

2:01:19 Chair Ellis I understand. That is the same concept that we are just talking about. Some component of fix.

2:01:27 G. Hazarabedian I was not trying to suggest that it is your job as a Commission to do anything about the poor way that Lane County administers itself. I was suggesting that I would hope that you would be aware of the fact that the downsizing that I have had to go through and it is not just lawyers. Obviously there is a staff component that roughly is equivalent to that goes away when the lawyers go away. It is that you would be aware of that and cognizance that my fixed overhead costs to be the public defender don't go down by the same percentage that the layoffs and cases go down. That you would look at that when you were looking at the \$2.1 million dollars that the legislature has apportioned to help public defender and look at what I put in my RFP to justify some increases and realize that my office is now closer to the brink of when do we cease to be a viable organization. What size do we need to move the whole office to smaller accommodations? What size do we need to change structurally the whole makeup of the office? I am not Chicken Little. I am saying that we are approaching that point where that could come to a real question if things get any worse.

- 2:02:50 C. Lazenby That should be a concern of ours as a Commission because what I took from Greg's comments was a need to maintain the capacity as the demand for these services go down, we have to be mindful that it cycles back up and when it cycles back up it is going to be more expensive for us to rebuild the capacity to provide quality services than it will cost us to maintain it through this sort of drought. That is something that I think is a legitimate policy concern for the Commission to follow through with, as opposed to the lights and the insurance costs not being variable but the capacity of the system to provide the quality services. We need to think about that as we could through these contracting pieces too. We have got the demographics that will tell us that crime wave is going to pick up again.
- 2:03:45 G. Hazarabedian Mr. Chair, Commissioner Lazenby has more eloquently stated what I have been trying to state.
- 2:03:52 C. Lazenby Clearly my check cleared.
- 2:03:59 Chair Ellis You are not just flattering him. So, Lane, let me go ask you a question. This is a very interesting dialogue for us. You said well PDs are open and we get to see everything. The suggestion was that with some of our other contractors we should seek that same level of information. We have at least two law firms that are key providers in their part of the state and they are both here in the room. Is it your suggestion that somehow we should insist that Jack open his books and show us everything that is there?
- 2:04:50 L. Borg No. No. I am just recognizing that is a vulnerability that you have because what you don't know in that situation - I really don't want to because I am sensitive to what Steve was arguing about. This should not become a fight among indigent defense providers. I am just trying to give you my observations that when you don't do that, and I am not saying that you should do. That is just a blind spot out there. That is vulnerability out there. When you look at the examples - that is why I was talking about the case in Washington. That is the liability out there. You are operating blind when you don't have that. You have got to figure out a way to respect the private business that Jack is. He is a private business and I honor that and it should be that. You have to figure out a way how do you do that and still make assurances it is a not a vulnerability out there. The two ways that you have that are vulnerable when you don't is what is a caseload? That is going to part of this quality discussion too. We don't really have a definition about what a caseload is even among public defender offices. What is a caseload? Then where is the money going. It doesn't need to get to the level of micromanaging. It just has to be a way to be comfortable with it. That is not going to a situation that is going to blow up in the Willamette Week where here is so and so in Grant County making \$200,000 handling way too many cases and they didn't know. That is where you guys will come into criticism from the public and the legislature. That will hurt all of us. It only has to happen once. Look at the situation in Washington. I am still talking about it. It only has to happen once and it blows up.
- 2:06:45 C. Lazenby Lane, I don't want to get too far down the weeds in this. We sort of have a 10 year track record of usage county by county. We have toured around and we know who the folks are that are providing that. I would think that given our limited resources and what goes into each of those individual contracts, whether it is with the consortia or the public defender organizations, we would see an outlandish glitch like that because it would appear to us as a leakage of money. It is more theoretical than real it seems to me. I appreciate your concern for our political welfare. I think we would detect that. What can you say to us that would make me believe that it is a problem?
- 2:07:41 L. Borg I don't disagree with anything. You just have to keep doing that. You can't just say that we looked and everything is fine. The process just has to keep going and you are being vigilant to that.

- 2:07:51 C. Lazenby I think the money leakage issue is something that is going to be very hard for us to get a handle on. The caseload issue is a much easier one for us to get a handle on. We can find and see 2,000 to one lawyer. I think we would be able to stop that. But if a private law firm is taking a requisite number of cases. They are getting paid whatever they are getting paid, but it comes to light that that person is also making \$200,000, and someone is tying it back into our contract process. That is going to be harder to plug. We are going to say, "No. They are really only getting paid a \$100,000. That other \$100,000 was on four cases that they took that were private retained cases."
- 2:08:37 G. Hazarabedian If I can jump in here very quickly. Commissioner Potter what we can see is the caseload that OPDS has contracted with and the entity to do. What you don't have is the ability to see what other caseload those lawyers are doing on the private side.
- 2:08:59 J. Potter That is what I just said. They could have only four more cases and get a whole bunch more money coming in. The case that we might pay \$1,000 for in the private sector it might be \$20,000.
- 2:09:16 Chair Ellis On thing that I think Paul will be sensitive to, I was not happen that our package this year separated out PD and hourly and excluded consortia. What I don't want to see is that kind of a situation again that drives a consortium like MCAD, who was it just two years ago converted from hourly to case unit?
- 2:09:50 P. Lipscomb It was actually five.
- 2:09:56 Chair Ellis Whatever time it was. Time flies. But recently, which I thought was a very positive step trying to get away the old rolodex appointment system. I think I will make a note to Nancy. In the next biennium I think we need to think through how we put our packages together. I do remember that this issue came up but it was too late to change. I had the same concern that Paul had. So let's put that as something we are going to think through. I would much rather we got the legislature to just increase the Commission's appropriation on the contract fund and then let us work it out. It is not a simply thing to work out but at least we are in a position to balance it in a way that I think the legislature may not be.
- 2:11:01 P. Lipscomb There is a danger here too to the PD offices. If LFO gets down far enough in the weeds to see that consortia are doing a case for 30% less than the public defender is doing it, then you are going to be explaining that in front of the legislature.
- 2:11:15 Chair Ellis I think we have explained that. We can all debate what the right percentage is. I have been comfortable for a long time that some incremental differences are justified. We went through this back in the Coos Bay meeting. I always remember meetings by where they take place. That was in 05. That was the only time in my experience where we had a little extra money to work with and we debated this. All components of the provider community were there. I can't remember exactly what the percentages were, but the direction was for all the reasons that Angela stated, this was before your involvement, but the direction was PDs because of the two principle reasons that I talked about a moment ago should get incremental comp. I haven't heard anybody on the Commission say that principle is wrong. We can debate where the line should be drawn.
- 2:12:36 J. Potter Can I switch gears slightly?
- 2:12:36 Chair Ellis You certainly can.
- 2:12:37 J. Potter Paul, I ask you this question and you heard Lane one of his other points was that the big contractors should be negotiated with first. Most of the PDs in every county will be the big contractor. I think Nancy or Paul will correct me if I am wrong, but the big contractors are usually public defenders except in Marion County...

2:12:59 Chair Ellis Or Clackamas.

2:12:59 J. Potter But there is no public defender there.

2:12:59 Chair Ellis I know but they are a big contractor.

2:13:06 J. Potter True. But just in the public defense arena in your county you are bigger than the public defender in terms of contracts. So do you agree with Lane that we should be negotiating the larger contractors first?

2:13:25 P. Lipscomb I don't think there is any moral difference. I can't think of any reason other than good business practices why you might want to adopt that, but Lane is pretty persuasive that every other business does it. I am not exactly sure how it is currently being done or has been done in the past. I know that we put in a request for proposal - a response to the request for a proposal that we feel is reasonable and responsible and it comes back and we are told, "No. Sorry. This is the best we can do." That is the negotiation. We make an offer and they make a counter offer.

2:14:10 J. Potter So you have submitted your proposal?

2:14:07 P. Lipscomb No. I was waiting until after this meeting. It will be fine tuned tomorrow.

2:14:17 J. Potter Mr. Chair, I have a question for the general audience. Just by a show of hands who has not submitted their proposals yet? Who has submitted their proposal? So it looks like maybe two-thirds have not. This is outside of my role but I will remind people anyway that as you listen to these discussions and you hear all the kvetching about money and not getting enough, in your proposals you have got to ask for it. You have got to ask for it. I know there is a history in the background that said you are not going to get anything, so don't ask for it. You have got to ask for the money. You will never get any more money unless you ask for it. It doesn't help us down the road when we go to the legislature either. They will ask what did people apply for? Okay. Give them that.

2:15:15 Chair Ellis Thanks, John.

2:15:17 C. Lazenby You know I think that this whole field we gained a lot of traction because of what happened in the BRAC. Institutionally I think the legislature even though the people have all changed and all that. There is an institutional memory there that if we don't fund this something bad happens. I think we still ride that kind of crest as a result of what happened in the BRAC. From just a practical standpoint because I have been through 10 years of we need more money, I think you folks have an obligation to talk among yourselves about how you can create a better sense of value for the services that you provide. That is all I am going to say about that.

2:16:10 L. Borg I want to make a comment on that. It hasn't been talked about yet today but there was another aspect to what happened during the legislative session. A lot of people in this room were there and participated in that and that was with Jennifer Williamson's parity bill. I know you had a briefing on that at your last meeting. The thing that I can tell that was probably to me that showed how effective that presentation was, was Chris Garrett, who is a deservedly so, recognized as an excellent legislator, extremely bright guy, private practice, he couldn't talk. He looked at that disparity and Angela talked about that chart. It is almost to the point with my office where the top end of my salary is below the starting salary of the DA's office. They just stared at that. All the lawyers in the room that knew that and worked in firms just looked at that and saw this is not sustainable. I think Commissioner Lazenby's comments are spot on. That is the next sort of BRAC crisis. They got it. They saw this is not sustainable. The stories of the lawyers about what they are giving up or what they are doing. I thought it was

telling when out of Tom's office he had demonstrated that he had a person who had left and the difference in pay that that person got by going to the DA's office. It is a mortgage. It is \$180,000. You can buy a house. You can pay off a law school debt. It was a significant amount of money for just that one choice. The last thing that I want to say is I want to echo what Angela and Tom are saying about juveniles. We really need to look a different model for juveniles. When I look at the cost centers in my office and stuff, the adult crimes are subsidizing juveniles. They have been for a long time. I have been broke a really long time because I was told that is the way it was when I was there. There is another little storm coming this next year because Multnomah County will be going through eCourt transition. We have been told, and when I talked with Mark McKechnie, and I told them you can expect about half of the review hearings - because the staff is going to be gone about 50% of the time doing trainings. Then they are going to have no vacations for that three months so they are going to have to catch up. We are going to have about six months of decreased court time that will mean fewer review hearings. I am absolutely convicted that what they are going to do is as Tom was talking about, they are going to substitute in other types of hearings and if we go with the current model of you are being paid by the original dependency and then whatever review hearings happen, it is going to be particularly acute in YRJ. It is going to hit my office. It is going to hit Keith Rogers and MDI. All of us that have this model of needing those review hearings and predicting that they are going to come in. They are not going to be there for the first half of 2014. It might be that like the BRAC years this is a chance to look at a different model. To look at it a different way. Whether it is an FTE model, or whether it is just recognizing all of these. In my proposal one of the things that I am suggesting is maybe look at an original credit for the appointment of case. Then so much per month for the months that the case is open. These things can go on for 18 months or 24 months, sometimes longer. Maybe that is the model we look at. I don't think there is a concern that somehow we are going to get rich off of that. We are not setting the review hearings or continuances; it is the court who is saying how long that case is open. We have to look at a different model. It is particularly non-sustainable in juveniles.

2:20:15 Chair Ellis

Reality is we are dealing with a finite pie. You guys are so articulate. This has really been awesome hearing you. But to fund to addressing some of what each of you, at least the PD piece, are saying there are two ways. One is reduce the per case payments to the non-PD providers, or reduce the population of the non-PD providers. Any suggestions?

2:20:50 T. Crabtree

I can add a third thing. Essentially it is kind of like us getting an overage check, but if you let the legislature know that there will be these additional case credits that we will be having to seek funding for because the courts have created them because of their shortages. They don't have the time to handle all these review hearings in court. They don't have the time for the contested hearings, so they have created these that are governed by staff people. These are requirements added to us, court ordered, so this is an area where the case quota will be going up. We have to compensate for that and that is something that the legislature has always recognized is an increasing caseload. We might not get paid for it in advance but we do have the ability to go back and request E-Board funding to cover the increased cases. In some counties it will be making up for what would have been a decreased caseload. It will keep it even. I don't think it is a matter of whose pocket we take it out of. It is a cash flow issue as opposed to a case flow issue.

2:22:38 C. Lazenby

But it is whose pocket you are going to take it out of. You talk about going back to the E-Board and asking them for more money because of an exigency that has occurred in the middle biennium, and that to them turns into how do I take this from K through 12? How do I take this from the prisons? How do I take this from somebody else? So it may not be within our own system that you are doing it, but what you are suggesting is exactly that. We are squeezing the water balloon here. That is all we are doing.

2:22:52 T. Crabtree

But we are recognizing reality at the same time.

2:22:55 C. Lazenby Sure. I understand.

2:22:57 T. Crabtree If the legislature creates a new crime and suddenly they have to pay for the defense of that. They have to pay for eventually the corrections people or the prisons to do that. They recognize that and they do it. That is the just natural outcome from that. This is essentially doing the same. It is recognizing the reality that things aren't fixed in 1985 case terms. The times evolve. The types of cases we handle evolve. We are requiring to do more things and so eventually we have to recognize that there has to be a way to pay for those.

2:23:54 S. Gorham Mr. Chair, if you do what you just suggested you are going to get for the two-thirds of the caseload less quality. It is unavoidable unless you just say, "No. We are not going to provide the service," which is the BRAC model. I think we have to go to the BRAC model rather than ...

2:24:15 Chair Ellis I don't think it is quite as stark as you say because decreasing caseload has been how we have funded things in the last few years. We are about to wind this up.

2:24:36 P. Levy I know that Jennifer Nash, who was also not on the play bill, wants to make some remarks and then I want to have an opportunity

2:24:48 Chair Ellis To synthesize all this into a coherent whole.

2:24:57 P. Levy Yes.

2:24:57 Chair Ellis Yes, Jennifer.

2:24:57 J. Nash I will be brief. I had no intention of saying anything when I walked in the room, but after listening to the comments especially given that there are no consortia members up here - I understand, but certainly no small consortium members, I thought that I should say something. I am a consortium member who is here from Benton County. We have about 1,900 cases a year. We have seven lawyers that provide indigent services and that number is going to increase to probably nine or 10, and we are going to do that by reducing caseloads in 2014-15. My comments are I wholeheartedly disagree that even small consortiums are not in a position where they are providing leadership roles in the community. I am on so many different committees that provide training to other lawyers, DHS caseworkers. Our group does everything except post conviction relief. We do murder cases. We do adult criminal, juvenile criminal, juvenile dependency, mental health cases. We don't have a public defender's office because it is small and it is just not sustainable to have a public defender's office. I think the most important thing, and I know the Commission does this, but it really disturbs me to hear - while I think public defenders do a tremendous service and really, really excellent work. In fact I called Angela a couple of weeks ago on a case that I needed some help with. That consortium attorneys are getting paid less. It is true we have private cases and our private cases subsidize our public defense cases. There is no way we could run our business as the 100% provider. Commissioner Ellis, you talk about having people doing almost exclusive because of the need for education specialty of criminal law, juvenile law, etc., even if they are a consortium provider. That is just not possible. There may be consortium providers who take retained criminal cases or retained juvenile cases. Most of our attorneys have practices that are not related to their criminal. That is because we have to have the money available to pay the same overhead costs that public defender offices have. We have rent. We have PLF that public defenders aren't paying. Our firm provides insurance for all of our employees. We provide retirement monthly because we want to be good employers. All of those costs have to be paid for. They are not being paid for by public defense funds. They are being paid for by our private cases. If you want a situation where you have public defense providers who are consortiums who are doing almost exclusively that work you are going to have to pay them for that because they can't do it without the private cases. You say you wish the legislature would give a pot of money that then the Commission could divide up.

It is the Commission who is putting forward the policy packages to the legislature. This is what we would like to do. We want to increase public defender pay and not increase consortium pay. You have the option to do that. You have the option to do whatever statistical analysis needs to happen to make that a viable proposal to the legislature. I would ask on behalf of consortia providers that you do that. I have consortium providers in my consortium who don't want to have a retained caseload. There is some tension there especially because we our group decided to increase our providers. Those people did not want that to happen because it would directly cut into their part of the pie and they didn't know they were going to be able to do that. Our board's and our group's response was, "Well, take private cases." If the Commission doesn't want that to happen, the Commission has it within their ability to try to change that over time so that we can have adequate compensation so that we are not having to take private cases.

2:29:05 C. Lazenby

Can I ask for some clarity from Nancy. It seemed to me that what I heard Nancy say when she was talking about the budget discussions and the increased money was that there was a discussion about additional money for consortia. It sounded to me like the legislature specifically said, "No." So it isn't a matter of the Commission not putting that forward. It was the legislature denoted that it would only go to PD offices. I seek clarity on that. I may have misheard.

2:29:38 N. Cozine

I wanted to start by just reminding everyone that the three policy option packages that were submitted to the legislature this session were exactly the same as they have been every biennium for the last many, many biennia. They are constructed based upon an established model that pulls from very predictable data points. As you know Kathryn is the one who structured those. As she explained it for her the most reliable places to pull numbers were the places where she had more information about caseload and compensation. Every provider submits in their RFP information about compensation for attorneys, but it doesn't necessarily include the private sector compensation. The public defense compensation is included there. So for our consortium providers who are exclusively PD work you could look at that. But there isn't way for her to sift through which consortium providers are partially private funded. She would rely simply upon the PD compensation tables to develop the policy option package. When we talk with the Commission two times this year about this policy option packages and as we talked to our consortium providers and it became very clear that we need to have a little more discussion about the ideal is. So partially it is kind of responsive to the legislature because they will drill down and ask details and we need to be able to answer their questions. That is how those policy option packages were originally created. That at least that was my understanding. This gets back to what I did say earlier where I think we are at point because I think our system has developed to include consortium providers that do so much public defense work. It becomes essentially they are a FTE provider. You have come to a point where we should be talking about how we could create a policy option package that better reflects public defense as it has developed over the last 10 years. So whether it is attaching something like the caseload limit to the funding so that we can confidently say to the legislature we are providing this amount of money for this many cases and there aren't a bunch private cases coming in and supplementing and taking away from the time spent on public defense cases. You know that is a conversation that we need to have. It gets back to our earlier conversation where I think that OPDS could dictate through contract some of this provisions, but I really think that we will get further if we have a conversation with our contractors about what works for them as we develop those types of contractual provisions and as we develop our policy option packages.

2:32:59 Chair Ellis

Okay. I want to thank you all of you. This was extremely helpful.

2:33:16 P. Levy

What staff, the analysts and myself and Nancy, want to come away from this with some idea of where you want us to go. I want to suggest what I purpose of as a dialogue. Both of the people who have been talking to you and from your responses and to be told that I am on the right track or not. I want to make a couple of comments about what we have heard. It is has

been very useful. Some of it is actually very easy for us. Steve Gorham's comments about there not really being a solid rationale for disparity in death penalty provider rates is well taken. It is something that I think we can move towards remedying. We have put all the mitigators at the same rate. But what the other discussion reflects is the difficulty with the model that we have followed for decades now of financing public defense services through cases. So you hear now people being quite specific and saying that just doesn't work when we have large, fixed costs in running a public defender office. What it also creates is this debate between consortia and public defender offices when you look at case rates and you see a disparity and you somehow think that that reflects a judgment about the reality value of the work that is being done. That is not what it is meant to do at all. It is meant to reflect the fact that we have what has been called variously over the years since the beginning of the Commission, key providers or central providers. Recognizing the essential role of public defender offices in the jurisdictions where they exist and a commitment to sustaining those organizations. Unfortunately the way we have done it is through cases and case rates. So you have this disparity which simply is disparity in structure and financing and not a reflection on the relative worth of one lawyer's work over the others. Adopting a new model is something that we need to do. I think the discussion here is persuasive on that point. This is not the first time we have heard it. It is probably not something we can accomplish in this contract cycle, but it is something that we can be mindful of as we work on these contracts. That is the other point. I think that I heard here and I started with my opening remarks is that I looked at the historical documents of the Commission's expressions of how they view the structure of public defense. The Commission has consistently done two things. You have recognized the central role, value, and importance of public defender offices and commitment to sustaining those organizations. You have also said that you do not care to be involved in the debate about which is better, a public defender office or a consortia, and you have not engaged in that type of debate and it is not necessary. We need both. The ADA principles on best practices for the delivery of public defense services say you must have a strong private bar component to the public defender system. But we need to figure out a way to finance them both. What I am hearing is that we need to find within the resources that we have available in this contracting cycle, a way to sustain our public defender organizations and the details of which we would like to have the latitude to work out. For instance, you have heard about the increase of the reliance on out of court, informal family decision meetings or family treatment decision meetings. Whether we accord credit for those or some percentage of those or increase rates for dependency cases, which is the approach we have taken traditionally. We would like to work out the mechanics of that with the general guidance we need to sustain public defender offices. That does not mean, and we would not take it as the message, that we should be cutting case rates and values for consortia. I don't think we need to do that. I don't think we want to do that.

2:39:09 Chair Ellis

What about this concept that PD offices have these fixed costs and somehow it does feel wrong that they come up short on their quota and somehow that impacts the entire financial structure. Is there some way to use the incremental money, which is not a ton of it but there is some of it, to move in a way that would make the variable risk match the variable costs as opposed to hitting the fixed costs?

2:39:42 P. Levy

I think there is. When have moved as a couple of people have observed, we have moved that way a little bit in buying not cases but services in drug courts and another types of specialty courts. I don't want to get too far ahead of our process and what we can and cannot afford. I absolutely agree and I don't think anyone would argue with Tom Crabtree that it is a fiction that if you have less work that you don't need the basic floor of money that pays you rent. We need to find a way to make sure that the rent can be paid. The lights come on and that the organization continues to be there through hard times. That is the message that we are hearing and want to use as our guidance in contracting. One thing that I don't think that we need to do is adopt the suggestion that we contract first with public defender offices or with large contractors. One of the ways in which we have really moved our contracting operations forward is in the work that will begin this afternoon and we have what we call our "War room

operations," which is where we put into a giant spreadsheet all of the contract proposals. What people are asking for. What we have been paying them. What the caseload looks like. What the bottom line dollar is that we have from the legislature and where they have directed that. So we know what people want. We know what we have and we can figure out looking at everybody this is the statewide plan. How to meet their needs guiding by your priorities.

- 2:42:10 Chair Ellis I thought, and again, it is hard for me to remember what cycle we are cycling we are talking about, but it was like two cycles ago, maybe three that we moved away from the staggered contracting and went to a contracting program where everybody was on the same timing, which was designed to avoid the very conversation that Lane says that he encounters now which is thanks for asking but we are all locked in. It keeps everybody on the same timing so that what you are talking about a statewide where both the large and the small are being worked over simultaneously.
- 2:43:00 P. Levy Worked on.
- 2:43:07 Chair Ellis Let the record reflect that I meant that. I thought that was a good mood and I supported it and I am glad we are doing it. I think it does address this issue that people are told it has already been decided before you have put your proposal in.
- 2:43:33 P. Levy I think that we are not going to be asking consortia to take less.
- 2:43:48 Chair Ellis Less on a per case basis.
- 2:43:48 P. Levy Right.
- 2:43:46 Chair Ellis But there are variations in caseload and that is an adjustment that may be made.
- 2:43:55 P. Levy Yes. In fact there may be situations, I think, very limited where we have too many contractors for the caseload. We have already begun frank discussions with some of those contractors.
- 2:44:16 Chair Ellis So anyone want to respond to Paul?
- 2:44:19 C. Lazenby Just a concern and that is I appreciate the comments from Lane and other folks about sort of the business realities that they do. I guess my concern is as the legislature starts to move towards this more sort of outcome based performance evaluation, which is going to make it harder for us to move away from per case sort of compensation. That is a tension that is going to be really hard for us to break through in a lot of ways. I think creative ideas on how to do that would be really helpful. With them switching over to this performance based evaluation, it is going to be very hard for us to say, "We would like to give you money so you can operate as a business. We have got this piece we have to do with the legislature where they are going to want to see how much bang they are getting for every dime they are spending." To a certain extent it is almost in conflict.
- 2:45:18 P. Levy We need to think of new models and new ways of financing public defense. Indeed, Nancy has observed that the whole process now I backwards. We are doing contracting now. We are just getting our RFP. People will follow Commissioner Potter's suggestion. Tell them what you need and the legislature is adjourned. The order of these events might be rearranged to much better effect. Even the idea that we finance a fixed structure, some level, for PD offices is a very good one. I think that is going to take another cycle, at a minimum, for us to figure out how to make that work in conjunction with what we asked for from the legislature and how we made that request.
- 2:46:32 Chair Ellis Okay. Thank you. Good segment.

Agenda Item No. 7

OPDS Monthly Report

- 2:46:41 Chair Ellis Okay. Now the OPDS monthly report.
- 2:46:44 Hon. Elizabeth Welch Excuse me, Chair Ellis, I have to sign off. Good luck to everybody. See you in Astoria.
- 2:46:48 Chair Ellis Alright. Thank you.
- 2:46:48 C. Lazenby Bye judge.
- 2:46:48 Chair Ellis Monthly report?
- 2:46:52 N. Cozine Thank you, Chair Ellis and members of the Commission. We will keep this really brief because we are running short on time. We will go ahead and start with an update from our appellate division.
- 2:47:18 S. Wiley Chair Ellis, members of the Commission, my name is Shawn Wiley. I am subbing for Peter Gartlan. He is currently in the wilds of France.
- 2:47:23 Chair Ellis I was going to say where in France is he today?
- 2:47:25 S. Wiley We are not sure and we are not asking. We all wish Pete and Carol well on their honeymoon. So happy to take on the duty. So, again, mindful of our time we had our annual MayDaze last month. As the Commission knows we put on two in house CLEs every year. They are the Holiday and MayDaze. This year was a very successful half day program that focused on mental health issues. Pete actually gave a quick presentation on the fallout from the Supreme Court's decision to vacate *State v. Hemenway* and then the strategy moving forward. Then we moved into the focus and Alex Bassos gave us a great overview of legal issues stemming from a host of mental health issues, including aid and assist and some of the requirements for certification of mental health experts and it was fascinating. We also heard Dr. Nicole Ball from the Oregon State Hospital. She gave us a presentation on dealing with difficult clients. It was a very good and thorough program. I have a quick legislative update. Last month I gave the Commission a quick overview of the bills that we have drafted and asked the legislature to enact them. I am happy to report that both bills passed and were signed by the Governor. That is the DNA testing appeals provision and also something to do with timing of an amended notice of appeal. We are reaching out to clients who were affected by the DNA testing and also looking at our in house processes for dealing with amended judgments. The JAS unit has added a new attorney. Sarah Peterson is very skilled and knowledgeable attorney. She has made an immediate impact. I am also happy to report that Shannon Storey will giving a presentation with other experts in litigating appeals in juvenile cases at the ABA National Parent Conference in July. It is high honor. AD has initiated a new externship program. It is a pilot program. This summer we have taken on a couple of students from Willamette University Law School. They are presently working with Joshua Crowther on some discrete death penalty issues. Josh has an ongoing capital appeal and it was a good fit for externs to be able to do discrete research. We are going to assess how that goes after the summer and hopefully expand it into something that lasts longer than just a summer and includes the major laws schools of Lewis & Clark and others. The last thing that I wanted to report on is the Supreme Court. Just this morning we wrapped up the last oral argument in the last case that we have this session. The Supreme Court takes an annual hiatus during the bulk of the summer months. In the past week we argued two cases, *State v. Holbrook* was argued today by attorney Alice Newlin-Cushing, and that had to do with the recent suspicion question, specifically whether or not the officer had articulated sufficiently specific symptoms of meth use that would allow the officer to have reasonable to stop and question the defendant. The second case is *State v. Van Moon*??? And that was litigated by Neil Byl. It is another fascinating case having to do with what a party has to do to preserve an objection to a

jury instruction given by the court. So that wrapped up a very busy Supreme Court schedule for this session and we are already in briefing and preparations for our arguments that will occur in September. I think that is about all I have to tell you.

2:15:05 Chair Ellis

Great. Thank you.

2:51:10 P. Levy

Real briefly three things. I have already told you one. The analysts have begun devoting what will now be an enormous amount of time to the contracting process as the RFPs come due in a couple days. We have also been meeting weekly to review and look to improve how we are carrying out our function of dealing with non-routine expense requests. The review function is largely being performed now by the analysts and myself. We are examining the type of requests we are getting. Whether we are giving them sufficient review. How we can do them better and really what is the practice that is reflected in what we are being asked to approve. That is a process that has just begun and which we will be sharing more about with the provider community. I think, quite possibly, that will happen at the management conference. Then, finally, I just want to report that we did have an office wide diversity program on May 30. I think it is fair to say that based on the responses that we got that it was a very successful presentation. These are programs to which we ask staff, we require staff to come and it has all the potential for disgruntlement and that was a big waste of time, but that is not the response we got. People were engaged and thought it was a really useful and time well spent. We were very happy with that.

2:53:15 Chair Ellis

Nancy.

2:53:16 N. Cozine

Thank you. From where I sit I am heavily involved in helping all aspects of the office right now as we look at what our structure, what our needs are, and continue the discussion around defining roles and responsibilities and determining what is the best structure for OPDS as we move forward. We have had a structure in place for a very long time based upon the skill set of Kathryn. So as we reassign responsibilities we are looking at our structure. That is going very well. I want to note that the diversity program was successful and it was a nice opportunity for everyone in office to spend the morning together. I would to note and to thank the hard work of everyone at OPDS right now. People are very engaged in their work and working hard to make every day a successful day.

2:54:21 Chair Ellis

I did want to tell the Commission that I took the liberty of writing a letter on behalf of all of us to Kathryn to thank her for her extraordinary contribution. I think that was presented to her ...

2:54:40 N. Cozine

On May 30th.

2:54:49 C. Lazenby

Who did the diversity training?

2:54:50 P. Levy

It started with an hour from a woman who spent, I think, all together about four years in the custody of OYA. Now she is an employee of OYA. She talked about her journey from coming into the delinquency system at age 11 or so and the escalating severity of her involvement and how her life went downhill with drugs and gangs. What her experiences were with lawyers and judges and with OYA. She assured us that she was not the only person who has taken this path. Her remarkable turnaround and what she is making of her life now and how she is managing that. It was extraordinarily compelling and engaging presentation. Then the balance of the program was two women who facilitated a discussion, very engaging discussion, with staff about the topic of implicit or unconscious bias. They did a really good job of presenting the material and getting us all to talk about our own experiences and observations. As pre-work for this most of the staff took a test of sorts online that sort of measured the bias that you might have. You could pick the particular area that you wanted to test yourself against. Race, sex, what have you. You go in thinking well no I am not. I am a good liberal progressive guy. I don't have any bias. It is eye opening and alarming. It is

backed by an enormous amount of research and I can't give you the website for it right now, but I think if you just googled implicit bias or maybe Harvard. I think it is hosted by Harvard and you would find it. It is a fascinating exercise.

2:57:30 N. Cozine We could actually forward the materials that we sent. There is a link to that website. There was another implicit association test. I think Carol and April, the two facilitators, recommended and it was also included in the materials. We would be happy to share that with you.

2:57:53 S. McCrea Good. Thanks.

2:57:59 Chair Ellis Anything else?

2:57:59 N. Cozine We have the Padilla Project.

Agenda Item No. 8 Padilla Project Report

2:58:02 Chair Ellis Alright. The Padilla Project Report. Alex Bassos and Stephanie Engelsman.

2:58:13 A. Bassos Thank you. We will be precise. Chair Ellis, Commissioners, my name is Alex Bassos. I am the director of training and outreach for Metropolitan Public Defender. This is Stephanie Engelsman. She is our primary immigration attorney and the supervisor for the project. We are so appreciative of the opportunity to be involved in providing immigration advice to attorneys throughout the state. We currently have a .5 FTE to provide consultations with any attorney in the state who needs to know what the impact of (inaudible). Immigration law is incredibly complicated. I think we have all come to the conclusion that defense attorneys need to have some base knowledge about immigration law, but the truth is that it is so complicated. There are so many moving parts and so many exceptions to exceptions that for a full time criminal defense attorney it would be difficult to provide excellent advice without some assistance. So the premise of our project is that, which we call the Padilla project, is that the attorney giving advice should both specialize in immigration law and be handling criminal cases. So Stephanie is indebted half-time into our major felony section taking major felony cases, and the other half she is doing these immigration consultations. I believe it has been enormously successful. Your handout is an example of the sort of thorough material that Stephanie has been providing to everyone. Your second is a survey that we sent out to anyone who has asked for a consultation. About a quarter have responded. There is somewhere between 80 and 90% satisfaction depending on how you ask the question. There is nearly a unanimous belief that the program needs to be continued and expanded. If you look at the graph end you will see that early on we were building the program. We needed some time to set up our internal structures. There is a form on the web that anyone can go to and fill out the information. We needed to think through that too how you the information without getting yourself into a situation with any kind of a conflict or docketing files and all that. But after a few months we were getting up to around the five or so that we thought we wanted to be at. So we thought we might expand a little bit. It has always been difficult. How do you get the right amount of cases in because they are not being assigned? So advertising brings more cases in and that is what happened. You can see from your graph that in May of 2012, Stephanie wrote a single post on a wide variety of defense and that jumps the numbers up. Those stabilize for awhile and we decide we want to expand just a little bit more and she writes another post on defense and responds to a couple post, conversations on the list server on OCDLA pond and spoke at the sentencing conference and the numbers skyrocket again to where we are really over capacity right now. We have never done anything like send information out about our project through OCDLA, for example to every member, or through OPDS to every provider. We just have a limited capacity and right now we are getting about nine or 10 a week.

3:01:45 Chair Ellis Why isn't this an excellent example of impact data?

3:01:51 N. Cozine It is an excellent example of impact data.

3:01:55 Chair Ellis Thank you. Let me make one thought. Do you guys want to be eating while listen or do you want to wait?

3:02:01 J. Potter I will wait.

3:02:02 Chair Ellis Okay. Go ahead. My thought on that was I didn't want you to be under pressure. You can be salivating but not under pressure.

3:02:16 A. Bassos I guess with that I would like to pass it over to Stephanie so she can tell you a couple of stories of clients that have been impacted aside from just seeing the numbers.

3:02:27 S. Engelsman Good afternoon. My name is Stephanie Engelsman. I have been an attorney at the Metropolitan Public Defender's office for coming on six years it will be. I was a public in Illinois before. I am also an immigrant myself, so I have always been very interested and concerned about the criminal consequences that come for immigrant clients. Before Padilla came out in 2010, and Padilla came out in 2010, I was getting a lot of OPDS funding to hire private immigration attorneys to tell me what to do with my cases so that I would get clients accidentally deported. When this became a project I went to Lane and said that I was interested in it and that I would like to be considered. I took over mainly the project in March of 2012, so I can speak only for those months, but it has been fascinating and I know most recently the vice chair put in her own request.

3:03:29 S. McCrea I did.

3:03:29 S. Engelsman It has been something that has been growing and helping a lot. Recently, Alex and Lane to helped set up a legal assistance who has been working with me. We have a lot more streamlining of the project going on since March of this year. That legal assistance has assisted in sending out a survey which Alex generated or compiled, and then also a request for responses about how did we help. The attorneys consistently from throughout the state responded that our help gave them the confidence to go to DAs and to judges with informed information rather than just guessing that it is going to be bad. Some attorneys said that they were able to get judges to be incensed when DAs wouldn't go with what they were recommending, and so the judges were actually doing their own thing to project. I will tell that story in a moment. Another DA was able to get an assault II dismissed in exchange for a plea on an unlawful use of a weapon, because from what Padilla project was able to say, we were able to say that that won't cause the same tremendous immigration consequences. They will smaller and more easy to navigate for a client who will head up to Tacoma without counsel. I think that is appropriate to say given the *Gideon* nature of this year's conference. So to be brief I have two stories. The first happened in Multnomah County. Actually they both do. One of the downsides to this project is I get very little personal information on purpose about the clients. I get everything from the attorneys. Again, on purpose I don't ever speak with the clients directly. I inform the attorneys of what they should be advising their clients and that is it. As such I very rarely hear exactly what the outcome is unless an attorney comes back and says, "Thank you very much for your help," or responds to our email. But in Multnomah County because I have been a trial lawyer there for awhile I know a lot of new attorneys. Some of them have been in the room here today. They have my cell phone number. They have my email addresses and there was one example where one was in a settlement conference with a very powerful and confident judge who is willing to do what she wants to do. He was able to come on what seemed like a simple case, a possession charge, and was able to say, "If you plead this client or if you force this client to take deal on a possession charge based on his history that he has one already on his record, he this mentally ill man whose family is very supportive and is not here as a citizen but is instead a green card holder, he will be absolutely deported and inadmissible and it will be a big problem given his

mental illness and other reasons. Obviously he will go to back to a country that he doesn't know having been here for so long." So the attorney called me on my cell phone. It is something that Alex and I have discussed and I am comfortable with taking emergency cell phone calls or emergency calls in my office or emergency emails. I check my emails on the weekends too because it is something that I think is so impertinent that attorneys get this help when they need it. I don't fault attorneys for learning about the project a few days before their plea and they need help. So while we are growing it is just a consequence of getting the information out here and some attorneys need immediate assistance. So this attorney was on the phone in the settlement conference. We were discussing back and forth everything that the judge threw out. What if we do this? Well that this will cause. What if we do this? Well that will do this. The judge started to catch on and started to realize what problems would happen if what the DA happened. She went to the DA and put pressure on him. He happened to be retiring. She said, "You are retiring. What do you care? Do something special with this case. He refused and this judge took it upon herself to listen to all the information that we were providing both in the write up that I had given him and then also at the same time live conversations we were having, to take a plea and literally do nothing else. There was no conviction for immigration purposes. She didn't impose any sentencing. She didn't impose a fine or any kind of pretrial release. She literally just released the man to an INS hold. So when he got out to immigration he didn't have a second conviction. I have seen this attorney around and he has told me that that mentally ill man is now safe, out of custody, back at home with his family and back in Portland. So without this project, I am confident that the attorney would have thought simple possession, no custody time, it is all we can do. We can't do less we can't do more. We will just plead out and send him on his merry way and hope for the best. That is one story. The second story also involves a Multnomah County case. It was one that I was fortunate enough to know more about the client than I otherwise normally do. This client was herself a DV victim, but in this instance her husband had called the police on her and so she became the DV perp. Her twin girls were taken from her. She was away from them for about four months. She is from Morocco. She has a green card. She is a very educated woman. Her husband is a very educated as well. Immediately realized what had happened and he didn't want to prosecute, but it is a felony. The DA's office had taken hold of it and they wouldn't let go. So through the Padilla Project and being able to say what damages consequences not only to her but the collateral consequences of the children being motherless. Of the mother being deported and the father now potentially having to rely on state funding because he is a single father now. So all of the collateral consequences I tend to put in there as well if it is a good thing to be reminding the government. They don't always care about what happens to the defendants. In this case the state went above and beyond. They dismissed the indictment outright on the felony case. They brought a new charge against for a misdemeanor assault. They let her plead reckless. They dismissed the domestic language which could have caused problems for her and would get her deported, and made no mention of him being her husband, he was just a named party in the information. The way immigration law works is the government is not able to look in the record and get more information than they can't get on the record in criminal court. She was able to travel outside of the country. She came back recently. I heard she is back with her children. Her family is reunited. They have learned things from the criminal justice system, but they have also learned what can happen collaterally to them immigration wise. The Padilla Project, again, I feel confident was the only reason that the state was willing to do something relatively unusual. To not only dismiss the felony but dismiss the indictment entirely and bring a whole new case number so there was nothing linking the two and nothing linking her to a domestic violence charge or domestic allegation. To do this because of what we brought to the table about the dire consequences that this woman faced.

3:10:40 Chair Ellis

Do you find anything like the level of understand you are bringing to the defense community on the prosecution side? Or do they just go do their thing and they don't have a clue what the collateral impact is going to be. I can speak to Multnomah County. I know almost all of the prosecutors and I have a very good working relationship. I learned that when defense attorneys bring something to the prosecutors or the judges that it is taken with credibility

because of my reputation. As far as the other counties, I am just hearing from responses that the DAs have no clue. The judges are very interested even in the conservative counties where there are a lot of migrant workers who the conservative districts rely on to bring them their strawberries. So they are very, very interested in what will happen to these clients surprisingly so. There are some responses where the district attorneys are saying we don't take immigration consequences into consideration but then they are still doing something different. It may be that they are putting up a wall to say they don't consider this stuff but in reality in they are because they haven't figured out that they are permitted to under the Supreme Court case.

- 3:11:57 Chair Ellis I am interested in your graph. I understand it the dark blue line are consultations you have with MPD attorneys, and the light blue line includes those plus above that the ones with non-MPD attorneys. I am assuming MPD was on vacation in April of 2012. My question and it relates to some of the discussion you heard earlier, on the consultation for the non-MPD attorneys, do you just do that as part of the service that MPD provides?
- 3:12:35 S. Engelsman Yes. It is because defense attorneys all around the state - I don't know if they are privately retained but certainly the public defenders, as a public defender I can speak that they don't have time or resources to know this stuff and to stay on top of the ever changing aspect of it.
- 3:12:55 Chair Ellis I know when *Padilla* came out we talked about this. There is no way you can educate the whole population of defense lawyers on the complexity of immigration issues. This is very exciting, frankly, to hear you describe how that has played out.
- 3:13:12 A. Bassos Just to be clear, Chair, this is a funded project. We are receiving .5 FTE.
- 3:13:14 S. Engelsman It is not free.
- 3:13:16 A. Bassos It is not the public defender's office just being the public defender's office. Maybe we do this because we are a public defender office, but theoretically ...
- 3:13:28 Chair Ellis No. I think I understood that. But those non-MPD lawyers that are getting the benefit of Stephanie's expertise don't have to pay something extra for it. That was my point.
- 3:13:43 J. Potter And if they funded it at .5 you couldn't fund it by itself for the same price. That would be my guess. Some of the overhead costs are already figured into the PD's budget I am assuming. So there is an amount of money that is coming. But if you were to parse it out and set up an office in downtown Portland.
- 3:14:02 A. Bassos Absolutely. It would be far more expensive to have OPDS fund these through non-routine expense requests, for example, or through another place. The truth is that I think that most people just wouldn't seek the advice. We have created a low enough barrier that people feel comfortable submitting information and getting advice back. We are seeing better results.
- 3:14:27 Chair Ellis At one time there was talk about putting on contract some immigration specialists that would be a consulting source, but is this how we have addressed this now is doing it through MPD?
- 3:14:38 N. Cozine Yes.
- 3:14:43 Chair Ellis I am very excited about this whole presentation. Thank you.
- 3:14:46 L. Borg I would like to make another comment. It is having a criminal defense lawyer who has now has become an immigration specialist. There are some great immigration lawyers out there but they don't always understand the nuances of the criminal process that Stephanie has brought in having been in major felonies to deal with things like indictments, just the mired of things that happen in criminal prosecution. So we got good information from immigration

lawyers but you still needed to shift. What Stephanie is offering is strategy to help them navigate this.

3:15:25 A. Bassos And it is my expectation that if we have the opportunity to expand this program that we would add an additional person who is doing half-time cases and half-time immigration consultations. I don't think we would want to make someone do just immigration consultations.

3:15:46 S. Engelsman I was just going to say in closing, which Alex sort of touched upon, is what I see as the responses that we are getting or the submissions that we getting is just the tip of the iceberg. Obviously there are not 200 defense attorneys in the State of Oregon. Obviously not all of them have heard about this. We have had to purposely keep our talking about the program a little under wraps because we don't have the ability to handle 40, 50 submissions a week, which is what could very easily happen because we have done very little in terms of advertising this program and it is already growing steadily. There is a lot of room for growth and I think defense attorneys are obliged (inaudible).

3:16:28 J. Potter You will see a blip next week.

3:16:37 P. Levy I think you are justifiably applauding their work. There are other PD offices that have devoted some resources to developing immigration expertise and even within some consortia there are lawyers who have the expertise that those lawyers don't. They have kept a low profile but in other organizations there are resources that are being used.

3:17:08 J. Potter So are those identified people talking to each other?

3:17:11 P. Levy I don't know.

3:17:11 J. Potter You need an association?

3:17:14 Chair Ellis Thank you both. That is really great. Any other business for the good of the order? If not, I would entertain a motion to adjourn.

MOTION: John Potter moved to adjourn the meeting; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Meeting Adjourned

Attachment 2

EXHIBIT 3. SCHEDULE OF GUIDELINE AMOUNTS

ATTORNEY FEES - TRIAL AND APPELLATE LEVEL CASES		
Non-capital Case	\$45 per hour	Includes juveniles charged with aggravated murder.
Capital Case, Lead Counsel	\$60 per hour	See definition in section 2.1.2
Capital Case, Co-counsel	\$45 per hour	Initial cap of 300 hours for trial-level cases. See definition in section 2.1.2.
Out-of-State	\$45 per hour	Or the minimum public defense hourly rate of the state in which the attorney resides, whichever is more.
NON-ATTORNEY FEES (Must be preauthorized by OPDS)		
Paraprofessional	\$10 per hour	
Transcription	\$3.00 2.50 per page for original \$0.25 per page for copies	Reimbursement for postage with receipt.
Guardian Ad Litem	\$45 per hour maximum	For attorney and non-attorney providers
Handwriting Expert	\$90 per hour	
Forensic Expert	\$90 per hour	Mileage paid without specific preauthorization.
Investigator	\$28 per hour	Mileage and some out-of-pocket paid without specific preauthorization.
Fact Investigator - Capital Case (See definition for capital case in section 2.1.2)	\$39 per hour	Mileage and some out-of-pocket paid without specific preauthorization.
Mitigation Investigator - Capital Case (See definition for capital case in section 2.1.2)	\$44 per hour	Mileage and some out-of-pocket paid without specific preauthorization.
Psychiatrist, Psychologist, Physician, Other Expert	\$110 per hour	Travel expenses must be specifically preauthorized.
Polygraph Exam	\$200 – in office \$300 – in custody, in county \$350 – all others	Flat fee for exam and report.
INTERPRETER FEES (For attorney/client communication, does not require preauthorization by OPDS)		
Qualified Interpreter	\$25.00 per hour	Travel time at one-half the hourly rate and mileage at the guideline rate.
Certified Interpreter	\$40.00 32.50 per hour	
ROUTINE CASE EXPENSES FOR COUNSEL & INVESTIGATORS (Preauthorization not required)		
Blank CD/DVD, case and label	\$1.00 each	For media, case and label
Film Developing/Photograph Production, In-house and Vendor	Actual cost if vendor. Photos in-house at \$0.40 for 3 x 5 or 4 x 6. \$1.20 for full page.	Receipt required if produced by vendor.
Photocopies and Scanning, In-house	Maximum \$0.05 per page	Also applies to in-coming faxes.

Attachment 3



Oregon

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Report to the Public Defense Services Commission

Clatsop County Public Defense Providers: Response to Peer Review Recommendations

July 17, 2013

I. INTRODUCTION

Background. Beginning in 2004, the Office of Public Defense Services (OPDS) has conducted over 40 peer reviews of public defense contractors with the goal of assisting public defense providers achieve excellence through a collaborative process that relies upon volunteer review teams of public defense leaders from across Oregon. Upon the recommendation of the Quality Assurance Task Force (QATF)¹, the specific objectives of each evaluation have been to determine the quality of service provided by a contractor; identify provider policies and practices that can be recommended to other public defense contractors; identify areas in need of improvement and assist the contractor in improving services; and acknowledge and commend practices by public defense providers that are especially deserving of recognition.

Until 2011, peer reviews were based largely upon confidential interviews and promises that the report would be shared only with the administrator of the contractor, the QATF, and a limited number of officials at OPDS. As a result, reports were not subject to disclosure under the Oregon Public Records Law². But another consequence of this policy was that information gained from peer evaluations could not be readily shared

¹ The Quality Assurance Task Force (QATF) was established in 2004 to advise the OPDS executive director on the protocols for evaluations and how best to achieve the recommendations of each evaluation. In 2012, the QATF was incorporated into a new Public Defense Advisory Group that continues to advise the executive director on how best to achieve excellence in public defense and on other matters related to public defense services in Oregon.

² Because reports were based upon information submitted in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential and OPDS obliged itself in good faith not to disclose the information publicly, peer review reports were exempt from disclosure under ORS 192.502(4).

with the Public Defense Services Commission (PDSC), even where reports recommended that PDSC consider significant changes concerning contracting in a county or region. Because the disadvantages of confidentiality were thought to outweigh its benefits, the OPDS Executive Director, with the concurrence of the Public Defense Advisory Group and the PDSC, directed that peer reviews no longer rely upon confidential interviews.

With the change in peer review protocol, OPDS also built a new step into the peer review process. Although staff follow-up to reports had long been a part of peer reviews, entities under review are now informed that a report will be made to the PDSC regarding contractor response to peer review team findings and recommendations. The report to PDSC will typically occur no sooner than six months following the finalization of the peer review report, allowing sufficient time for the contractor to undertake whatever response to the report they intend to make. Thus, this report follows a September 2012 peer review visit to Clatsop County and reports to the providers there that were finalized in November 2012.

Clatsop County Evaluation. The review in Clatsop County looked at the work of the two public defense contractors there. The Clatsop County Defender Association (CCDA), which was a four-person consortium at the time of the peer review, provides representation in adult criminal, juvenile dependency and delinquency, and civil commitment cases in Clatsop County. Mary Ann Murk, a solo practitioner, also contracts for the same case types.

The OPDS Executive Director assembled a review team consisting of Keith Rogers, who was asked to chair the team, and attorneys Jennifer Nash, Jack Morris, and Jennifer Kimble. Paul Levy served as staff for the team.³

The review was conducted in accordance with Paragraph 3.8.2 of the OPDS Model Contract which provides that any evaluation performed by OPDS of a contractor office adhere to the standards set forth in the American Bar Association's [*Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor*](#) (2002).

Prior to the on-site visit by the review team, stakeholders in the Clatsop County justice system, including judges, the District Attorney, probation and parole, the Juvenile Department, the Department of Human Services, the Citizens Review Board (CRB), Court-Appointed Special Advocates (CASAs), and others, received an online survey asking about the quality of representation provided by CCDA attorneys and Mary Ann Murk. A total of 14 people responded to this survey.

³Keith Rogers is the executive director of Multnomah Defenders, Inc. Previously, he has been the director of the Washington County section of the Metropolitan Public Defender, served as a circuit court judge in Washington County, and maintained a private practice for several years. Jennifer Nash is the administrator of the consortium of attorneys providing public defense representation in both criminal and juvenile cases in Benton County. Jack Morris heads a law firm that contracts to provide public defense representation in Hood River, Wasco, Sherman, Gilliam and Wheeler counties (the 7th Judicial District). Jennifer Kimble is a member of a four-person consortium that provides representation in criminal and juvenile cases in Crook and Jefferson counties (the 22nd Judicial District). Paul Levy is General Counsel at OPDS in Salem, and served as staff to the peer review. All team members have participated in other peer reviews.

Members of CCDA, except the administrator, received a separate survey about consortium operations and the effectiveness of the consortium administrator. There were no responses to this survey.

The CCDA administrator, Kris Kaino, also answered a detailed questionnaire about consortium operations. Mr. Kaino cooperated fully with the evaluation and, along with Mary Ann Murk, provided invaluable assistance in preparing for the evaluation and scheduling interviews for the site visit.

A three-day site visit to Clatsop County was completed on September 28, 2012. During the site visit team members met with judges, court staff, prosecutors, a state legislator, probation officers, mental health services providers, a private bar defense attorney, and others, conducting interviews with over 30 people. Other interviews were conducted by phone following the visit.

At the conclusion of on-site interviews, the team met to discuss preliminary findings and conclusions, and then met separately with Kris Kaino and Mary Ann Murk to provide initial feedback on the information it had received and some of the recommendations it was considering. Thereafter, separate draft peer review reports were provided to Kris Kaino and Mary Ann Murk on November 28, 2012. In January 2013, Mr. Kaino and Ms. Murk provided formal responses to the draft reports which were then finalized, with the responses attached.

On May 23, 2013, OPDS Executive Director Nancy Cozine, General Counsel Paul Levy, and Billy Strehlow, OPDS Analyst for Clatsop County, visited Astoria to conduct interviews with key justice system officials and the contractors to determine what changes had occurred in the county in response to the reports.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews are related in the balance of this report.

II. CLATSOP COUNTY

Demographics. Clatsop County has a population of about 37,000 people, which is somewhat more populous than its neighbor Tillamook County (approx. 25,000) but less than all other coastal counties except Curry (approx. 22,000)⁴. Like nearly every Oregon county, at the time of the peer review it was listed as an economically “distressed county” by the Oregon Business Development Commission, although its unemployment rate of 8% in August 2012 was among the lowest in the state.⁵ Fishing, timber and agriculture, along with tourism, are the principal industries in Clatsop County. The U.S. Coast Guard is the largest single employer in the county.

According to U.S. Census data, the county is somewhat less racially and ethnically diverse than the entire state population, with 86.9% identifying as white persons not of

⁴ <http://www.pdx.edu/prc/>

⁵ <http://www.oregon4biz.com/Publications/Oregon-Economic-Data/>

Hispanic or Latino origin (78.1% statewide); 0.7% identifying as black persons (2.0% statewide); 1.3% identifying as American Indian or Alaska Native (1.8% statewide); 1.4% identifying as Asian persons (3.9% statewide); and 7.8% identifying as persons of Hispanic or Latino origin (12.0% statewide)⁶. Census data also show the county has a slightly higher than statewide percent per capita of high school graduates (91.1%; 88.6% statewide), but a lower percent of college graduates (21.6%; 28.6% statewide).

Oregon State Police profile of index crimes for Clatsop County shows little change over the past five years, with the number hovering right around 1500. Total reported crime for the county has dropped slightly over the same period.⁷

Justice System. The county courthouse is a majestic building constructed in 1904 and most recently renovated in 2007. It is located in Astoria's historic downtown and houses the county's three circuit court judges: Presiding Judge Philip Nelson, Judge Paula Brownhill, and Judge Cindee Matyas. The District Attorney, Joshua Marquis, and his six deputies also have their offices in the courthouse. At the time of the peer review, three of the four CCDA attorneys had their offices within a short walk to the courthouse; the other attorney was about 15 miles away in Seaside. Mary Ann Murk has her office at historic Pier 39, which requires a drive, brisk walk or trolley ride to get to the courthouse.

The county jail is also near the courthouse. Its capacity is capped at 60 beds, requiring frequent "matrix" (or forced) releases of prisoners. In July 2012, voters rejected for a third time in recent years a levy for construction of a new jail. The Juvenile Department and Department of Human Services also have offices in the downtown area. The Probation and Parole offices, however, are in a somewhat remote area several miles from town in Warrenton. The Oregon Youth Authority's North Coast facility, which includes detention beds used by Clatsop County, is at the same Warrenton complex.

Case processing. The county's three judges all handle some criminal and civil docket matters but have divided among themselves primary responsibility for particular case types, with Judge Nelson handling in-custody arraignments and juvenile delinquency cases, and Judge Brownhill handling most juvenile dependency cases. Each judge also presides over special courts, which are addressed further below.

The county does not have a formal early disposition program, as provided by ORS 135.941, or a similar procedure for routine early disposition of criminal cases. However, in criminal cases, the court will set an "early resolution conference" (ERC) 45 days after arraignment (30 days for in-custody cases). It is DA office policy to provide a written pretrial plea offer at initial appearance in misdemeanor cases and at the indictment arraignment in felonies, at which time they also provide discovery. If a case is not resolved at the ERC, the matter is set for trial 60 days later (earlier for in-custody

⁶ <http://quickfacts.census.gov/qfd/states/41/41007.html>

⁷ Oregon State Police, 2010 Annual Uniform Crime Report, http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx. The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft and Arson. Total reported crime was 5,909 in 2006 and 5,213 in 2010, the last year for which data are available and a low for the five-year period.

cases), or the case is continued for a “final resolution conference” (FRC), after which it is set for trial if there is no resolution.

In delinquency cases, the county Juvenile Department typically appears at arraignment without representation from the DA’s office, which only appears at jurisdictional hearings when requested by the Juvenile Department. At the time of the peer review, public defense attorneys were typically not present for arraignment in delinquency cases. The Juvenile Department estimates that youth waive their right to appointed counsel in approximately 40% of delinquency cases. The department also reports that 20 detention beds are available at the OYA North Coast facility, with between six and 13 youth typically in custody awaiting disposition.⁸

Shelter hearings in dependency cases can take place at any time during a court day, depending upon the judge’s availability and case exigencies. Mary Ann Murk is notified of these hearings and is typically present and appointed to represent children. CASA is also notified, and the DA’s office is present. At the time of the peer review, no one was notified to be present for appointment to parents, who were usually unrepresented at shelter hearings. After court jurisdiction is established, which is rarely contested, the court typically will conduct no further review until a permanency hearing is held a year later, or earlier in a significant number of cases. A Citizens Review Board hearing will take place at six months following the disposition on the petition. DHS is usually not represented at permanency hearings, even contested ones. An assistant attorney general appears for DHS if a case proceeds to a termination of parental rights petition.

As indicated above, Clatsop County employs a variety of special or “problem solving” courts. Judge Nelson presides over a drug court, served by a “team” that includes a deputy DA, a probation officer, a treatment provider and Mark Lang, a local non-contract defense attorney who bills OPDS hourly for his services. The program functions as both a “supervision court” for persons convicted on felony drug offenses and placed on probation and as a “conditional discharge court” for persons who can earn dismissal of drug offenses through successful completion. The court is not designed or funded, as with programs in some counties, to include “Measure 57” offenses. Judge Nelson also oversees a drug court and a “behavioral court” for adjudicated youth in delinquency cases. Typically, contract attorneys will not attend these post-dispositional delinquency proceedings after their clients have entered the programs.

Judge Matyas presides over a “treatment court,” served by a team that includes a deputy DA, a probation officer, treatment providers and, again, Mark Lang as defense counsel. The program is a supervision court, serving persons both on probation and post-prison supervision who have either a mental health disorder or other disorder, such

⁸ According to the most recent statewide detention trends report from the Oregon Youth Authority’s Juvenile Justice Information System (JJIS), in 2007 Clatsop County was somewhat above the average statewide rate for total juvenile detention admissions per 1,000 youth with 48.7 total admissions (27.8 statewide) and 20.3 unduplicated admissions (14.0 statewide) for youth ages 10-17. Data for 2007 also show that Clatsop County was slightly above the statewide average for length of stay for all admissions with an average of 10.7 days (9.1 statewide average). Although a statewide comparison report is not available for subsequent years, JJIS data for Clatsop County for 2008-2011 show that total admissions have declined somewhat from a high in 2007, and that average length of stay has remained about the same. http://www.oregon.gov/OYA/Pages/jjis_data_eval_rpts.aspx.

as traumatic brain injury, which is a common diagnosis for veterans who have served in Iraq or Afghanistan.

Judge Brownhill manages a “family drug court,” which serves parents in dependency cases, who can earn a dismissal of the petition in their cases through successful completion of the program, which includes a variety of treatment providers. Again, a non-contract defense attorney, Stacey Rodriguez, who has her office in Cannon Beach, is paid on an hourly basis to represent parents in this program. If a parent who is represented by a contractor enters the program, Ms. Rodriguez will be substituted as counsel for that client. If a second (or subsequent) parent in the same case also enters the program, the original appointed attorney will remain on the case, although that person is not part of the court “team,” which includes the judge, a deputy DA, Ms. Rodriguez, DHS, a CASA, and treatment providers. Mary Ann Murk, who usually represents children in dependency cases, also attends family drug court staffings and court proceedings.

Data from the Oregon Judicial Department show that Clatsop County averages somewhat more trials in criminal cases than statewide. Data on age of pending cases and age of terminated cases show that the county is among the fastest to resolve cases.⁹

III. OVERVIEW OF CLATSOP COUNTY DEFENDERS ASSOCIATION (CCDA)

At the time of the peer review, the Clatsop County Defenders Association was a consortium of four lawyers. Although the group has an “operating agreement” signed by all members, it does not otherwise have a formal business structure.¹⁰ Kris Kaino, one of the members, has served as the consortium administrator for the past 10 years. The group does not have a board of directors, and no person outside of the group participates in the oversight or administration of its operations.

The four attorneys who were members of CCDA at the time of the peer review have each practiced law for over 20 years. At the time of the review, the group’s composition had not changed for many years, and it disclaimed any role in providing training or educational opportunities for its members, or in conducting any oversight or evaluation of the quality of its member’s services. There is no formal mechanism for members to share memoranda or other practice tools and aids. The operating agreement calls for quarterly meetings with topics ranging from financial and caseload matters to legal trends and developments in the court justice system. CCDA members report interacting with each other frequently in and out of court, along with frequent email exchanges about legal matters and consortium business.

At the time of the peer review, each consortium member had some office staff working for them except for Mr. Kaino, who shared a receptionist in the suite of offices where he

⁹ <http://courts.oregon.gov/OJD/OSCA/Pages/statistics.aspx>.

¹⁰ The operating agreement casts some doubt regarding the actual name of the consortium. The document is entitled “Operating Agreement of Clatsop County Indigent Defense Consortium,” but it identifies the entity it governs as the Clatsop County Defender’s [sic] Association. For simplicity and consistency, this report refers to the consortium as the Clatsop County Defenders Association, which is how it is named in its contract with PDSC.

shares space. Mr. Kaino had part-time assistance to help with preparing case reports for OPDS but no person other than Mr. Kaino was available to assist with day-to-day consortium administrative matters such as case assignment or resolution of client contact issues.

As consortium administrator, Mr. Kaino is known among court personnel as a contact person for concerns about consortium members or operations. Along with Ms. Murk, he had worked with the Presiding Judge, just prior to the peer review, to place primary responsibility with contractors for identifying and resolving potential conflicts of interests with new case appointments, a function performed until then by the court in advance of initial appointments. Mr. Kaino and Ms. Murk believe this may reduce the number of non-contract hourly appointments in potential conflict cases, which they saw as a major contributor to a recent decline in case appointments to CCDA and Ms. Murk. Under the new system, the contract attorney assigned to cover in-custody arraignments for a particular day, who ordinarily will receive the appointment on that day's cases, receives a list several hours before court of defendants to be arraigned and any identified alleged victims in their cases. If the attorney identifies a potential conflict, the appointment will go to another contractor. It is the responsibility of the assigned arraignment attorney to identify a new contractor to receive conflict appointments.

Mr. Kaino had also worked with the Presiding Judge to ensure that one attorney usually handles all of a defendant's pending cases and is appointed on any probation violations that arise from those cases.

Outside of ad hoc meetings to resolve specific matters, at the time of the peer review neither Mr. Kaino nor any other consortium member participated in regular justice system policy meetings. In fact, no such meetings were taking place in Clatsop County. There is a Local Public Safety Coordinating Council, but it meets infrequently and the defense attorney representative is not an active public defense provider.

IV. THE MARY ANN MURK FIRM

Mary Ann Murk has her office on historic Pier 39, a former cannery that is the largest and oldest waterfront building in Astoria, located on the Columbia River. The office is comfortably and professionally furnished to accommodate both adult and child visitors. Ms. Murk employs a full-time legal assistant. At the time of the on-site visit by the peer review team, Ms. Murk estimated that she had 60 open dependency case, mostly involving representation of children, in addition to open adult criminal and juvenile delinquency cases. She could not provide a number for her total open caseload.

Ms. Murk has contracted with OPDS for many years. In previous contracts, she managed a "consortium" consisting of herself and Dawn McIntosh. Ms. McIntosh now holds the contract to provide public defense services in Tillamook County.

IV. PEER REVIEW FINDINGS AND RECOMMENDATIONS

Clatsop County Defender Association

The Public Defense Services Commission (PDSC) conducted a service delivery review in Clatsop County in 2006, and identified a number of “significant concerns.”¹¹ The concerns included the imminent need to attract new public defense attorneys to work in the county; the caseload demands on the then six public defense contract attorneys, particularly in light of the quick rate at which the court processed cases and lack of communication among the county’s judges on judicial administration matters; disparity between contract rates in the county and elsewhere in the state; the absence of contract attorney participation in any early disposition program; the lack of organizational development and structures in the county’s consortia; and unsatisfactory representation by CCDA on behalf of parents in juvenile dependency cases. In 2008, as an update to the 2006 report, then-OPDS Executive Director Ingrid Swenson visited with Clatsop County judges, the district attorney, and defense providers and reported that most of the issues identified in the 2006 report had not been resolved. The peer review team also concluded in 2012 that little had changed since the 2006 report to the Commission.

The peer review team found that every member of CCDA had strengths in some areas of practice or type of cases and one member was said to be an excellent trial attorney in criminal cases. Each attorney was well-liked by their justice system colleagues, and were usually seen to care about their clients. But overall, the review team concluded, the group did not deliver consistently good representation, especially in juvenile dependency cases. This was a particular concern in such a small group, where the weaknesses of just one or two attorneys can have a significant impact on the clients entrusted to the consortium’s attorneys. The unsatisfactory representation was manifested in a variety of ways, from failure to establish timely and meaningful contact with clients, lack of preparation for court proceedings, tardiness for court, apparent ignorance of current or applicable law, failure to identify and zealously advocate for client objectives, confusion in the court and similar difficulties. The causes, too, were varied, from a simple lack of interest to large workloads and other less tangible factors, according to interviews. The peer review report recommended that OPDS should look to a different way of providing public defense services in Clatsop County if the group did not undertake meaningful changes to improve the quality of representation that it provided.

After providing detailed information about the information it gathered from interviews and the online survey, the peer review team made the following recommendations to CCDA:

1. **Contract Administration.** CCDA should carefully review the OPDS recommended Best Practices¹², and implement quality assurance and other practices that seek to ensure that every public defense client receives

¹¹ <http://courts.oregon.gov/OPDS/docs/Reports/clatsopfinalreport.pdf>.

¹² <http://www.oregon.gov/OPDS/CBS/pages/bestpractices.aspx>

satisfactory and appropriate representation. These recommended practices were assembled in part from the experience gained through other peer reviews of Oregon public defense providers, where contractors of all types—including small consortia—have undertaken steps to assure quality representation. The fact that CCDA is composed of four seasoned attorneys is not a sufficient response to having no recruitment, training, evaluation or disciplinary processes in place. Clearly, as recommended below, the composition of CCDA should change, with the likelihood of adding less experienced members for whom appropriate guidance, mentoring and oversight may be essential.

OPDS should follow up, through its contract administration staff or other means, to ensure that meaningful improvements have been undertaken by CCDA to establish quality assurance protocols that bring about real change in the quality of CCDA services. If effective improvements are not undertaken, the peer review team recommends that OPDS seek to change the way it provides public defense services in Clatsop County by either contracting with a different entity, by providing a list of suitable attorneys to appoint to particular case types, or through other means.

CCDA should hire a staff person to work with the courts, clients and member attorneys to facilitate the timely assignment of appropriate counsel to new cases, and assist with the efficient transfer of cases among consortium members when conflicts of interest require a change in counsel. A staff person can work with court staff to ensure that attorneys are available to represent parents at shelter hearings in dependency cases. A staff person can also assist clients and attorneys in facilitating contact between them, in addition to other contract administration duties that do not require the attention of an attorney. Nearly all public defense consortia, of every size, have a staff person to assist with these and other tasks. The position is financed through a percentage “hold back” from the contract proceeds that otherwise would be distributed to member attorneys.

- 2. Member Recruitment.** In many interviews and on every survey conducted by OPDS regarding public defense services in Clatsop County, local justice system officials have stressed the need for new consortium members. If clients are not being visited in jail and detention, if attorneys are coming to court unprepared and without current knowledge of applicable law, if attorneys are not engaged with their dependency case clients after the court establishes jurisdiction, and if attorneys are not appointed to nearly half the delinquency cases in which youth are eligible for appointed counsel, then it is very likely that new or different members of the consortium are needed. A handful of potential members were mentioned in a number of interviews, and it is likely that these people are known to the consortium. If other options are desired, the group should undertake active recruitment efforts.

The peer review team is mindful that enlarging consortium membership, in addition to adding a permanent staff person, has the effect of reducing the compensation received by current members. However, it also appears that

some current consortium members are not attending a number of proceedings—CRB hearings, Family Drug Court hearings and other post-disposition proceedings—for which the consortium could be receiving case credit and, therefore, more revenue for the group from which to partially finance new positions. Moreover, as described long ago by the PDSC, it has always been expected that attorneys participating in a consortium will maintain a private practice that includes retained work so that they are not entirely dependent upon public defense income. Consortium lawyers should not treat a public defense contract as an entitlement program that guarantees a particular level of income. Rather, the first priority should be the provision of high quality client representation through a structure that can meet the particular financial needs of its members.

- 3. Juvenile Delinquency Representation.** Two separate but related issues should be addressed by CCDA concerning delinquency cases. First, the consortium should work with the Presiding Judge and Juvenile Department to ensure that financially eligible youth waive their right to appointed counsel only after being fully informed of the risk of proceeding without a lawyer and the benefits of having one. As part of this process, youth should have an opportunity to consult with counsel before making a decision to waive a lawyer. In this regard, CCDA should work with the court to ensure that a consortium attorney is present when youth make their first appearances in delinquency cases. Of course, in addition to the youth, all other juvenile justice stakeholders should understand the benefits of having a lawyer represent a youth in delinquency cases. There should be little question about this point¹³, but it may not be apparent in Clatsop County if those lawyers now appointed in delinquency cases do not see their clients in detention or make timely responses to calls and other messages from clients and Juvenile Department officials.

The adverse consequences of shackling youth during transport to court proceedings and during such proceedings are becoming better understood. As a result, both nationwide and in Oregon, courts are increasingly prohibiting the practice without a clear demonstration of the need for heightened security measures and the absence of reasonable alternatives to shackling. Pleadings and court orders concerning the litigation of this issue recently in Yamhill County are available, along with other resources, for advocating against routine use of shackles in delinquency cases. According to one interview with a consortium member during the peer review, CCDA attorneys reached an agreement among themselves that they would not challenge this practice. It is hard to imagine what circumstances would have led to such an agreement, or how a lawyer's duties to individual clients could be sacrificed by a vote of a consortium. In any case, the group as a whole and each member attorney should reconsider the matter and seek assistance if required in challenging the practice. OPDS General Counsel can provide additional information on

¹³ The importance of counsel in delinquency cases should be self-evident. An excellent description of the role and responsibilities of a lawyer in these cases can be found in publications of the National Juvenile Defender Center (<http://www.njdc.info/index.php>), especially their [*Role of Juvenile Defense Counsel in Delinquency Court*](#) (2009).

this matter. Youth, Rights and Justice, a public defense contractor in Portland, is also a resource.

4. **Juvenile Dependency Representation.** It is not clear that CCDA should continue to provide representation in these cases. Representation in dependency cases requires knowledge and skills that are very different from the practice of criminal defense, and it is an unreasonable expectation that every good criminal defense attorney will also serve dependency clients well. Therefore, both CCDA and OPDS should reassess whether the consortium should continue to contract for representation in these cases.

But if CCDA does continue with this work, then each member handling dependency cases should become thoroughly familiar with the standards of practice and law that governs this practice. Every lawyer providing dependency representation under contract with OPDS is now required to attest to attendance at 16 hours of specialized training for each contract period. It is not clear that each CCDA attorney has fulfilled this obligation.¹⁴ In addition, CCDA lawyers should be familiar with the expectations of the Oregon State Bar performance standards in dependency cases,¹⁵ and with the OPDS expectations described in its document *The Role of Counsel for Children and Youth*.¹⁶ The entire consortium would likely benefit from actual in-person attendance at applicable Oregon State Bar, ODCLA or Juvenile Law Training Academy programs. The group should also consider seeking consultations with the Juvenile Law Resource Center provided by Youth, Rights and Justice, and with the Juvenile Appellate Section of the Appellate Division of OPDS.

The group should work immediately with the court to ensure that lawyers are notified of shelter hearings so that attorneys can appear then to represent parents. The importance of zealous representation of parents at shelter hearings is explained well in a series of articles in the Youth, Rights and Justice *Juvenile Law Reader*.¹⁷ Each member of the consortium should be familiar with these articles and share them with the court in order to promote an understanding of the importance of having counsel available to represent parents at the shelter hearing. In addition, participation in these hearings is an obligation of counsel under the Oregon State Bar's performance standards, Standard 3.5, which describes the steps that attorneys for both parents and children should take at shelter hearings.

¹⁴ In its 2011 response to the OPDS Request for Proposals for 2012-2013 contracts, the CCDA administrator explained that he had acquired the recordings of two past seminars from the Juvenile Law Training Academy, which each member was expected to "attend" by the end of December 2011. There was no separate certification that each lawyer had obtained the materials for these programs or listened to at least 16 hours of instruction.

¹⁵ The performance standards, which are currently being revised and updated, are available at http://www.osbar.org/surveys_research/performancestandard/index.html.

¹⁶ *The Role of Counsel for Children and Youth* is available at <http://www.oregon.gov/OPDS/CBS/pages/roleofcounsel.aspx>.

¹⁷ The articles, *Zealous Advocacy: The Shelter Hearing*, Part I and Part II, are in the December 2007 and February 2008 issues of the *Juvenile Law Reader*, available at <http://www.irplaw.org/juvenile-reader>.

Post-disposition representation of parents in dependency cases can be critical to ensuring that the Department of Human Services provides services and visitation, among other efforts, needed for successful reunification of children with parents. It appears, from interviews, that attorneys are not maintaining meaningful contact with clients following disposition in these cases, and that advocacy at review hearings is perfunctory. Again, the OSB performance standards are a good guide to the expectations for attorneys in this regard, particularly Standard 3.12 (Postdisposition), Standard 3.13 (Review Hearings and CRB Hearings), and Standard 3.14 (Permanent Planning Hearings). The peer review team heard that very few post-disposition review hearings are conducted by the court but that the court would also conduct early permanency hearings that frequently result in a change of plan to adoption. More active representation of parents combined with more frequent review hearings is likely to assist clients with fulfilling the obligations imposed by the court for achieving reunification. This requires, of course, engaged and informed representation by skilled lawyers for parents.

As noted above, the team heard from the CCDA administrator that he could not attend CRB hearings because they conflict with court appearances. Since CRB hearings are set at the same time every month, it is not clear why courthouse matters could not be scheduled around CRB meeting times. The team learned, however, that it might be possible to conduct the CRB hearings at the courthouse, as happens in some other counties, which would make attendance even more convenient for attorneys. The CCDA indicated at the peer review team's exist interview with him that he would be open to investigating this idea.

5. **Adult Criminal Representation.** In addition to addressing the issues concerning client contact and timely case preparation, CCDA should consider whether its attorneys are using investigators appropriately. It's not clear that attorneys are providing appropriate guidance to investigators or staying well informed on their work. It is a particular concern that an investigator would feel compelled to require—and an attorney would permit—a client to sign a form warning that case work would be incomplete if the attorney does not seek authorization from OPDS for the necessary hours to work on a case. The use of this form suggests a fundamental dysfunction in the relationships between attorneys and their investigator and clients. CCDA should resolve the issues that prompted the use of this inappropriate form.
6. **System Collaboration.** The peer review team recommends that the Clatsop County Defenders Association administrator, in concert with Ms. Murk, explore placing a public defense contractor on the Local Public Safety Coordinating Council or, if this group is not meeting effectively, urge the Presiding Judge to convene a Criminal Justice Advisory Council that can foster more targeted collaboration on policy affecting the court, public defense and related services¹⁸.

¹⁸ A Local Public Safety Coordinating Council (LPSCC), required by ORS 423.560, must include a broad range of justice system partners, including a criminal defense representative, and address countywide

Mary Ann Murk Firm

At that time it conducted the 2006 service delivery review, the Commission noted that “[b]oth attorneys in the Murk Consortium were singled out for their strong personal commitment and zealous advocacy on behalf of children in juvenile dependency cases.”¹⁹ The comments received in interviews during the peer review team’s 2012 visit echoed this assessment and were similar to the comments on the online survey that highly praised Ms. Murk’s work.

Ms. Murk was described as extraordinarily diligent in all phases of her representation. She maintains good client contact, making timely visits to in-custody and detained clients and visiting with the children she represents in dependency cases. Unlike other public defense attorneys in Clatsop County, she regularly attends Family Drug Court and other post-dispositional proceedings, including CRBs and Family Decision Meetings at DHS. One person described Ms. Murk as “efficient, effective, direct and trustworthy.”

The peer review team heard only one concerning comment amid all the praise for Ms. Murk. As noted above, the PDSC’s 2006 report noted that Ms. Murk has a strong personal commitment to her representation of children. Several interviewees said that Ms. Murk often requests an early permanency hearing on behalf of her children clients, seeking a plan of adoption and termination of parental rights. Ms. Murk was said by some to be acting upon her own strongly held views of her clients’ best interest which may not always be the same as her clients’ expressed wishes. At the peer review team’s exit interview with Ms. Murk, she maintained that she understands and abides by her professional responsibilities when representing children, but also told the team that she has a strong commitment to permanency for children and a belief that children do not necessarily need to be raised by biological parents in order to thrive.

V. CONTRACTOR RESPONSE TO PEER REVIEW

Clatsop County Defender Association

Almost immediately upon receiving the draft peer review report, the CCDA administrator, Kris Kaino, began regular conversations with the OPDS analyst for Clatsop County and OPDS General Counsel about how his group could improve its work. Among other things, Mr. Kaino was invited to confer with Jennifer Kimble and Jennifer Nash, who were members of the peer review team with experience in the

criminal and juvenile justice system planning. Likewise, unless an equivalent already exists, ORS 1.851 requires that the Presiding Judge establish a local criminal justice advisory council (CJAC) that includes public defense providers and that specifically addresses “coordinating court, public defense and related services and resources in the most efficient and cost-effective manner that complies with the constitutional and statutory mandates and responsibilities of all participants.”

The 2012 OCDLA/OPDS Public Defense Management Seminar featured a panel of prosecutors and defense attorneys from three counties who have used the structures of a LPSCC or CJAC, among other forum, to collaborate successfully on system policy matters and issues related to quality of defense services.

¹⁹ See, [OPDS’s Final Report on Service Delivery in Clatsop County & PDSC Service Delivery Plan for the County\(2006\)](#).

management of small consortia that had faced quality assurance challenges. He was also referred to other consortia that had undertaken quality assurance initiatives.

In Mr. Kaino's formal written response to the peer review, which was attached to the final report, he outlined actions that he had taken or intended to take in response to the report's findings and recommendations, including:

- Hiring a consortium staff person to serve as a liaison with the court regarding appointment of counsel, to assist with client complaints about consortium attorneys, and to assist in other consortium operations.
- Meeting with Ms. Murk and Presiding Judge Nelson to arrange for the presence of an attorney at delinquency arraignments. The new CCDA staff person will assist with this process. The issue of waiver of counsel in delinquency cases was discussed at this meeting but was described as a matter needing further work.
- Recruiting new consortium members, and obtaining agreement from Ms. Murk and another local attorney expert in dependency cases, Stacy Rodriguez, to assist in mentoring attorneys new to dependency work, while Mr. Kaino would plan to mentor attorneys new to criminal representation. Judge Brownhill also agreed to provide input regarding the work of attorneys new to dependency work.
- Meeting with Ms. Murk and Judge Nelson regarding shackling of youth in transport to and during court hearings in delinquency cases. Independently of that meeting, OPDS General Counsel provided Judge Nelson, upon his request, a lengthy opinion on shackling by Judge John Collins, in Yamhill County, that addressed the potential for harm from unwarranted shackling and placing restrictions on its use in that county.
- Requiring each CCDA member to review the OPDS statement on the role of counsel for children and youth, the Juvenile Law Reader articles on the importance of zealous representation of parents at shelter hearings, and the Oregon State Bar performance standards in dependency cases. In addition, members agreed to read each new issue of the Juvenile Law Reader, published online by Youth, Rights, and Justice, Inc.
- Requiring each CCDA member to attend in person an upcoming OCDLA juvenile law seminar, and requiring in person attendance thereafter at one juvenile law seminar every year.
- Working with Ms. Murk to place a public defense contract attorney on the Clatsop County LPSCC, and arranging quarterly meetings with Ms. Murk, court staff and judges to discuss court operations and representation in criminal and juvenile cases.
- Planning a meeting with CCDA members and someone from parole and probation to learn more about the interstate compact on supervision of probationers, was an issue identified as needing attention in the peer review report.
- Meeting with each member of the consortium to discuss the peer review, requiring reporting of first in-person contacts with new in-custody clients, and addressing any issues particular to individual members that arose in the course of the peer review.

Later, on March 1, 2013, Mr. Kaino updated OPDS General Counsel on progress with CCDA improvements, reporting that two new attorneys would be performing consortium

work, one of them focusing largely on dependency cases; that quarterly meetings with the judges had begun; that the court had agreed to restrict shackling of youth to only those instances where a specific risk is identified; that each CCDA member was registered to attend the April 2013 OCDLA juvenile law CLE; that the staff person had been hired; that attorneys were now required to make timely responses to any complaint about their performance or face a fine; that the consortium would conduct an annual survey of system stakeholders regarding consortium performance; that the training session on interstate transfer of probation had been very helpful; and that other measures, specific to individual attorneys had been undertaken.

On May 23, 2013, OPDS Executive Director Nancy Cozine, OPDS Analyst Billy Strehlow and OPDS General Counsel Paul Levy visited Clatsop County to speak with judges, court staff, the District Attorney, contractors and others about developments following the peer review. Local justice system stakeholders generally acknowledged a variety of changes in response to the peer review, including the addition of new attorneys to the consortium, the addition of a consortium staff person, establishing a procedure for attorneys to be present at first appearances for parents in dependency cases and for youth in delinquency cases, a change in procedure concerning shackling of youth in delinquency matters, and other changes concerning particular consortium members. There is also an expectation that Mr. Kaino and Ms. Murk will meet regularly with the court concerning public defense management issues, and that periodically the court will meet with the public defense contractors and the District Attorney concerning court procedure issues.

After the May 2013 visit by OPDS staff, Mr. Kaino informed OPDS that two long serving members of CCDA would no longer be providing services for the consortium, one for health related reasons and the other because of plans to move to another community. Mr. Kaino described active efforts to recruit additional member to join CCDA. As a result of this development, if the Commission approves a contract for the 2013-2014 biennium, except for Mr. Kaino the composition of CCDA will be entirely different from the group as it existed when the peer review team visiting in 2012.

The Mary Ann Murk Firm

As indicated above, the peer review team found a high degree of satisfaction with the services provided by Ms. Murk. With only one significant caveat, the peer review team concluded that she was indeed providing very good representation in her clients. Ms. Murk addressed that concern raised by the peer review in her response to the team's report, agreeing to review her advocacy for children with community partners and implement changes that might be needed in her practice. In its May 2013 follow up to the peer review, OPDS staff heard that there is still a very high degree of satisfaction with Mr. Murk's work, and that she has been working with Mr. Kaino to assist with improvements to the consortium operations, including providing training in dependency cases for attorneys new to CCDA.

VI. CONCLUSION

As described above, the peer review team concluded that public defense services in Clatsop County had not changed significantly since the Commission had visited in 2005 and identified a number of concerns. However, in response to the peer review report, Mr. Kaino undertook a number of actions, some immediately and others over the course of the following months, which promise to provide more meaningful quality assurance by the consortium and better representation to public defense clients. Those changes are welcome and appropriate, and the challenge will be to sustain and build upon them as the group's composition changes dramatically and grows. All Clatsop County justice system stakeholder should expect continued monitoring of public defense performance in the county by the staff of OPDS and the Commission.