

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Thursday, July 28, 2011  
10:00 a.m. – 3:00 p.m.  
Offices of the Oregon Judicial Department  
1133 Chemeketa St. NE  
Salem, Oregon 97301

**AGENDA**

1. **Action Item:** Approval of the Minutes of PDSC's June 16, 2011 Meeting (*Attachment 1*) Barnes Ellis
2. **Action Item:** Approval of Service Delivery Plan for Deschutes County (*Attachment 2*) Barnes Ellis Commissioners
3. PDSC 2011-13 Budget Update (*Handout*) Ingrid Swenson Kathryn Aylward
4. PDSC Schedule for 2011 – Meetings And Possible Topics (*Attachment 3*) Ingrid Swenson/  
New ED  
Commissioners
5. Presentation of Dependency Report (*Attachment 4*) Ingrid Swenson
6. OPDS Monthly Report OPDS Management Team
7. Request to Submit Post Deadline Response to RFP (*Attachment 5*) Forrest Rieke
8. **Executive Session\*** Review of Statewide Service Delivery Plan (for Contracts Beginning 1/1/12) Commissioners  
OPDS Staff
9. **Action Item:** Approval of Statewide Service Delivery Plan Barnes Ellis

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

***\*The Executive Session will be held at approximately 11:00 a.m. pursuant to ORS 192.660(2)(f).***

***The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.***

***Next meeting: The next meeting of the commission is scheduled for September 15, 2011 from 10am to 2pm at a location to be announced.***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

Official Minutes

Thursday, June 16, 2011

9:00 a.m. – 12:30 p.m.

North Sister Room

Seventh Mountain Resort

Bend, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Peter Ozanne  
John Potter  
Janet Stevens  
Honorable Elizabeth Welch

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

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

**Agenda Item No. 1 Approval of the Minutes of PDSC's May 5, 2011 Meeting**

**MOTION:** Shaun McCrea moved to approve the minutes, Janet Stevens seconded the motion; without objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 2 Presentations on Public Defense Delivery in Deschutes County**

Chair Ellis reminded Commissioners of two previous meetings at which there had been discussions about a service delivery plan for Deschutes County. Final action had been postponed until the newly elected district attorney had taken office and established prosecution policies including any adjustments to the early disposition program (EDP). Ingrid Swenson said that since the Commission's meeting in Deschutes County in June of 2010 the court had made some changes in judicial assignments and had gone to a centralized docket system instead of the hybrid system it had used in the past. She said there were

still some scheduling issues for attorneys. She said that in June of 2010 a large number of cases were being processed through the EDP program. Since one of the goals of an EDP program is to resolve cases promptly, OPDS had assumed that most of these cases involved only one or two court appearances. After OPDS staff met with the court, the district attorney and Brendon Alexander, further research disclosed that it was not uncommon for there to be five or more appearances in some cases. In addition, in the past two months only two to three new cases per month had been processed through the program. Under these circumstances it appeared that there might not be a need for special treatment of these cases, that appointment of counsel could occur in the normal course.

Chair Ellis said that one issue for the Commission had been the group style of representation provided to EDP clients. He said that an EDP program with five appearances sounded like a contradiction in terms. Ingrid Swenson said that multiple appearance were the result of failures to appear for hearings and failure to fulfill the dismissal conditions imposed by the court. She said that OPDS had been trying to obtain information from the district attorney about whether he intends to continue the EDP program and, if so, for what types of cases. Recently it appears that more cases are being filed as violations, which may reflect a decision not to process some cases as misdemeanors through the EDP program. In the past the judges were concerned that the program did not comply with PDSC's guidelines.

Tom Crabtree said that the previous district attorney had processed a high volume of cases through EDP. When Crabtree and Rahmsdorff was evaluated by the first Quality Assurance Task Force site team one of the issues the site team identified for possible Commission review was the operation of the Deschutes County EDP program. The Commission's guidelines were issued in response to problems observed in this program. The two "district court" judges assumed the role of probation supervisors for program participants. Multiple appearances resulted from failures to appear and from non-compliance. District Attorney Flaherty has increased the number of cases filed as violations and there are, therefore, fewer EDP cases. It remains to be seen whether this is a long term trend. One of the chief deputies recently hired by the office had been the deputy initially in charge of the EDP program.

Chair Ellis inquired whether there were an adequate number of experienced lawyers to handle major cases. Tom Crabtree said that the DeKalb firm had hired two new attorneys, one of whom had been a senior deputy DA. and he hadn't heard any recent complaints about the number of experienced lawyers. He said the district attorney's office had lost a lot of people and that had led to improved plea offers. He said the county had caught up on its backlog. The DA's office is still one deputy short in juvenile cases. They have gone from two and a half people to a half person assigned to juvenile cases.

Chair Ellis said that Judge Sullivan would testify later but that his sense was that the public defense system in Deschutes County appeared to be structurally sound, with a strong public defender office and a consortium to handle conflicts. Assuming representation in major cases is adequate, there don't appear to be major issues.

Presiding Judge Michael Sullivan and Deschutes County Trial Court Administrator Ernie Mazorol testified at the conclusion of the initial executive session. Judge Sullivan said that he would discuss what was changing in Deschutes County and how the changes might affect PDSC's contracting process. He said that the Eleventh Judicial District had had a reduction of

approximately 8% in personnel. There have also been changes in personnel. The courts have been consolidated with all judges carrying the same types of cases. In addition, the judges no longer have individual dockets. The court now has a criminal department, a civil department and a domestic relations department. In the past the judges had to await the arrival of defense lawyers on short matters since the lawyers had matters in other courts. It was very inefficient. They looked at the Jackson County model and now have two judges handling short criminal matters and other judges trying cases. There has been a change in the district attorney. Mr. Flaherty has a good working relationship with the judges. Judge Sullivan referred to a document provided to Commissioners that contained data on the number of cases and the number of trials for felonies and misdemeanors. The list does not include the aggravated murder case, *State v. Middlekauff*, that took over two months of one judge's time. In addition one judge was ill for a period of time. He said that the number of trials is down, the number of felonies is down but the number of misdemeanors is going to be up and that appears to be the trend for the future. One change that has been made is that when a driving while suspended charge is filed it is treated as a violation. The number of DUII cases appears to be increasing. There are over a hundred a month. These cases involve a significant amount of paperwork. The new district attorney may be evaluating cases differently and deciding not to pursue some. Judge Sullivan said that he is continuing to hold settlement conferences. The deputy DAs who participate appear to have more authority than they did in the past.

Commissioner Ozanne inquired whether the data shows an increase in violation rates. Judge Sullivan said that the increase may be in the number of cases resolved as violations instead of filed as violations. He said that even with the reduction in resources the court is trying to make headway on its backlog. They are making headway in civil and domestic relations cases but lack sufficient resources, for example, to afford postage to mail notices of dismissal in a couple thousand small claims cases. Mr. Mazorol said their budget had been frozen in February and there is currently no flexibility to be innovative.

Regarding the provision of public defense services Judge Sullivan repeated that there would be more misdemeanors in the coming year but that felonies would probably not increase with the district attorney taking a very close look at these cases. If the fast track program continues the court is willing to work with it. They want people to be adequately represented. They believed they were being adequately represented in the previous program. If PDSC wants to change the system of representation, the court is willing to go along with that. He said PDSC should not put the burden on the court of justifying PDSC's program. Once it is in place the court will tell PDSC if it is good enough. Overall things are working but PDSC might want to look at what it is contracting for. There are three pending murder cases in Deschutes County. The Guzek case was before the court last year. Judge Sullivan cannot hear that case since he was the person, then in the district attorney's office, who authorized Guzek's arrest. Judge Sullivan provided more data on the total number of criminal cases for the past two years but said there would probably be continued changes coming from the district attorney's office.

Commissioner Ozanne asked whether in view of the changes that were occurring an early disposition program was even needed. He said that as an individual Commissioner he did not like paying for group consultation. Judge Sullivan said the program was still being used but to a lesser degree. There were certainly cases resolved and people got good dispositions. No one who went through the program has complained. It is up to PDSC whether it wants to

provide representation in this program or not. There is a waiver form the court goes over with people who want to waive their right to counsel. People often waive on DUII diversions, for example.

### **Agenda Item No. 3**

#### **Approval of Service Delivery Plan for Lincoln County**

Chair Ellis said that one issue that had troubled the Commission was that the consortium had a law firm member in which only the associates, not the partners participated in handling public defense cases. In order to address that issue the consortium had restructured itself so that its members were individual attorneys, not firms. Ingrid Swenson said that in addition to addressing that issue the consortium had also begun to address the underlying issues of the lack of a structure and the lack of quality oversight. Chair Ellis said that the group would have a board of directors with outside members and that it appeared that they were making a good faith effort to conform to PDSC standards. Commissioner Ozanne said it looked like a remarkable turnaround. He suggested revisiting the county in a year. Commissioner McCrea asked to clarify that it would be the consortium that selected individual attorneys, not the law firms. Ingrid Swenson said that the consortium would have attorney agreements with the individual members. Chair Ellis said that he would like to see the senior partners more engaged in public defense and that they could continue to take cases even if it were only a small percentage of their practice. Commissioner McCrea asked what would occur if an associate decided to leave the firm and Chair Ellis said that they could. Commissioner Ozanne said that under the new arrangement the law firms would have agreed to allow the consortium to review the associate's performance, training and mentoring. Commissioner McCrea inquired about compensation and Chair Ellis said that the consortium would pay the associate who, in turn, might have to provide a portion of it to the firm. The associate at some point might decide to go out on his or her own. Ingrid Swenson clarified that PDSC would not be contracting with individual lawyers. PDSC would contract with the consortium, which would contract with individual attorneys to handle consortium cases.

**MOTION:** Shaun McCrea moved to approve the service delivery plan for Lincoln County, Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 6-0.**

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

#### **PDSC 2011-13 Budget Update**

Ingrid Swenson said that a work session on the PDSC budget bill would be set in the near future. The document provided to the Commission was the recommendation being made to the Ways & Means Committee by committee staff. She said that approximately \$13 million of the recommended funds were contingent upon the passage of House Bills 2710 and 2712, the court fee bills.

Commissioner Ozanne asked whether the budget assumed that the legislature was going to allow Measures 73 and 57 to take effect. Ingrid Swenson said that a decision had not been made yet but allowing them to take effect would have an impact and that it was one of the issues that had been holding up the public safety budgets. If the measures were allowed to take effect replacement funds would have to be found. Commissioner Potter said that the decision had not been made yet.

Kathryn Aylward said that some of the adjustments made to PDSC's budget had been made to all agency budgets, including the inflationary adjustment, the reduction to personal services and the reduction to services and supplies. With

regard to the services and supplies adjustment, these funds were restored to the Public Defense Services Account since funds from the account are expended almost exclusively for services and supplies. The legislature held back 3.5% of each agency's budget. Release of held back funds will be requested in February. Ingrid Swenson said that in view of the expectation that the held back funds would still be available in February agencies were authorized to expend 54% of their biennial budgets during the first year of the biennium. Chair Ellis said that PDSC is different from other agencies because there isn't much it can do to reduce expenditures, and if funds aren't available at the end of the biennium it may be another BRAC. Kathryn Aylward said that with a status quo budget contractors nevertheless experience the effects of inflation and may need to catch up in a future biennium. She said that PDSC did not receive any budget notes from the Legislative Fiscal Office requiring the agency to report to the Emergency Board but that PDSC might wish to report if caseloads increased or decreased. Chair Ellis asked whether the legislature was still budgeting on a biennial basis. Commission Stevens said they are constitutionally required to do so.

#### **Agenda Item No. 5**

#### **Contractor Recommendations for PDSC Contracting Priorities**

Lane Borg thanked Ingrid Swenson for her service as Executive Director. Two years ago when the Commission met in Eugene it was decided that since caseloads were declining, all boats should go up and down with the tide, looking to all contractors to share in reductions or increases as appropriate. He asked the Commission to reconsider that policy in areas where there are public defender offices. Public defender offices should have minimum caseloads that get filled first because of all the important things that public defender offices do that consortia are not adapted to do as well such as training and development and involvement in policy meetings. In order to develop good felony lawyers an office needs to have a sufficient number of less serious cases on which to train them. OPDS has worked with Metropolitan Public Defender to carry out the Commission's directive but if the budget continues to shrink over a ten year period, public defender offices need to have a sufficient number of lawyers to cover the caseload. If there are an insufficient number of minor cases to train new lawyers, he would have to hire laterally. The Lane, Marion and Southern Oregon public defender offices as well as Metropolitan Public Defender need to have a base that can sustain their operations.

Chair Ellis said in the past the Commission had recognized that it was harder for public defender offices to shrink than for consortia. Since then consortia have been urged to engage in full time public defense and it is now harder to draw a distinction. PD offices provide services that consortia are not organized to provide but the old distinction is less sharp. Commissioner Ozanne said he still didn't see a consortium operating at the public defender level on policy making, quality assurance, and training. Lane Borg said there is a distinction between adjusting caseloads for existing contractors and negotiating new contracts. When considering new contracts MPD should be looked at like a teaching hospital, essentially providing training even to competitors. Commissioner Ozanne said that it might never have been realistic to tell consortia that they could just do other things if the public defense caseload declined.

Gordon Mallon commended the Commission for contracting with mitigators in capital cases. He said that he had been able to hire experienced, qualified mitigators because their contracts allow them to take more Oregon cases rather than cases in states that paid them more. He would support increasing the

number of contract mitigators. Using them has improved quality and saved money.

Bob Homan said that contractors handling three strikes cases should receive the same amount of compensation they receive for Jessica's Law cases rather than the Measure 11 rates, since the defendant is faced with a life sentence. He said he didn't believe there would be a lot of such cases.

Tom Crabtree said he agreed with Lane Borg about giving priority to public defenders. The Commission should look at who is providing the most services and make certain that they can retain the service of these providers. OPDS has addressed the problem he brought to the Commission's attention last year by taking over the calendaring and ensuring that cases are fairly distributed.

Chair Ellis said that the Commission had created a challenge for itself. There had been an effort over six or seven years to "professionalize" consortia as in Lane County, for example, where there was enormous improvement. In Marion County MCAD has made enormous improvements. Progress is being made in Lincoln County. There is a layer of administration in consortia that didn't exist earlier. They are doing better quality work. It gets harder to say that PDs should be sacrosanct and consortia should take the ups and downs.

Tom Crabtree said he appreciated that with respect to some consortia but that was not the case across the state where some public defense clients would be willing to sell their dogs to hire a private attorney.

Paul Lipscomb said things in Marion County are different from Deschutes County and the metro area. In Marion County MCAD is the principle provider. Its lawyers are at the table to discuss system wide issues and provides the same services that public defenders provide in other jurisdictions.

Jim Hennings said that when MPD was founded the state of public defense was very sad. There were some very good lawyers and the bar did some great things including sending lawyers to the south during the freedom rider era. Except for a few individuals, however, there wasn't quality representation in court appointed cases. A public defense system requires full-time defenders. It is similar to an old type of Ford that was guaranteed to get you there and back. The rest of the bar is like the bumper that is kept in reserve and can expand and contract as needed. The base for public defender offices should be about 60% of the caseload. PDSC should maintain a public defender office as the base whenever possible. Chair Ellis said that Oregon had pioneered the development of a full-time community based defender. He said the good news, however, is that in 2011 there has been substantial improvement in the non-PD providers, partly because some of them are devoting nearly 100% of their time to public defense. Today, the notion that PDs should be spared and non-PDs take all the fluctuation is harder to justify. Jim Hennings said that full time defenders are the spine of the system that guarantees a certain level of service across the board. In states that have cut public defenders the quality of representation has tended to decrease across the board.

Commissioner Ozanne said that individual lawyers are doing terrific work and ultimately the quality of individual lawyers is what assures quality. But on the margins structure matters. Every state is different but it is up to the Commission to look at the literature and the research that favors a public defender system. People come and go, as do consortia. Public defenders do too but in the long

run you have to think more about structure and look to the experience of the country and not just say, "Oregon is different."

Commissioner Potter said it is a refreshing change that the arguments between public defenders and consortia are not around quality. Quality has been raised across the board. MCAD pushes the Marion PD to be better; the Arneson group pushes the Umpqua public defender to be better. The Morris firm puts out good work. It is refreshing to talk about quality regardless of the service delivery system.

Rob Raschio, the president of OCDLA presented Ingrid Swenson with a president's award for her career in service of justice for all. Chair Ellis thanked her for her service and said she had done an outstanding job. He said that since the early days of the Commission there have been significant improvements in quality and there is now a more healthy climate around discussions of how to make things better.

Commissioner Ozanne said that in addition to quality of service, the other important factor is finding good managers regardless of the type of organization. In Oregon and other places, one danger for public defense systems is that they tend to get arteriosclerosis. People tend to stay and the opportunity for turnover and training new lawyers is lost. Lawyers shouldn't just be serving out their careers until retirement. The important things are quality of lawyers and quality of management, and on the margins, structure.

**Agenda Item No.**

**OPDS Monthly Report**

Paul Levy said that at its June meeting the Commission usually thanked those who had participated in quality assurance peer reviews around the state and asked that thanks be extended to those who had participated over the last two years as well as to the members of the Quality Assurance Task Force. He said that since the last update to the Commissioner reviews had occurred in Klamath County, Yamhill County and at the Multnomah Defender Office in Multnomah County. In the latter review several members of the peer team received significant benefits from their participation. Chair Ellis said that this had been an excellent program started by Peter Ozanne.

Peter Gartlan said that David Degner had retired after 21 years as an appellate attorney. He said the office had recently represented a client in the first victims' rights appeal from a sentencing hearing. These cases are fast tracked by the court. The case involved a plea agreement with open sentencing that was sent back for resentencing based on the victim's claim of lack of notice, which the state conceded. OPDS moved for dismissal for lack of timeliness. The motion was denied. On the merits OPDS argued that resentencing would violate the federal double jeopardy clause. Since the victim's rights are constitutionally based and were enacted more recently, the court said they would prevail over the defendant's double jeopardy claim under the Oregon Constitution. With respect to the federal double jeopardy claim, the court held it did not prohibit a resentencing hearing. OPDS considered filing a petition for certiorari but decided not to since the Court might well say that it would get involved only if the defendant actually received a more severe sanction at the resentencing hearing. Chair Ellis inquired whether the trial attorney would now have an interest in ensuring that there not be a basis for the victim to overturn the sentence. Peter Gartlan said that it does put the defense in the position of asking the DA if they have notified the victim. Chair Ellis said DAs could wait and see what the outcome of the initial sentencing was. Peter Gartlan said the office is

waiting to see how many appeals there will be. Given their expedited nature he believes a team approach to handling these cases will be employed. He said that OPDS had recently been asked to appear as amicus in a post conviction relief case. Chair Ellis said that that was a compliment. Peter Gartlan reported that the division's semi-annual CLE event had occurred in May and included presentations on Department of Corrections intake, working with challenging people and a Supreme Court roundup. Finally, he said that OPDS had interviewed for three vacancies. There were over 180 applicants, with very impressive people applying. Erin Synder who is currently a law clerk to Judge Haselton has accepted one position. Offers have been made to two others.

Kathryn Aylward said that the Yamhill County Defender's contract had been terminated. It was the only remaining contract under which consortium attorneys billed the consortium on an hourly basis and sought approval from non-routine expenses through the consortium. Until another contract is negotiated for this county the court will revert to a private bar list including may of the same providers. It is hoped that the new contract will no longer be hourly. OPDS has renegotiated some contracts where there has been a dramatic change in caseload. For example, Multnomah County contractors were not meeting their quotas because of changes in charging practices and the contracts therefore had to be amended. The providers were very cooperative. OPDS worked with them in an effort to ensure that the changes were not abrupt or unduly disruptive. All OPDS contracts that were below quota were reduced.

Chair Ellis announced that the Commission would go into executive session.

[Executive Sessions. The Commission met in two separate executive sessions to discuss candidates for the executive director position and to discuss specific contract issues.]

The Commission deferred consideration of Action Item No. 8.

**MOTION:** Shaun McCrea moved to adjourn the meeting; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 6-0.**

**Meeting adjourned at 1:30 p.m.**

PUBLIC DEFENSE SERVICES COMMISSION  
UNOFFICIAL EDITED TRANSCRIPT

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

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Peter Ozanne  
John Potter  
Janet Stevens  
Honorable Elizabeth Welch

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

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

**Agenda Item No. 1 Approval of the Minutes of PDSC's May 5, 2011 Meeting**

0:24 Chair Ellis We will call the meeting of the Public Defense Services Commission to order. The first item is the approval of the minutes of the May 5th meeting. Are there any additions or corrections to the minutes from May 5? If not, I would entertain a motion to approve the minutes of May 5.

**MOTION:** Shaun McCrea moved to approve the minutes, Janet Stevens seconded the motion; without objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 2 Presentations on Public Defense Delivery in Deschutes County**

0:37 Chair Ellis Next is the Deschutes County public defense delivery plan. We have had two meetings on this previously. A draft has been circulated and at the last meeting we decided to defer any further action until after the new district attorney was installed and a meeting could be held to see if there were ways to adjust the EDP program to come into conformance with the guidelines that we have promulgated. Ingrid, you were present at a meeting. Perhaps you can bring us up to speed about that?

1:27 I. Swenson I can, Mr. Chair. I guess the other issue that is still open that we discussed when we were here a year ago had to do with some restructuring that the court was doing. They had designated a couple of their judges as essentially district court judges. Because of changes that were being undertaken, the court was reconsidering its docketing system, its assignment of cases, and so forth. I know Tom Crabtree is here today and he can fill you in on how some of that is working out. The court is moving forward with its changes and I think they have abolished the district

court/circuit court distinction. They have three assigned criminal judges now. I think there are still some scheduling issues related to the necessity of appearing in multiple courtrooms. They have moved away from the individual docketing system. When we were here earlier they had what they called the “hybrid” system. Judges were assigned cases after a plea was entered until they were closed. That is no longer the case.

As far as EDP is concerned, there is a lot of information in your materials about the operation of that program. A year ago the volume of cases was quite high in that program and it appeared to be something that might be having a beneficial impact both for the clients and for the court. What we didn't know was what kinds of cases those were, and, because we were expecting the arrival of the new district attorney, we anticipated that he might take a different approach to what cases got assigned to the program. We also didn't really have a good understanding of what was happening on the cases that were being processed through that system. Among the things that we have discovered - Amy Jackson, who is the analyst for that area, took a very close look at some of the cases that were being processed through EDP. It was certainly our impression that they were to be resolved at the initial appearance or at a second appearance if not at the initial one, but she found it was not uncommon to have five or more appearances with respect to each of these cases. That becomes a very different system if you are seeing clients that often and appearing in court that often on their matters. When you look at that situation you think maybe this is a standard appointment. Maybe this shouldn't be an EDP system at all. Kathryn Alyward and Amy and I participated in a telephone conference with the presiding judge and Judge Brady and representatives of the district attorney's office including Mr. Flaherty, and Brendan Alexander who was the contractor who was handling those cases. It was everyone's hope that by meeting together and talking about that system, and learning what the district attorney's intentions were with respect to those cases that we could figure out an approach that was acceptable to them and also met the Commission's criteria for representation in EDP programs. It didn't work out that way partly because we realized we did not have, at that point, enough information about what was really happening with the cases. It was thereafter that we did the research that indicated the number of appearances that were involved.

5:17 Chair Ellis

Let me just pause a second. I had the impression from our prior sessions that the way it was working is the defendants that were eligible for EDP would meet as a group. Mr. Alexander would give them general consultation as a group about consequences and then would offer to meet separately with those that wanted a private conference, because the group session very likely is not privileged given the relationship. That was what was creating the problem. I don't understand how an EDP program would have five appearances. That sounds like a contradiction in terms.

6:07 I. Swenson

Exactly, Mr. Chair. That is why the issues and questions changed after our last meeting. We had the same understanding you did about what this program looked like and the assumptions we made about it. However, it appeared that that was not the case. I think a couple of things affect that. One is there are failures to appear and when someone fails to appear there has to be another proceeding. By the second appearance there is supposed to be some kind of compliance with the programming that was to occur for the defendant to earn the dismissal. They were either to have paid a fee or made restitution or something of that nature. If they didn't do that then they weren't in compliance and they would have to come back again. I am not sure what all the reasons were, but it appeared not to conform to the model that we understood it to be. Ms. Jackson now reports that in one month there were only two new cases referred to this program, and in another month only three new cases. Both she and I have attempted to get information from Mr. Flaherty about his intention with respect to filings in that court. I think we know that the number of violations being filed has been higher since the beginning of his administration. It may well be that he is instructing his district attorneys to just file the violations rather than sending them through this EDP process. If that is the case then there is very little

need for the EDP program at all if you are talking about a couple of cases. You are talking about an accelerated appearance schedule and those cases could be handled in the normal course if the number were to remain at that level. In a sense we are still trying to put together the data on that. Judge Sullivan will be here at noon and he may have some more information for us, but as of yesterday the district attorney's office had not made a final decision on how they were going to process these particular cases. The judges were very concerned with the Commission's criteria and whether they were being met in this program. When we met with Mr. Alexander and them that was certainly one of issues that we talked about. I think it was the conclusion of the group that whatever it was called it was clearly going to be seen as representation of each client. Whatever services were provided needed to be compliant with representation. If that is the case then it is a model that needs to conform to the Commission's guidelines. I think we will just have to report that it is unresolved at this point, a year down the road from your initial hearing here. Maybe Tom Crabtree has something more to add and then we will hear from Judge Sullivan. After that you can have further discussion about where you think that ought to go.

9:34 Chair Ellis

Tom do you want to bring us up to date?

9:42 T. Crabtree

As much as I can. On the EDP program it was always our feeling that Mr. Dugan's office didn't have a garbage filter. They would run a lot of the cases that would otherwise be declined through the EDP program. There were a lot of those that were filed. He didn't file a lot of violations. Didn't even offer violation treatment for people going through EDP. That created a large number of cases that would go through that program. I think it was because of how the Deschutes EDP program was functioning that the first Quality Assurance Task Force team that dealt with my office came up with a proposal to have standards for the EDP. It eventually led to what the Commission adopted. Over the course of years that had been a problem. One of the problems leading to all the appearances was that we had the two district judges, if you will, who wanted to essentially act as of the probation officers there. They weren't sending people out to be monitored to do whatever it was that they were ordered to do, be that community service, restitution, fine, whatever. They would monitor it. They would set the cases in front of themselves to come back over and over again. I think that is what led to so many being in there and so many different court appearances in many cases. Some had to do with people not showing up, but a lot of it had to do with people not complying. Since Pat Flaherty has been in office they have increased the filing of violations, and consequently, not as many as previously have gone through the EDP program. I have attempted to talk to him about that. It appears he has other things on his mind these days other than the EDP program as primary. That is what I can tell you. Our experience now is that very few cases are going through there, but whether that is a long term trend remains to be seen. Interestingly he rehired a deputy who was the first deputy under Dugan that was in charge of EDP.

12:50 Chair Ellis

One of the five that was let go shortly after he took office.

12:54 T. Crabtree

No, no, no. This was somebody who had left years ago and gone over to the valley and got rehired back, but he was the deputy who was initially in charge of the EDP. Whether he is going to have anything to do with that now I don't know.

13:13 Chair Ellis

You may not be the right person to ask, but in the report it says that the DeKalb firm lost two partners and there was a concern whether there was a sufficient number of experienced defense lawyers for major cases. Where is that?

13:35 T. Crabtree

Jacques went out and hired a person who had been a senior deputy in the DA's office. Has a lot of experience. Has a good reputation. Does handle a lot of serious cases. He is there. Another person that he hired has some experience but not nearly as much as Mr. Spears, but I haven't heard complaints about that lately. You will have an opportunity to talk to Judge Sullivan whether that has been an issue. In the

meantime my attorneys – I have had one turnover, I guess, in the last two years and ...

14:24 Chair Ellis            The big shrinkage is in the DA's office for a while so you are probably doing alright.

14:29 T. Crabtree            Yeah. Doing alright and that, of course, leads to a lot of really good offers to close cases that had been these former deputies'. I think that that has allowed the county to catch up on its backlog of cases, simply because the district attorney's office was significantly understaffed for a substantial period of time. They are still one deputy short and that is in the juvenile arena. That is the one area where they have significant shortages now. There had been two deputies that were assigned to juvenile full-time, plus a part-time person from County Counsel's Office who is here today who did a lot of the dependency work. So they had two and a half people doing it. Right now they have one-half person doing the juvenile work. Filings are way down. In delinquencies they have one other person that they are grooming to help take over juvenile, but that is the area where we are seeing the biggest shortages now.

15:48 Chair Ellis            Alright.

15:49 I. Swenson            I think when Judge Sullivan arrives he will say that he doesn't now perceive a lack of a sufficient number of felony qualified lawyers. He thinks scheduling remains a problem for the courts. I know it does for the lawyers, too.

16:08 Chair Ellis            Other questions from the Commission? Thanks. I think I want to hear from Judge Sullivan before we conclude on Deschutes, but I would just say my sense is that structurally it is in pretty good shape. The model of having a strong public defender office and a consortium able to handle the conflict issues and the other piece of the caseload seems to be in place here and seems to be functioning well. If the major case representation is now adequately covered, I don't sense a big issue here. I don't know how the others are reacting. That is my sense. We will defer, unless people have comments, until after we hear from Judge Sullivan. Thanks.

17:17 T. Crabtree            Thank you.

17:21 Chair Ellis            I might say that our meeting today is going to be a little unusual. We have a few more public subjects to do. Then we will go into executive session and then we will resume the public session later with Judge Sullivan. There will be some on again off again.

**Agenda Item No. 3            Approval of Service Delivery Plan for Lincoln County**

17:45 Chair Ellis            On Lincoln County, Ingrid, anything more on that? We have had two meetings in a row where we have focused on Lincoln County. Let me just set the stage for what I think was the one issue that was troubling the Commission. That was the phenomenon of a consortium that had a law firm member where neither of the two partners was participating much at all, but two associates that the partners managed were essentially full-time. I think it did seem awkward from our perspective to have that kind of arrangement. It is not that anybody is acting in bad faith or inappropriately, but that is just the way it was working out. As I understood it from Guy Greco at our last meeting, the consortium is incorporating and restructuring and the way they plan to proceed is to not have law firm members, but to have lawyer members – those two associates will be members and the two partners can be too, as individuals. It just won't be a law firm membership. That way, I think, we avoid what I did think was an odd and not really appropriate structure. Have I got it about right?

19:24 I. Swenson            That is certainly my understanding, Mr. Chair. I think they have addressed that issue, but I think in doing that they have also begun to address the underlying issues which the Commission observed from the time we were there in 2004, I think, and

then in the process of the site review. This was a system with no formal arrangement of any kind. They distributed money and that was about the scope of the administrator's duty. There was no quality oversight by the administrator and it was up to the law firms how they managed their own lawyers and whether they gave them any training, any mentoring, any oversight or ever evaluated them. So they have addressed all of those issues.

- 20:18 Chair Ellis                   And they are going to restructure and they are going to have a board with outside member participation. I have felt that they are making a good faith effort to move toward the standards that we tried hard to urge them to adopt.
- 20:37 I. Swenson                   It would certainly appear so. I have not seen their response to our request for proposals, but I certainly spoke with Mr. Greco about the contents of that and he sent us some sample bylaws and so forth that he was working on. I think our office has received the formal documents now and I believe he has followed through on all of those things.
- 20:57 Chair Ellis                   Any comments or questions from other Commissioners on Lincoln?
- 20:58 P. Ozanne                    It seems like a remarkable turnaround. I think it is great. I guess what I would add is in the process, assuming – I don't know at what point but - assuming when a contract is awarded that we revisit the county in a relatively short time, maybe within a year from now. I would be interested to see that they follow the plan.
- 21:33 Chair Ellis                   I share that view. I do think when you have a provider community that, to my perception, is sincerely trying to improve themselves and move to the direction we are pushing... You are the institutional memory and were there about six years ago.
- 22:00 P. Ozanne                   No. It is a great turnaround.
- 22:01 Chair Ellis                   Any more on Lincoln that we need to do?
- 22:07 I. Swenson                   No. If you want to approve a tentative service delivery plan, in accordance with your instructions from last time, it would be contingent upon their receiving a contract, and if they do then revisiting them approximately a year from the last meeting, which was in May.
- 22:21 Chair Ellis                   I think that was already included and I certainly support it.
- 22:30 S. McCrea                   I'm sorry. I had to miss the meetings on Lincoln County. I did spend some time reading the minutes. I am a little bit behind on it and I apologize for that. The question I have is looking at page 23 of your report, and Ingrid asked if it wouldn't address the Commission's concerns if the consortium were to contract directly with individual attorneys rather than law firms, so that even though associates in law firms might be handling public defense cases, it would be the consortium rather than the firm that selected the attorney members. For me for clarification, are the members of the consortium then the individual attorneys as opposed to the law firms?
- 23:17 I. Swenson                   That is correct. That is the intention. The consortium will have individual attorney agreements with all the members, all the people who intend to participate in the handling of public defense cases. It will be with individuals not with the law firms.
- 23:32 S. McCrea                   So if there is an associate of the law firm who is a member of the consortium, then the contract will be with that person?
- 23:41 I. Swenson                   That is correct.
- 23:41 Chair Ellis                   Just to fill that out. The two senior lawyers, who are qualified lawyers, I would like to see them more engaged in public defense. They too can be members of the

consortium even though they might continue with a pretty low percentage of their time, but they would not be standing between the consortium and the two associates who were essentially full-time defense providers.

- 24:07 S. McCrea Then how did we resolve, if at all, what if one of the associates that we have a contract with decides to leave the firm?
- 24:20 Chair Ellis They can do that.
- 24:20 S. McCrea Okay. There is nothing to prohibit that.
- 24:21 P. Ozanne Mr. Chair, Shaun, it seems to me it is an issue with the partners. The law firm has agreed to allow review of performance, training and mentoring, and any responses to under performance are handled through the consortium and not the law firm.
- 24:51 Chair Ellis I think it is doable. If I were a partner in that law firm, I would still feel an obligation and an incentive to review.
- 25:02 P. Ozanne But in the absence of that it would be the consortium.
- 25:04 S. McCrea But then it is an employment issue and not a Commission issue what the compensation schedule is between the lawyer we contract with and his or her boss.
- 25:18 Chair Ellis Correct. My assumption is that the consortium pays the associate. The associate probably has to kick it into the pot of the law firm as you would (inaudible), and then the law firm will redistribute the way that they redistribute.
- 25:31 S. McCrea Okay. Because that has been one of our concerns in the past, that the person who had the contract, specifically the boss, would be getting the money and the associate would be doing all the work and not getting fair compensation.
- 25:50 Chair Ellis If I were that associate and it looked to me like I was bringing in \$100 and I am only getting \$60 back and rent and other things, I might decide that I would rather be an individual practitioner. They can certainly do that.
- 26:10 I. Swenson Mr. Chair and Vice-Chair McCrea, I just want to clarify that we are not contracting with the individual lawyers. We are contracting with the entity of the consortium which then has sub-contracts, if you will, with the individual members of the consortium.
- 26:30 S. McCrea So we are contracting with ...
- 26:30 I. Swenson A non-profit ...
- 26:34 S. McCrea We are expecting that the consortium is then having a direct contract with the individual lawyers?
- 26:44 I. Swenson Correct.
- 26:44 Chair Ellis Alright. I believe there was a motion. Was a motion actually made?
- 26:50 S. McCrea No.
- 26:50 Chair Ellis I am awaiting that. If anyone is so motivated.
- 27:01 S. McCrea For approval of the service delivery plan for Lincoln County?
- 26:59 Chair Ellis Correct.
- 27:00 S. McCrea Okay. I will move for it.

**MOTION:** Shaun McCrea moved to approve the service delivery plan for Lincoln County, Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 4**

**PDSC 2011-13 Budget Update**

27:23 Chair Ellis

Alright. Budget Update.

27:23 I. Swenson

Mr. Chair, I gave you a handout and it is very similar to one I sent you by email earlier. It is the current status of where we are. We are expecting a work session on our budget bill sometime very soon, possibly today, possibly another day. We don't know for sure and the legislature is on one-hour notice at this point, so they can set a hearing with only one hour notice to the interested people. But the document I presented to you is what the recommendation will be to the Ways & Means Committee in addressing our budget issues. The only point I want to make before Kathryn describes some of the details is that a significant amount of funds, I think it is a total of \$13 million plus, is contingent – not contingent but, how did they phase it, “assumes passage of” the two court fee bills, House Bills 2710 and 2712. Without that funding we are not sure how they would fill this gap. We will have to await resolution on those bills before we know if this potential source of funding is available.

29:00 P. Ozanne

Mr. Chair, a question, I have heard it or read it in the newspapers and so I am not sure how reliable it is, but I have heard that the ...

29:09 Chair Ellis

That is the Portland paper.

29:10 P. Ozanne

That the legislature is going to allow Measure 73 and 57 to go into effect. I think I know the answer to this question, but is the budget done assuming something about those two measures and whether they have an impact?

29:31 I. Swenson

They definitely have an impact. I think that is what has been holding up all of the public safety budgets - the resolution of these issues. We are part of the larger public safety budget and corrections and the judicial department are still awaiting budget hearings like we are, in the hope that there is some resolution. If Measure 57 is allowed to take effect and Measure 73, that money has to come from another direction. There have been many discussions, as you probably know, about other potential approaches to finding money to replace those funds.

30:18 P. Ozanne

So my source, and I should say it wasn't newspaper reporting but a columnist in *The Oregonian*, who criticized the legislature for punting on those two issues, so it isn't resolved yet.

30:26 I. Swenson

I don't believe so.

30:31 P. Ozanne

There is hope that there might be resolution or deferral from our perspective?

30:38 I. Swenson

At least as of yesterday when I was there, people involved in that conversation were certainly in the capitol meeting with legislators. John may have had some more recent information from the OCDLA lobbyist, I don't know, but I don't think they have yet been resolved.

30:53 J. Potter

They have not.

30:59 P. Ozanne

Thanks.

30:59 Chair Ellis

So do you envision any more testimony, or are you just waiting for a budget work session?

31:06 I. Swenson We are waiting for a work session, but there are often budgets with respect to which members of the committees have questions or issues. I don't expect further testimony but possibly responses to questions.

31:24 Chair Ellis The two of you are standing by if they need you.

31:28 I. Swenson We are.

31:28 Chair Ellis Alright. Anything else on that?

31:30 I. Swenson Kathryn, would you like to talk a little bit about how we got here?

31:35 K. Aylward You have the information in this handout but just to tell you a little bit about the background of this. These items are generally what were applied across the board to all state agencies. The removal of an inflationary adjustment and that occurred not only in our operating budget, but in the account as well. That was \$5.6 or 7 million as an inflationary adjustment. The 5.5% reduction to personal services, again, that was done to all state agencies across the board, our operating as well as the account. As you know we estimated a way to come up with a figure that represented a personal services adjustment for the account, and so the portion that was equal to 5.5% of that was removed from the account as well. The 6.5% reduction to services and supplies was applied to all state agencies. However, in our budget the entire 200 and whatever million of the account is considered services and supplies. It is what our agency is purchasing. Obviously reducing that by 6.5% is not possible for us so that 6.5% cut - just to the account - was restored in this recommended budget. Then finally, the interesting bit in all this, is that they basically said, "Okay, here is the level that we agree to fund you at or to, but we don't really have that much money right now and we have to have a balanced budget, so we are going to hold 3.5% of that back," and again I am told that is across the board for all state agencies, "and you can come back in January at the special session and hopefully by then the revenue forecast will have improved and we will actually have that much money." It is an interesting acknowledgment that, "We are establishing right now what we agree your needs are and our priorities in funding you, but can I pay you Thursday for a hamburger today. Here is what we think you need - come back." You can always wonder if it is going to be available. If the budget doesn't improve then it obviously isn't there to distribute, or other needs may surpass yours or the situation changes.

33:57 I. Swenson But indeed in anticipation that the money will be there, they authorized all these agencies to spend 54% of their total budget amounts in the first year of the biennium.

34:08 Chair Ellis In our case it is probably different than a lot of other state agencies. There isn't a lot we can do. If we have to reduce our budget we will just cut cases. I have no interest in cutting our provider compensation level, so we will just spend like it is going to be there and then if it turns out not to be there, we are back to BRAC time.

34:36 K. Aylward That is correct. We have explained in hearings and also to LFO and people understand that as soon as you remove an inflationary adjustment, inflation is still there. Our contractors are still facing that, so even if contract rates stay exactly the same, it is actually a loss for them. They then have to cover their own increases in health insurance costs and their own inflationary costs, so it is a setback for them even if it is status quo. Again, this will be something for a future biennium when it is catch up time. We will see what happens.

35:18 Chair Ellis Okay. Anything else on that?

35:22 J. Potter Mr. Chair, I want to make sure I understand what you said. I heard you say that we would go back in January to a special session...

35:28 I. Swenson No, regular session.

35:32 K. Aylward The end of January or February. One other thing - we don't have any budget notes, no recommended budget notes from LFO at this point, which means that we don't have to go back and report to emergency boards, but I think it is likely that we will report anyway. The legislature needs to know what is happening with our caseload. If it turns out that caseload drops and we don't need that three and a half percent, the sooner they know that the sooner they can use it for other areas, and likewise if it goes up they need a heads up about that.

36:12 Chair Ellis So even though they now will have annual sessions, they are budgeting on a biennial basis still?

36:21 J. Stevens They have to. It is in the constitution.

**Agenda Item No. 5 Contractor Recommendations for PDSC Contracting Priorities**

36:24 Chair Ellis Alright. The next item is contractor recommendations for PDSC contracting priorities. Do you want to introduce this?

36:48 I. Swenson Just very briefly, Mr. Chair. I did include the memo that I sent to our contractors advising them of the role that you play in contract oversight, and inviting them to participate if they wish to. As far as I know, as of this morning, only Lane Borg, Gordon Mallon, and Bob Holman intend to make remarks, but there may be other people who decide they want to do that too.

37:12 Chair Ellis Okay. Bob didn't make the agenda.

37:18 I. Swenson No.

37:19 Chair Ellis Lane, do you want to share your thoughts with us?

37:27 L. Borg I may not be at the July meeting. I want to, on behalf of the Metropolitan Public Defenders, thank Ingrid for her service. She has really continued the good work that Peter started. I think she has had some significant – I realize I am speaking to the choir here, but she has really had a significant impact on indigent defense in the state and I would say, if I can, for my organization even though my predecessor is in the room, we are very proud of the fact that Ingrid came from Metropolitan Public Defenders. We really appreciate her work and wanted to thank her. What I wanted to address today really goes back to a comment or statement. I don't know whether it should be characterized as a policy or preference, but two years ago at your retreat in Eugene when we were in a similar situation at the beginning of the contracting cycle looking at the money coming out of the legislature and priorities about what was going to happen, the comment was made that since we were looking at shrinking caseloads that all boats should go up and down with the tide. We look at all contractors and kind of either reduce or increase as necessary. I am asking that as a Commission you reconsider that policy, you reconsider that position. I want to be clear that I am not advocating at this point or in these comments that in areas where you don't have a public defender office that you put in public defender offices, but in areas where you have a public defender office or, as in my county or one of my counties, multiple public defender offices, that you recognize that we need to have minimum funding, minimum caseloads that get filled first. I realize that this has an impact on consortia and other people who are looking at it more as the business of law practice, just an alternate way of funding the law practice, but the reason I am asking to do this is because of all the good things that a public defender office does that consortia really aren't adapted well to do. They aren't adapted well to do training and development. It is difficult for individual consortia members to be involved in all the policy meetings. It is helpful when you have a small number or a single entity, as in the case of say Lane or Marion County - a single PD that can participate in these policy meetings because it gives them continuity. It gives them a seat at the table and it gives us a voice in that system, but all of that takes resources and takes having the ability to do that. If I am going to develop attorneys to be major

felony attorneys, I need to have baby lawyers. I need to have enough misdemeanor caseloads to develop that. I want to be clear. I am not here complaining about the good work that Kathryn and my particular analyst Caroline have done. They have done a great job. They have worked with us really well. I have really appreciated the work that they have done. I really see and assume that they are just carrying out the directive of the Commission on how to administer this business of indigent defense. I think as we are looking at shrinking and this may be the environment perhaps for the next 10 – last time it was 10 years so maybe this time only eight - more years, that you should look at saying that where we have a PD office we need to set a base. It needs to have a level at which they get this many cases to be able to develop into the other areas that we want to do, and that they have the bodies to cover the things that the court wants us to cover. To give you an example, two and a half years ago just after I started in this position, my misdemeanor section downtown had seven staff attorneys and a supervisor. The supervisor was about a half of a supervisor because they carried a caseload. I now have four misdemeanor attorneys in that section. That is not sustainable for development. I am thankful that I have got my Washington County office to have new lawyers go into, but it is not sufficient to develop those lawyers into minor felony or major felony lawyers, so I am going to have to depend on lateral hires and bringing in people from other areas. You lose out on what the purpose and best practices are. The idea of having an institutional public defender's office is that we carry out, and I am not speaking just for myself, but I hope I am speaking on behalf of my fellow public defender offices. Mr. Hazarabedian, Tom in Marion County, down in southern Oregon. We have got public defender offices and we want them to do, and they are doing, good work, but we need to have a base that keeps us sustainable. Thank you.

42:40 Chair Ellis

Let me just react a little bit. This has been obviously one of the issues that we have had to balance for the last 10 years. The old model, I think we were pretty clear that where you had a public defender with full-time criminal defense lawyer employees and you had a consortium of part time criminal providers but with an outside practice in common, I think we consistently said we recognized it is much harder for the PD to shrink than it is for the consortium to take a reduced caseload. I think the problem has been that we have been clearly urging consortium providers to ramp up to become closer to a 100% because that makes them more qualified, more specialists. They come to meetings like this. They are engaged full-time in public defense provision. That makes it a little harder for us to draw a sharp distinction between PDs in a shrinking caseload environment and consortia in a shrinking caseload environment. The balance of what you said I think we have tried to honor. It has been true that we have recognized that PDs do provide a training function that is much harder for consortia to provide, and that PDs provide a system participation function that consortia really aren't organized to provide, and, yes, we intend to compensate PDs at a level that allows them to continue to do those good things. The old distinction has become, in my mind, less sharp than it was. That goes both to money and caseload. We kind of have to watch both. That is just a comment.

44:54 P. Ozanne

Yeah but I still don't see a consortium operating at the level of the kinds of elements that Lane just mentioned - policy making, quality assurance, training, so I still think there is that distinction.

45:19 L. Borg

One other comment, Mr. Chair, that I would have just in response is that I think the distinction, the way I see the distinction you are talking about - because we are in these biennial contracts - would be between administering a contract and letting a contract. How much capacity do you buy at the beginning? You are at a threshold now where you are buying capacity for the next two years. The staff – Caroline is our analyst. I think she has done an excellent job of administering that and keeping an eye on it and making sure as we go along that everybody is treated fairly. I think the staff of OPDS is doing an excellent job on administration of the contract, but I am speaking now to how much capacity do you buy. The idea is like – I have used this analogy with many, many friends of mine and other people in policy positions - MPD is like a teaching hospital and we do things that are contrary to a profit motive

- besides that we are a non-profit - in that we train our competitors. We do all these things and so I think you need to look at it and we need a certain number of interns or baby attorneys so that capacity is maintained, that is at this threshold level.

- 46:37 Chair Ellis I am just saying that it is not as simple as I once thought it was.
- 46:38 L. Borg Right. Thank you.
- 46:45 P. Ozanne I am now a Commissioner and not an executive director carrying out the wishes of the Commission. It is a harder message to send to lawyers whose workload you are going to reduce. When you say, "Go out and practice and do other things," that is an easier message, although I am not sure that it was ever very realistic. You are going to have hard decisions for some lawyers addressing our caseloads.
- 47:19 Chair Ellis Gordon.
- 47:20 G. Mallon Thank you, Mr. Chair. Members of the Commission, I am here to speak on a very limited basis about one specific thing and that is contracts for mitigators in capital cases. I would first like to commend the Commission for the pilot project that you folks started two years ago. To my observation it has been a success in that I have been able to hire experienced, qualified, the best mitigators that we have to offer in the state because they were available because they have this contract where previously it was very difficult to find one that was available because they were taking cases in other jurisdictions that pay a lot more. What I am suggesting today is that you expand that program. I believe there is some movement in that direction already. I believe the pilot program has been successful because it improves quality and I believe it is actually cheaper even though the rate is higher. First, the quality situation and one of the things that mitigators without contracts do is take more cases than they can really work on effectively in order to make enough money to pay their bills. The other thing they do is work in other jurisdictions that pay more. Now that these folks have contracts they stay in Oregon more, not exclusively, they stay in Oregon more and don't have to take as many cases. It is less expensive that way because more experienced people are able to work more efficiently. They also are able to work with less supervision from the attorneys and so less time is needed there. Just to summarize, good work so far in this program and I ask that it be expanded. There are other mitigators who are equally qualified that we need to keep in the state.
- 49:58 Chair Ellis Thanks. Comments? What percentage of your time is now capital?
- 50:03 G. Mallon One hundred other than the stray speeding ticket that I do.
- 50:15 Chair Ellis Okay. Thanks. Bob?
- 50:26 B. Holman Thank you. I would like to echo Lane's kind words for Ingrid. She has done a great job over the years. What I really want to address is a single thing that I think is an inequity in our contract system. That is the treating of the three strike cases differently than the Jessica Law cases. You are looking at a life sentence for somebody convicted of this offense. I think it is just as important as the Jessica Law or a murder case. I would like to recommend that we compensate those cases at a similar rate. Those are my only comments.
- 51:04 P. Ozanne Bob, I'm sorry, I didn't hear the case...
- 51:07 B. Holman It is the three strikes. The third conviction for a sexual offense you are looking at life in prison. They are getting compensated the same as a Ballot Measure 11 case right now, not at the higher level of the Jessica Law case. Thank you. I know this is a bad year to bring that up.
- 51:30 Chair Ellis Can you give me some sense of the number of situations like that?

- 51:32 B. Holman I don't think there are very many. I think we have had two since the law was enacted in our office in Lane County. It is not a great amount of cases. There is a far greater amount of Jessica Law cases than there are three strike cases.
- 51:56 Chair Ellis Anyone else want to weigh in? Tom?
- 52:06 T. Crabtree I just wanted to tag team with Lane here on the priorities for public defenders. In some areas of the state you have different situations. You don't have one consortium that is practicing with a significant percentage of their cases being public defense work. You have got some boutique contracts. You might have one consortium that does certain types of cases and then a law firm that does some in other areas. I would urge the Commission again not to let cases rise and fall together, but look at who is providing the most services and assuring that the public defender in those areas has a certain base, that they are allowed to remain stable and not rise and fall with the others. Along those lines, as you recall when I was here a year ago I was talking about an extreme shortage in cases for us and not so with the private law firms. Since Amy has taken over the calendaring we haven't had that problem. I want to offer my kudos to her for making sure that we have all been similarly situated and don't have huge deficits and huge increases.
- 53:56 Chair Ellis You can see something of a challenge that we have created for ourselves. A lot of our efforts in the last however many - six, seven - years, has to been to - I'll use the phrase - "professionalize" the consortium. So in Lane County, for example, there has been enormous improvement from what we had five years ago, which was kind of just a random rolodex kind of thing. Now it is a much more cohesive group at our urging. In Marion County, MCAD has made enormous improvements. It is a much better group of providers. They are working with each other. They have got a much stronger administrator. Not that the prior administrator, who I think is in the room, was not strong, but there is no question that MCAD is a much improved organization today over eight to 10 years ago. You just heard us talk about Lincoln County, which is moving, we think, in a very positive way at our urging. All I am saying is that there is a layer of administration that is now happening in consortia that didn't exist in the ones that I have just mentioned. They are doing much better quality work than they used to. Now, while that process, as I think everybody in the room recognizes, is positive for the clients that we represent and for the system that we are trying to make work it does get harder to say PDs should be kind of sacrosanct and protected and insulated against the vagaries of budgetary fluctuation and consortia should take all the ups and downs. It gets harder. I am not saying to either you or Lane that I don't recognize the role PDs play. Obviously, my whole background has been very much related to that, but the differences are not as stark as they once were. The ability to insulate PDs and have the consortia take all the adjustments has become harder.
- 56:30 T. Crabtree Sure and I appreciate that it is hard. In certain areas, the ones that you mentioned, for sure, but I think that isn't the case across the board in the state, unfortunately, and the goal should be to make sure that those who have court appointed counsel don't want to sell their dogs to hire a private attorney. We do want to have a certain amount of quality. Where it is possible to do that let the non-PD providers absorb the ups and downs, or impose the structure that you are talking about to ensure quality across the board. Again, I am not saying it is going to be easy but it should be easier where you have people in consortia that are able to practice outside of the public defense arena. Thanks.
- 57:43 Chair Ellis Thanks a lot. Anyone else?
- 57:48 P. Lipscomb Thank you, Mr. Chair. Paul Lipscomb, Executive Director of MCAD. I appreciated the chair's kind comments about MCAD a few moments ago and I think the other members of our organization, who are here, certainly did as well. I don't want to turn this into a knife fight and I was not going to respond to Lane's comments but

our situation, I think, is dramatically different in Marion County than it is in Metro. My good friend Tom, I hesitate...

58:25 Chair Ellis

Now you know that Tom Sermak is in Japan and not able to respond?

58:30 P. Lipscomb

I did not know that. When I said "my good friend Tom," I was talking about Mr. Crabtree here in Deschutes County. Mr. Sermak and I are certainly on very friendly terms as well, but I didn't know he was out of the country. All I would say is that the situation in Marion County is distinctly different than it is in Metro or over here in Deschutes County. In Marion County MCAD is the principle indigent defense provider that you have. The public defender's office has considerably less than 50% of the caseload. Our lawyers are at the table when there are system wide negotiations to be handled. We do provide the same types of public services that you are more accustomed to seeing probably in public defender offices elsewhere. We do train young lawyers. If you looked at the second consortium in Marion County, which does juvenile work, I think it is fair to say that your public defender in Marion County has less than 25% of the total business of indigent defense. If you are at all interested in considering what has been proposed by Lane and Tom, I would suggest that you opt out or except Marion County because it is distinctly different. Thank you. That is all I have to say.

1:00:10 Chair Ellis

Thank you. Thanks for your good work. Mr. Hennings, the dean emeritus.

1:00:17 J. Hennings

I am sorry your honors, I could not resist.

1:00:27 S. McCrea

Why are we not surprised?

1:00:26 Chair Ellis

Didn't we require that he sign up a month ahead of time?

1:00:30 J. Potter

I think we did.

1:00:30 J. Hennings

As you recall the state of public defense when we started at Metro was very, very sad. With rare exceptions that we usually ...

1:00:43 Chair Ellis

There are people in the room that weren't born in 1972.

1:00:48 J. Hennings

There were some marvelous attorneys, and the state bar did some marvelous things including going down to the south at a time when it was very dangerous and Oregon actually had the largest percentage of lawyers that were down there during the freedom ride time. That was what I was introduced to when I came up. Those were my heroes, but it was clear to me on the defense side that by and large on average, except for those few individual attorneys who were marvelous, the quality was not there. An indigent defense system required full-time work and I think that is the major difference. The thing that you are going to have to look at when you decide this is are you looking at a finely tuned operation that is basically the old type of Ford that they guarantee you is actually going to get there and back again? Is it going to guarantee that type of quality? We have proved in this state that full-time defenders, by and large, can do that and have done that and have created the type of baby attorneys who have gone on and done marvelous things in terms of honoring the commitment to the bar to provide excellent services to individuals. The question though is how do you keep that finely tuned Ford that gets there and back? You do that by maintaining a certain base. I personally think that base ought to be about 60% of the caseload. You can't get higher than 75% without having conflict issues that are going to destroy you. You have got to keep that Ford tuned. That means developing the baby attorneys. It means guaranteeing that it is going to be there for a while. What the people who do the full-time public defense work – hired by a law firm in our model, which is a non-profit - you do that by guaranteeing that they are going to be there at a certain level. As you said yourself years ago, the rest of the bar really is the bumper. They are the ones that you want to keep in reserve. You want to keep them healthy enough that they can provide work, but also understanding that

they can take work on the side, and should take work on the side, and that they can expand. If all of sudden the caseload expands you also don't ask the public defender to expand suddenly in order to do that. I think you have to take a look at your original concept, which was the full-time defender as the base wherever possible, and it is not possible throughout the state. Beyond that the rest of the bar is really the bumper that is expected to expand and contract because we are always going to have expansions and contractions.

1:03:59 Chair Ellis

This is really interesting because you and I go back a long, long ways. What you are describing is absolutely what was there immediate post *Gideon* – late '60s, early '70s on. No question that the development which Oregon pioneered, you pioneered, of a full-time community based defender, was then and is now a wonderful thing. What you are describing is the contrast between that and the very mediocre provision of service outside of the PD community that existed in the '70s. The good news - we are now at 2011. There has been substantial improvement in the non-PD side of the equation. Part of that is because most of those providers are close to, if not at, 100% of their time focused on this endeavor. All I have been trying to say to you and Lane, just as a note of caution, is the contrast is not what it once was. The notion that PDs can be a safe harbor, and the non-PDs take all the fluctuation, that is harder. That distinction is not as clear as it once one. We should be proud of what has happened.

1:05:40 J. Hennings

We are proud of what we have done. The fact remains that the full-time defenders in this state are the spine of the delivery system. They are the ones who guarantee across the board that there is a certain level of services. If that disappears, and I have seen it disappear in other states, because public defenders have been substantially cut or told they are going to take huge caseloads where they can no longer guarantee that service. The quality of services throughout the state tends to decrease after that. I think that you have to realize that you have a case here where the full-time defenders are the spine. The rest of the people have responded and responded well. I am very, very proud of what has happened in this state, but I still think you have to guarantee at least that that Ford that guarantees the baseline quality is there. I think you have to make sure that that happens in whatever you come up with. Now Oregon is different. You have places where you have got only consortia. I think the advance that we have just heard about over on the coast is tremendous and that is what you want to do. The bottom line is you cannot afford to ever lose those full-time public defenders if you want the system to continue.

1:07:06 Chair Ellis

We are probably not arguing very much.

1:07:12 P. Ozanne

I would just like to add something to the discussion since it is a public discussion. I am sure we will take it up with our contract priority issue as well, but I guess I should preface it by saying it is kind of ironic because all the things you say, I helped, with many other people, to advance. The consortia and the lawyers who are in it have done terrific work. Many of them are the best lawyers in Oregon. Many of them are my friends, and ultimately the quality of individual lawyers is what assures quality of cases. But on the margins, in my view, structure matters. I will just pick up the words that Jim used and he used them in a different context. Oregon is different. I am now in a position where I am going around the country talking mostly about the size of people's prison populations, but every state or jurisdiction that I go to is different. We are different. I think it is up to the Commission to look at the body of literature and research that has been done over decades, which essentially, in my view at least, favors a public defender system, not exclusively but for the reasons that has been talked about in terms of structure and the assurance of quality, training, and continuity. People come and go. Consortia come and go. Public defenders come and go too, of course, but I think in the long run over the decades you have to think more about structure. How is Oregon going to look in 20 years? I think the Commission has to address the literature and the experience of the country and not just say Oregon is different.

1:09:01 J. Potter           It is a refreshing change, Mr. Chair, from years ago. We had public defenders arguing their case, as they should, and we have consortia members and private bar members arguing their case and they should. The arguments are now circulating around quality. I believe, as you have said, we have raised the quality across the board. I believe that MCAD is pushing the Marion County PD to be a better PD office. My guess is that the Arneson group is pushing the Umpqua PD to be a better PD's office. My guess is that people look to Jack Morris' firm and say, "That is a private firm. They are putting out good work." My point is that quality is what is under discussion here. I understand all about the public defenders. I understand Jim's historical perceptiveness, but I still believe it is a refreshing change that we are now talking about quality and each office, regardless of the service delivery system, pushing the other to make it better.

1:10:11 Chair Ellis           Anyone else? Alright. Thank you. Those are very thoughtful comments.

1:10:24 S. McCrea           Can we take a break?

1:10:31 Chair Ellis           We have one other item to do before the break. Rob, do you want to step forward and deliver?

1:10:46 R. Raschio           As president of the OCDLA I wanted to thank you, Mr. Chair, and the Commission members for allowing me an opportunity to speak. Ingrid Swenson, of course, has been praised and deserves all the praises she has gotten. She has also been the recipient of two prior president awards. This year we got a bigger frame to thank her again as providers of indigent defense services throughout the state for her hard work and her dedicated career in service of justice for all. On behalf of the OCDLA.

1:11:52 I. Swenson           My honor and privilege as you know.

1:11:59 R. Raschio           Thank you.

1:12:01 Chair Ellis           Ingrid, I think you know how the Commission feels. You stepped up when Peter somewhat unexpectedly stepped down. You have done an outstanding job. I think the dialogue you heard earlier today is a good reflection of the work you have done. Here you do have a state where the major population centers – and not limited to the major population centers, it is broader than that - have significantly improved the quality of their service. Twelve years ago when the study commission was starting you couldn't have had this discussion. There was a lot of tension in the room. There were a lot of people who just didn't trust the system. They didn't feel like what was happening from a compensation point of view was fair. There were just a lot of things that were just not right about it. You have been a big part of the transition from that kind of climate to what we are hearing today, which is a very healthy, professional debate about how we make it better. In any event, from all of us thank you for your service.

1:13:38 S. McCrea           And if you want to reconsider...

1:13:44 Chair Ellis           Okay. We are adjourned for about 10 minutes.

[break]

**Agenda Item No.           OPDS Monthly Report**

1:26:52 Chair Ellis           The next item on the agenda is the OPDS Monthly Report. Ingrid, if you...

1:27:02 I. Swenson           Mr. Chair, I am going to just do a very brief introduction. Paul has got a presentation on quality assurance oversight. I am hoping Pete will report on some of the developments in the Appellate Division, and Kathryn has some contract related information. I will ask Paul to start.

- 1:27:25 Chair Ellis Paul, do you want to make your report on the quality assurance side?
- 1:27:32 P. Levy Thank you, Mr. Chair. We have usually used the occasion of this meeting to acknowledge and thank members of our community who have participated in quality assurance peer reviews around the state. We did not do that last year so we have a little catching up to do. Two years ago I gave a fairly detailed overview of a process that we use for these peer reviews. I certainly won't repeat that today. I wanted to acknowledge and have the Commission thank the people who have participated in the reviews. Since we last talked to you about this we have done reviews in Klamath County, Yamhill County, and then just very recently in Multnomah County. You see all of the names of the folks who participated in these reviews including a member of your own Commission. I want to say a few words about this most recent review. Before I do that I would really like to thank these folks for participating.
- 1:28:45 Chair Ellis I think it has been one of the really good programs. Peter you started this, so thank you for the concept. I think the whole idea of peer review from the standpoint of bringing people in to look at an office and give them advice on how to improve as opposed to the quality police showing up has been a good concept.
- 1:29:01 P. Levy I also want to be sure that I acknowledge the members of the quality assurance task force that oversees the process and advises the executive director. Jack Morris is the chair of that task force. The others, and I think I have remembered them all, are Greg Hazarabedian, Karen Stenard, Tom Sermak, Jennifer Kimble, Lane Borg, Jim Hennings, and Mark McKechnie. Kathryn and Ingrid, of course, participate in all of these meetings. I just wanted to say that I am worried about the value of these reviews. The most recent one that we did was just a couple of weeks ago in Multnomah County. We looked at Multnomah Defender's criminal representation in that county. With that review we have now really looked at all the large public defender offices in the state. This review was interesting. It was as useful for the team as it probably was for the provider that we were looking at. Doug Engle who was on the team is a brand new director of the public defender's office in Medford and Josephine Counties, the Southern Oregon Public Defender. He said throughout the review that the experience of seeing how a public defender operates outside of his own limited experience was extremely valuable for him. Brad Cascagnette was on the team. I know you are familiar with him from the consortium in Lane County. He got to see how things were done in another large metropolitan area. Then we had the other members of the team. It continues to be a really valuable experience for those who participate as well as for the entities under review. Thanks.
- 1:31:15 P. Ozanne Mr. Chair, could I just add to the comments and the discussion we had. We were talking during the break about the discussion we had about structure. As I thought about it, and I should have thought about it more, in addition to quality of service, the most important thing other than the individual lawyers who are involved whatever the structure is, is finding good managers. Having tried to manage myself it is very difficult to find lawyers who are also managers. We just don't think in those terms. Whether it is a consortium or public defender the key is do you have good managers? You can have a poorly managed system as a public defender just as well as a consortium. I do want to balance out the comments by saying both in Oregon and other places I have been, the danger with public defense systems is they tend to get arteriosclerosis. They tend to get a lot of people who stay there for a long time and nobody really looks at assuring that the very best work is being done by those people who stay there. Then we lose the ability to have that turnover and training ground. One of the things that I think public defense managers have to do is to look hard, as we did with the appellate office. We had to look hard at people who had been there a long time and say, "This won't do." We know the results now, thanks to Becky and Pete Gartlan and the others who have worked on it. It is really a matter of ensuring in the public defense model that the lawyers aren't just sort of serving out their careers there to retirement. There are obviously pros and cons of all of these. I would rely mostly on saying, "Quality of lawyers and quality of management, and on the margins, structure."

1:33:07 Chair Ellis That is a segue to appellate.

1:33:13 P. Gartlan Thank you, Mr. Chair and members of the Commission. Pete Gartlan with the Appellate Division, Office of Public Defense Services. I only have five items to report on. I will start with personnel. Dave Degner, who has been with our office for about 21 years is retiring at the end of June. I will make an observation. He is the first person I remember actually retiring from the office in about 20 years. Interesting observation.

1:33:51 Chair Ellis You mean others go on forever?

1:33:56 P. Gartlan No. It is a nice change in culture. I was referencing Peter's remark about the early days of his tenure at the office when hard decisions were made, difficult decisions were made.

1:34:16 P. Ozanne You were on the front line.

1:34:17 P. Gartlan We had a victims' rights appeal since the last Commission meeting. It is the first one in the state. The victim appealed from a sentencing hearing. The judge imposed a sentence and the victim found out about it later and filed an appeal with the Supreme Court. These cases are different. It is a different kind of appellate animal because they are on an incredibly expedited schedule. I think the notice of appeal was filed, the briefs were filed, oral argument was had within a month and the opinion came out about 10 days later. These are fast tracked.

1:35:02 Chair Ellis And sent it back for resentencing?

1:35:04 P. Gartlan And sent it back for resentencing.

1:35:05 Chair Ellis What position did your office take?

1:35:11 P. Gartlan We took several positions. We tried to get it dismissed with motion practice on the basis that the victim had not notified the court soon enough about – she was claiming she had not been notified. We were saying that was not factually accurate from the record, but that motion was denied. The primary arguments were, well, the primary argument was double jeopardy. This was not part of the relief that this system – you know the victim's statutory scheme - that this contemplated. We think the scheme was set up to avoid constitutional issues. We were saying that one of the constitutional issues would be the double jeopardy clause, subjecting somebody to a second sentencing with essentially the potential for imposition of a second and harsher sentence at the second sentencing. It is really fascinating because the victims' rights scheme is not just statutory it is also constitutional. To the extent that there was a state double jeopardy claim, probably that was preempted by the fact that there was a victims' rights constitutional amendment as well, and it is later in time. We think the court would have said, and the court did say, while there is no state double jeopardy constitutional problem because the victims' rights constitutional amendment is later in time and it will override the double jeopardy clause in the state constitution. Does that make sense? So essentially the only double jeopardy argument left was the federal constitution and that is what was briefed and that is what the court ruled on, relying a case *U.S. v. DeFrancesco*, to argue that there was no double jeopardy problem with respect to her resentencing. I could get into the intricacies of that issue. It is fascinating. We thought about petitioning for *cert*, and ultimately we decided not to do that. We thought it would be a significant investment of resources and probably the U.S. Supreme Court would deny *cert* because of a ripeness issue. I think the court would say there is no need for us to get into this unless and until if the defendant gets a second sentence and the second sentence is harsher. Then we have a double jeopardy claim and double jeopardy issue that we could address.

1:38:10 Chair Ellis And the resentencing hasn't occurred yet?

1:38:12 P. Gartlan Not to my knowledge. That doesn't mean it hasn't happened, but I haven't heard about it.

1:38:23 Chair Ellis Interesting.

1:38:23 P. Gartlan Fascinating. Really, really interesting. So many statutory and constitutional issues and yet it is all being done under an expedited briefing schedule.

1:38:38 Chair Ellis So does this push us to want to say before an initial sentence is imposed to try to be sure that there is no risk that a victim could overturn it?

1:38:54 P. Gartlan That is interesting because it puts the defense in the position of asking the DA if they have notified the victim.

1:39:02 Chair Ellis DAs could play it kind of cute and see what they get. If they don't think it is enough... Was this a sentence pursuant to plea agreement or trial or plea without agreement?

1:39:17 P. Gartlan It was a plea agreement but it was a plea to the charge with open sentencing. So there was no agreement as to the sentence itself. If there had been a stipulated plea agreement that the court had allowed, had approved, we could have raised another argument that that is not reviewable pursuant to the same statutory scheme. Those types of sentences are not reviewable. It was a plea agreement as to the charges and convictions, but not as to the sentencing.

1:39:52 Chair Ellis What position did the state take on appeal?

1:39:59 P. Gartlan They collapsed. They agreed that the DA had failed to notify the victim and just kind of washed their hands. It is different. I hate this phrase but the paradigm has shifted with respect to victims being involved. Now you really have three parties who can appeal.

1:40:31 Chair Ellis Two on one side and one on the other.

1:40:33 P. Gartlan The ballgame has changed. We are waiting to see just how many appeals there will be. Given the expedited nature of this we kind of went at it as a group. We had a team address it. We recognize now that that was the right approach. Also, in the future depending on how many cases there will be, we will have a team of people identified for this purpose to build up expertise in this area because it raises statutory and constitutional issues, new ones, completely new ones.

1:41:18 Chair Ellis Okay. That is two. You have three to go.

1:41:23 P. Gartlan The Supreme Court recently asked us to appear as amicus. It was an invitation. What makes it noteworthy is that it is on a PCR case which is not what we do. We do direct appeals directly from a judgment of conviction. This is a PCR appeal so this is like a lateral back on that judgment. This is not within our area of expertise but the court has asked us to weigh in on that as amicus.

1:41:59 Chair Ellis I think that is a compliment. Good luck.

1:42:05 P. Gartlan We had the May Daze CLE and I am disappointed to say that none of the Commissioners showed up. We had a very interesting program with respect to the Department of Corrections intake, dealing with challenging people, and a Supreme Court roundup. Finally, we interviewed for three vacancies. We interviewed last week and we are checking references this week and extending offers this week.

1:42:46 Chair Ellis I assume it is still a buyer's market?

1:42:47 P. Gartlan Very definitely. I think I mentioned we had over 180 applications for the positions.

1:42:54 Chair Ellis For three positions?

1:42:55 P. Gartlan Yeah. We didn't even announce it as three.

1:42:59 Chair Ellis That is unbelievable.

1:43:06 P. Gartlan We had very impressive people applying, very impressive people who did not get an interview. It is definitely a buyer's market. We are very happy with the three people we have identified. One person we have extended an offer to and she has accepted. Her name is Erin Synder. She is currently a clerk for Judge Haselton on the Court of Appeals. We think she will be an excellent appellate attorney as will the other two. We are hoping they will accept the offer when we make it as well. That is all.

1:43:49 Chair Ellis Any questions for Peter? Thank you.

1:43:57 P. Gartlan Thank you.

1:43:57 K. Aylward I just have a couple of contract related matters that the Commission should be aware of. We did terminate a contract. The Yamhill County Defender's contract. The way their contract works is it was an hourly paid contract similar to the MCAD model.

1:44:15 Chair Ellis The old MCAD model.

1:44:18 K. Aylward The attorneys would bill on an hourly basis and the Yamhill County Defender's office had central administration. They would review the non-routine expense requests and approve or deny them. They would review attorney billings for appropriateness, reasonableness. They would make determinations about who was a member and who was not a member. In part when this contract was first established it was partly a resource consideration. That meant our office did not have to pay individual hourly bills. We didn't have to review the non-routine expense requests. Over time, because our office has become more efficient, it is a simpler matter for us to absorb that. We felt we weren't getting quite the value for our money that we really should have been getting, so we have terminated that contract. What will happen between now and what would have been the contract term is the court will revert to what is effectively a private bar list. Many of the same providers that were in the consortium are still providing services. The court, of course, may choose whom they wish to appoint. Some of that may change a little bit. We are hopeful from January 1 on we will have a contract with an entity and it will no longer be hourly. It will be a case rate. That is kind of a big change for us. The other thing we have done is we have renegotiated a fair number of contracts. As you know the caseload that was anticipated, particularly in Multnomah County, we did not anticipate such a dramatic change in charging practices. Therefore the Multnomah contracts are not meeting their quota. We amended them and reduced their quotas from July 1 on. Our provider community is very cooperative. What we said to them is, "You know caseload is down. We can't keep you at this same level, but we also don't want this to be abrupt and disruptive." We don't want layoffs because we don't know what is going to happen in the next contract period. We still don't know for sure what the contracting priorities will be, so we said, "What can you reduce your monthly payment to that won't cause a dramatic disruption to your office?" They were wonderful. They really came forward and I genuinely feel that the reductions that they took were the most that they could do. It wasn't just Multnomah. Any contract that was far from meeting quota got reduced. That is it.

1:47:09 I. Swenson Nothing further on the update. We are ready for the executive session.

1:47:16 Chair Ellis Right. We are now going to go into executive session. There are three subjects we are going to do in executive session. Our hope is to resume the public session at

noon when Judge Sullivan is available from Deschutes County. Thank you all for your attendance at this point.

[Executive Session]

- 0:03 J. Sullivan Is that a timer?
- 0:11 B. Strehlow It is a recorder.
- 0:11 J. Sullivan Who am I being recorded by?
- 0:20 S. McCrea OPDS
- 0:20 Chair Ellis I think we are ready to resume the public session. Judge Sullivan, thank you for joining us. I hope you get lunch today somewhere.
- 0:34 J. Sullivan I am Mike Sullivan. I am presiding judge for the Eleventh Judicial District. Sitting next to me is Ernie Mazorol. He is our trial court administrator. I have been invited to be up here. I wouldn't be here because I am in the midst of a trial but unexpectedly we had to have some hearings about the admissibility of scientific evidence and had to go through all the criteria, which I am sure the attorneys sitting at counsel table are familiar with. That being said, I think the issue, and what you wanted to hear from me, is what is changing in Deschutes County and how can that help you with the contracting process?

There have been some changes in our county, specifically the Eleventh Judicial District. I will begin by saying that we have had a reduction in personnel. That is unique to judicial districts because we have lost about eight percent of our folks. That is pretty significant when you take a look at our caseload and I will go through that with you. In addition to that we have had a change in personnel in our judicial district. Prior to the beginning of this year we had one judge who, if you want to look at it this way, was a carry over from the district court era. As soon as we had the opportunity we consolidated the courts as the legislature had directed where everyone would be carrying the same type of cases, or could be assigned to departments, but one person wouldn't be able to say, "This is the only kind of cases that I am willing to do." With the reduction in caseload we no longer had sufficient personnel to have individual calendars for our judges. We could no longer do that. We had to develop a means by which we could calendar our cases. I know if there is just one judge sitting there it is a major undertaking to schedule all these thousands and thousands of cases that come through. We have gone to departments which is pretty comparable to what other judicial districts have done. We are going to have a criminal department, a civil department and a dom rel department. These are the changes that are taking place.

One of the things that we also noticed with the defense attorneys in the morning when we did our individual matters, short matters, was that the judges were constantly waiting for defense attorneys to come from different courtrooms. Short matters would typically be from 8:30 to 9:45. That is because things take longer than expected for one reason or another. We have all been there. We know how that happens. The prosecutor is sitting there. Frequently the deputy sheriff is sitting there with the prisoner. It just makes for a very inefficient way of getting things resolved. We looked at the model in Jackson County. Basically you have two people taking care of the short criminal matters. Then we have other judges who try cases during the week. We have a docket. That is difficult for the defense attorneys. I acknowledge that, but there is no going back because we don't have the resources to have individual calendars. We don't have the resources to have people just sitting around.

That being said, we have had a change of leadership in the district attorney's office as well. I know there have been lots of things in the press and I am not going to

address those. I will say that the new district attorney, Mr. Flaherty, has done his best to work with the courts. We have a good working relationship with him. We have gone through with our new system where we have two judges handling the in-custody and out-of-custody matters each day. We have tried to monitor the situation closely. In the packet that I gave you, you will see on the top is how many trials there were in the first five months of 2010. What I am most concerned with is the in-custody/out-of-custody cases, but that doesn't break it down. All we could tell is how many trials we are really having. The number of jury trials was 35 for this period last year. Then you take a look at the packet that is underneath it which is the first five months and you get 29. When you go up and you take a look at trials to the court you will see that when you add felonies and misdemeanors for 2010, it was 21. Then when you go down and you take a look at 2011, it is 15. It may be a bit skewed because we have an aggravated murder case that I don't even think is in the statistical information, but it took well over two months and with seven judges that is a pretty big impact. We also had one judge who was ill for some time earlier in the year.

6:15 Chair Ellis

Guzek?

6:17 J. Sullivan

No. Guzek was last year. Middlekauff was the case this year. That was a pretty significant trial. Even though the jury was waived it still took a long time. These are trends and I want to make sure that you understand. I don't look at these as the end all, they just give you trends about where we are. I am not so concerned that there may be somewhat of a difference in the trials. The number of trials is down. Now take a look at this statistical piece of information here next. Again, that is a comparison for the first five months of this year versus the last five months. If I were in your position I would go to the top of 2010, and you will see in the first five months we opened up 580 cases and we closed 720. On misdemeanors we opened up 1,020 and we closed 1,441. Now these are before the changes in the administration of the district attorney's office, and the changes that we implemented in our courts. Now going down to 2011, you will see that the felonies are somewhat down. There are 508 versus 580, but they closed 897. Then on the misdemeanors - 1,204 were filed but they resolved 1,623. So the felonies are down somewhat, but I think the misdemeanors are going to be up and I think that is a trend that you can probably look for in the future. One of the changes that we made at the beginning of the year because we consolidated courts is, when a DWS is filed and it is going to be treated as an infraction, we give that a violation jacket now as opposed to a misdemeanor jacket. I expected the misdemeanors to go down but they did not. It appears that are DUII cases are going up. We have over a hundred DUII cases in this county a month on average. It takes a lot of work for any of you who have filled out the paperwork or looked at it. We have to be processing it and assuring that the folks actually go through the program. There are many possible reasons. We like to think that because we have a more efficient system, of course, now that we are processing more cases it could well be that the district attorney's office is evaluating cases and saying that some of these cases are not prosecutable and has dismissed them, or gone through old cases and said, "We are not going to pursue those."

8:57 Chair Ellis

We know from reading the paper that there was significant turnover in the DA's office when DA Flaherty came in. Did that lead to a one time lump reduction in caseload? I understand that a lot of cases got closed out because the deputies ...

9:20 J. Sullivan

I think you would have to talk to the district attorney about what he did in that regard. All I can tell you is that we have been processing more cases and I broke it out month by month. The district attorneys are coming in and they are processing the cases. I have continued to do settlement conferences which I have been doing for a number of years. The district attorneys who come down to resolve cases have, perhaps, more authority than they did in the past.

9:50 P. Ozanne

Judge, there was some discussion before you got here in the morning about the possibility that violation charging rates might change. I don't see from the data that

you provided – all I am looking at is 2011 versus 2010. That hasn't manifested itself?

- 10:12 J. Sullivan We are seeing an increase in violations. There might be offers on, shall we say, lower misdemeanors where in the fast track program they are given an opportunity to plead to a violation.
- 10:23 P. Ozanne That is a better way of saying it. Wouldn't that show up in the 2011 statistics?
- 10:30 J. Sullivan This is how they are filed and not how they end up.
- 10:36 P. Ozanne Okay.
- 10:37 J. Sullivan I didn't want to overload anybody with information. I would have to go and query it a different way. I think Ernie would rather some of our senior staff be doing other things than gathering statistics for me. He knows I love statistics, but nevertheless I tried to keep my requests within line. I am tracking this every month to make sure we are in line with where I would like to go. What I am trying to do with less resources is to actually make headway on our backlog. I think we have actually been doing that. I think we will see more overall. I know this particular part of it doesn't affect you, but I think that we could actually show some inroads in our civil cases and dom rel cases. Right now we are so short on S & S money that I don't have enough money to authorize postage for a couple thousand cases, notices of dismissal, because we don't have the ability on those cases to email the notices, especially on small claims, we have to send out notices. We could actually reduce that if we had the money for postage. We can't do that right now because we have been reduced significantly on a month to month basis.
- 11:56 E. Mazorol Yes. Our budget was frozen back in February. In our S & S where our postage basically is, we had about \$14,000 a month to spend. They clipped us back to about \$7,500 a month. That gives you an idea. There is just no flexibility in our budget right now to do much of anything innovative.
- 12:14 Chair Ellis So our area of interest, obviously, is provision of defense services.
- 12:24 J. Sullivan We understand that.
- 12:24 Chair Ellis Any comments on how we can do our job better, or how the defense community is working into the changes you are describing in the caseload?
- 12:38 J. Sullivan Well, first I think that in your contracting I think you ought to be looking at more misdemeanors coming up in the coming year. If you are contracting for lots of felonies it looks like the trend is that – it is not going to go up. On five months' data I hate to say that it is going to go way down. I am just saying at this point Mr. Horton, who is a former district attorney, has been looking at and being very particular about what is being filed. I would expect that the felonies are not going to go up because he is actually going to look at those very hard. But on the other hand, at least with the data we have here, the number of misdemeanors is going to go up. If there is a fast track we are willing to work with it. We want to make sure that people are adequately represented. We thought the folks were being adequately represented on the last program. There were some concerns about that. As I indicated to your director, if you wanted a different system as long as we were satisfied that people were adequately represented we were perfectly willing to go along with that. We wanted to make sure that we addressed every standard and so there was no argument for us. Our only position was that if you have a program don't put the burden on us to justify your program to you. If you want the program – once you have implemented it we will tell you if it is good enough. The programs have been good in the past and we anticipate the programs will be good in the future. That is not to always say that I am perfectly satisfied with every case that comes in front of me. That is the nature of what we do. There is always a certain amount of

friction. You sometimes look at what is going on and scratch your head a little bit, but on the other hand overall things are working. I am just saying that you might want to take a look at what you are contracting for. We have three pending murder cases we just finished up on. I think Guzek was last year. I will never be able to try that case because the case is so old that I was the person who authorized the arrest of that individual as a district attorney. I am now in my 24<sup>th</sup> year as a judge. I will never have my hands on that case or do anything on that case. I hope we don't get it back again. Finally, the last document that is presented gives you an idea of where we are. In 2010, we had 4,501 criminal cases as opposed to 2009 - 4,324. Of course we can't give you the stats yet for 2011. If you were to extrapolate, it would appear that we – if you said 2,600 – beg your pardon, if we have 1,712 cases it looks like it will be around that because that is five months. You would have to add on another month's worth of work. We will probably be around 4,000 to 4,500, depending on what happens. There will probably be continued changes at the district attorney's office. We don't know what they are. We don't try and tell them how to run their office, but there probably will be. Again, I think that Mr. Flaherty has put a high priority on servicing the court. We have had a pretty good working relationship with him so far. I am not mentioning anything beyond that. All I am talking about is the working relationship that exists between the district attorney's office and the courts.

16:41 P. Ozanne

Judge, you alluded to it in your comments and I know you had an extensive telephone conversation with a number of affected parties including our staff about the early disposition program. Again, it is kind of going back to this issue of charging and violations and flow of cases. I gather we may not need or have an early disposition program. I am just speaking as one individual commissioner. I am not really keen on paying public defense funds for this consultation of a group. I just wonder what you see going forward with the program.

17:22 J. Sullivan

I think the program is still being used to a lesser degree. I think that there were certainly cases that were resolved, quite a few, under the former administration. The folks that took advantage of it got some really good dispositions. It is up to you whether you want to do it or not. Mr. Flaherty was at the meeting and he said that he wasn't going to alter his charging practices just because they got an attorney. "I am going to make the offer that I do and it is up to the indigent defense to handle that how they think appropriate." I don't think any of us are taking the position that we are going to differ on how we treat those folks. We will take a look at what you offer. In the past the services have been adequate. I don't think there were any complaints about those folks who went through the fast track and the disposition; at least I am not aware of any complaints by the consumers, if you will.

18:19 P. Ozanne

That is the dilemma that I think we are in. If it is to their advantage you certainly want the people to take a good deal in that early disposition program. I guess, again, I am just speaking for myself and not the other commissioners, but this notion of a consulting lawyer that we pay for frankly looks kind of like a fig leaf to me. Either they have a lawyer or they don't.

18:49 J. Sullivan

If that is what you decide we are perfectly willing to work with the people that you provide to assist those that have been charged with crimes and can't afford their own attorneys, which are the vast majority I might add.

18:59 P. Ozanne

Or they might obtain waivers.

19:01 J. Sullivan

We have a whole process for people who waive their right to an attorney. As you know we have a form now and we go over that form with the folks, at least I do, in open court to make sure that they understand what they are giving up. That happens quite a bit on DUII diversions, for example, and once in awhile with those folks who enter our deferred sentencing program in domestic violence. It means that they get treatment and can earn a dismissal, but only a few of those folks. The vast majority of those are represented because the consequences are so significant if they are convicted or if they do not complete the program successfully. Does that answer

your question? All I am saying is that we will work with the folks that you provide. I haven't had an issue at this point. If you decide to do something different then we will take a look at what you provide. To date the folks have been adequately represented.

20:05 Chair Ellis

Other questions for the Judge?

20:12 J. Sullivan

Or Ernie. He is the numbers fellow.

20:17 Chair Ellis

Okay. Thank you very much.

20:50 I. Swenson

Mr. Chair, I would propose that we postpone any further discussion of Deschutes County for now. I think we can do that in July. You will have the transcript of all this information.

21:10 Chair Ellis

Anything else that anyone wishes to bring before the Commission at this point? I think we are through with the public agenda. Then we go back to executive session on Item 7 and then we will reopen for Item 8.

[Executive Session]

0:01 Chair Ellis

We are back in public session. For the record the Commission has been in executive session discussing with the staff specific contract issues. We have decided to defer Action Item No. 8. Unless there is something somebody wants to bring up, I would entertain a motion to adjourn.

**MOTION:** Shaun McCrea moved to adjourn the meeting; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 6-0.**

**Meeting adjourned**

**1:30 p.m.**

# Attachment 2

**Public Defense Services Commission  
Service Delivery Plan for Deschutes County**

(July 2011)

**Introduction**

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

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

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

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

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

The original version of this report was provided to Commissioners and others

prior to the June 17, 2010 meeting of the Commission.

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

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

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

#### The Circuit Court

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

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

#### District Attorney

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

#### Procedure in Criminal Cases

The court uses a hybrid docketing system. While cases are assigned to individual judges at the time of filing, they do not actually go to the assigned judge until after the entry of plea. The five felony judges alternate handling the

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

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

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

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

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

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

## Procedure in Juvenile Cases

### Delinquency cases

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

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

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

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

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

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

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

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

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

### Dependency cases

In Deschutes County the Department of Human Services provides factual information for dependency petitions and the District Attorney's office prepares and files them. Preliminary hearings occur in the afternoon and are scheduled

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

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

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

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

only as needed. The Oregon Judicial Department reported that there were 77 petitions filed in Deschutes County in the one year period ending September 30, 2009. Attorneys are appointed for both children and parents in almost all cases according to DHS. No discovery is provided prior to the hearing and usually only the petition and the temporary custody report are available. DHS staff indicated that initial hearings are never contested. A custody review hearing and settlement conference is generally scheduled for several weeks after the initial hearing. The great majority of cases are resolved at this hearing or at a third hearing, if needed. Statistics for the year ending September 30, 2009 indicate that 11 cases were tried.

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

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

Deschutes County has an active CASA program.

#### Civil Commitment Cases

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

#### Specialty Courts

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

The county also has a family court that was started in 1994. It was the first pilot site in the country and has been written up as a best practice model by a number

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

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

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

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

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

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

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

concerns about the process he tells them that they can contest the charges if they wish or take a brief continuance to consider their options.

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

### Public Defense Providers

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

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

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

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

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

Non-contract attorneys are not needed on a regular basis but there are some Bend attorneys in private practice who are willing to accept occasional public

defense cases and one of the contractors in Crook County also accepts Deschutes County cases when necessary.

## Comments regarding Local Public Safety System and PDSC Providers

### Criminal Cases

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

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

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

### Representation of parents

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

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<sup>13</sup> One interviewee said that if he were a public defense client and either of two attorneys he identified were appointed as his counsel, he would sell his dog to be able to retain his own

attorneys to have any contact with DHS between court hearings. One state's representative said that sometimes attorneys are too passive and sign off on terminations without a fight. Attorneys are said to use the CRB process well.

### Representation of children

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

### Delinquency cases

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

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

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

### The Structure

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

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counsel. Information about the reported performance of particular attorneys was provided to contract administrators in each office.

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

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

### The Juvenile Dependency System

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

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

#### 7.1.4.1 In-Custody Initial Interviews

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

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

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

**7.1.4.2 Out-of-Custody Interviews**

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

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

### EDP Representation

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

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

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

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

Ernest Mazorol, the Trial Court Administrator for the Deschutes County Circuit Court provided the Commission with information about the caseload in the county. He said there had been a boom period from 2005 to 2009 with the biggest area of growth in civil cases. Criminal cases, felony offenses in particular, however, had declined by 6%. Over that period the number of judges had remained the same but court staff had been reduced by approximately 15%.

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

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

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

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

generally hears all of the cases, including the criminal case. Occasionally, however, another judge will hear a case if that is what the parties prefer. Most parents who also have criminal cases are represented by a single attorney in all of the matters but occasionally there is more than one attorney for a party. When there are multiple attorneys they appear to communicate effectively with each other. Clients generally represent themselves in the domestic relations case. Some attorneys assist their clients with paperwork and legal advice but do not represent them on the domestic relations case.

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

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

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

Mr. Crabtree said there has been an increase in the juvenile caseload, which may be due to a temporary drop that occurred when the Oregon Safety Model was implemented by the Department of Human Services. The caseload dropped dramatically but is coming back to previous levels. The family court program is excellent. It provides better results for clients than the adversarial system has. Ms. Arnette has excelled at bringing in outside community partners to provide services that aren't available in the normal case.

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

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

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

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

cases are second degree thefts, primarily shop lifts. In most of these cases the defendant has already had an opportunity to get the case dismissed through a victim/offender reconciliation program but has failed to complete the conditions. Other case types include misdemeanor hit and run cases and other motor vehicle cases. Most of the time there is a plea offer that reduces it to a careless driving, which means the defendant will not be convicted of a crime and his license will not be suspended. Oftentimes they are very questionable cases, but the attorney can usually identify those by reading the reports. Criminal mischief is the third major category of cases in the program.

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

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

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

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

Commissioner Lazenby expressed concern about whether these programs are really making the system more efficient. Does the benefit outweigh the limitations imposed on the attorney/client relationship? Mr. Alexander said that one benefit is that PDSC is saving \$300 to \$400 per case through the use of this

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

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

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

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

Membership in the consortium was traditionally based on who knew whom.

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

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

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

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

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

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

Commissioner Lazenby said that information from the judges about performance

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

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

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

### **Additional Information and Developments - June to October 2010**

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

Information about early disposition programs in other jurisdictions was forwarded to the trial court administrator and he indicated that he would like to review the information and talk further with the judges before convening a discussion about the future of the program in Deschutes County. He had briefed Presiding Circuit Court Judge Michael C. Sullivan about the issue, however, and Judge Sullivan was open to looking at existing procedures and any proposed changes. Additional information was requested about the current program from Brendon Alexander and an inquiry was sent to the incoming district attorney about his

view of the EDP program and his willingness to explore other models. Data was still being collected and reviewed at the time of this report but information collected to date indicates that there are approximately 60 new cases per month that are being processed through the EDP program. If the defendants in each of those cases had been provided with appointed counsel on the underlying case or cases, the cost to PDSC would have been approximately \$23,400 per month. The Alexander firm receives \$5,000 per month for the representation it provides in these cases. One of the things that is not known is how these cases would be handled if there were no EDP program. In some counties at least some of these offenses would be diverted or processed through a community court; some would probably be treated as violations rather than misdemeanors. Regardless of how they might be treated in other jurisdictions, it is largely up to the Deschutes County District Attorney to decide how they will be handled in that county. Until Mr. Flaherty takes office and decides whether he will continue the EDP program and, if not, whether he will prosecute all of these offenses and at what level, any changes attempted by others might be temporary.

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

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

said that issues related to the EDP program and the court's docketing system should be addressed by the court but that county commissioners would be interested in costs related to operation of the jail. Lack of timely access to clients can increase delay and costs. Ingrid Swenson was asked to follow up on these issues.

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

### **Developments between October 2010 and June 2011**

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

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

Mr. Flaherty said that he believed he would make more violation offers than his predecessor and expects to do that up front. Judge Brady said that the court would like to ensure that defendants are getting good information about the impact of accepting fast track offers. Issues discussed included whether PDSC

would approve funding for “consultation” rather than representation and whether the bar would make any distinction. It was represented that 80% of the fast track cases are resolved with a single appearance. OPDS agreed to work with its contractors to arrange for representation.

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

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

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

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

In June, Tom Crabtree provided an email update on some of the other issues that were discussed at the May meeting and on other developments in the county. He said that when Patrick Flaherty took office five deputies were let go and two resigned so that there were only eight DAs to do the work of 15. It was necessary for the felony deputies to spend a significant amount of their time training new misdemeanor deputies. In this period EDP cases were given very low priority. If there is a recall campaign against the district attorney, things will remain unsettled until November or later. He said that the anticipated

reassignment of judges would not occur until July 11 and that there had not yet been a consolidation of the former district and circuit courts. Misdemeanor arraignments were still held separately and there were separate call calendars for misdemeanors and felonies. Attorneys in the Crabtree and Rahmsdorff firm had indicated that their waiting time had actually increased by three to five hours per week. He said that jail access had apparently improved, however, and that there had been no complaints for some time.

#### Testimony and Discussion at June 16, 2011 PDSC Meeting

Chair Ellis reminded Commissioners of two previous meetings at which there had been discussions about a service delivery plan for Deschutes County. Final action had been postponed until the newly elected district attorney had taken office and established prosecution policies including any adjustments to the early disposition program (EDP). Ingrid Swenson said that since the Commission's meeting in Deschutes County in June of 2010 the court had made some changes in judicial assignments and had gone to a centralized docket system instead of the hybrid system it had used in the past. She said there were still some scheduling issues for attorneys. She said that in June of 2010 a large number of cases were being processed through the EDP program. Since one of the goals of an EDP program is to resolve cases promptly, OPDS had assumed that most of these cases involved only one or two court appearances. After OPDS staff met with the court, the district attorney and Brendon Alexander, further research disclosed that it was not uncommon for there to be five or more appearances in some cases. In addition, in the past two months only two to three new cases per month had been processed through the program. Under these circumstances it appeared that there might not be a need for special treatment of these cases, that appointment of counsel could occur in the normal course.

Chair Ellis said that one issue for the Commission had been the group style of representation provided to EDP clients. He said that an EDP program with five appearances sounded like a contradiction in terms. Ingrid Swenson said that multiple appearance were the result of failures to appear for hearings and failure to fulfill the dismissal conditions imposed by the court. She said that OPDS had been trying to obtain information from the district attorney about whether he intends to continue the EDP program and, if so, for what types of cases. Recently it appears that more cases are being filed as violations, which may reflect a decision not to process some cases as misdemeanors through the EDP program. In the past the judges were concerned that the program did not comply with PDSC's guidelines.

Tom Crabtree said that the previous district attorney had processed a high volume of cases through EDP. When Crabtree and Rahmsdorff was evaluated by the first Quality Assurance Task Force site team one of the issues the site team identified for possible Commission review was the operation of the Deschutes County EDP program. The Commission's guidelines were issued in

response to problems observed in this program. The two “district court” judges assumed the role of probation supervisors for program participants. Multiple appearances resulted from failures to appear and from non-compliance. District Attorney Flaherty has increased the number of cases filed as violations and there are, therefore, fewer EDP cases. It remains to be seen whether this is a long term trend. One of the chief deputies recently hired by the office had been the deputy initially in charge of the EDP program.

Chair Ellis inquired whether there were an adequate number of experienced lawyers to handle major cases. Tom Crabtree said that the DeKalb firm had hired two new attorneys, one of whom had been a senior deputy DA, and he hadn't heard any recent complaints about the number of experienced lawyers. He said the district attorney's office had lost a lot of people and that had led to improved plea offers. He said the county had caught up on its backlog. The DA's office is still one deputy short in juvenile cases. They have gone from two and a half people to a half person assigned to juvenile cases.

Chair Ellis said that Judge Sullivan would testify later but that his sense was that the public defense system in Deschutes County appeared to be structurally sound, with a strong public defender office and a consortium to handle conflicts. Assuming representation in major cases is adequate, there don't appear to be major issues.

Presiding Judge Michael Sullivan and Deschutes County Trial Court Administrator Ernie Mazorol testified.. Judge Sullivan said that he would discuss what was changing in Deschutes County and how the changes might affect PDSC's contracting process. He said that the Eleventh Judicial District had had a reduction of approximately 8% in personnel. There have also been changes in personnel.

The courts have been consolidated with all judges carrying the same types of cases. In addition, the judges no longer have individual dockets. The court now has a criminal department, a civil department and a domestic relations department. In the past the judges had to await the arrival of defense lawyers on short matters since the lawyers had matters in other courts. It was very inefficient. They looked at the Jackson County model and now have two judges handling short criminal matters and other judges trying cases. There has been a change in the district attorney. Mr. Flaherty has a good working relationship with the judges. Judge Sullivan referred to a document provided to Commissioners that contained data on the number of cases and the number of trials for felonies and misdemeanors. The list does not include the aggravated murder case, *State v. Middlekauff*, that took over two months of one judge's time. In addition one judge was ill for a period of time. He said that the number of trials is down, the number of felonies is down but the number of misdemeanors is going to be up and that appears to be the trend for the future. One change that has been made is that when a driving while suspended charge is filed it is treated as a violation.

The number of DUII cases appears to be increasing. There are over a hundred a month. These cases involve a significant amount of paperwork. The new district attorney may be evaluating cases differently and deciding not to pursue some. Judge Sullivan said that he is continuing to hold settlement conferences. The deputy DAs who participate appear to have more authority than they did in the past.

Commissioner Ozanne inquired whether the data shows an increase in violation rates. Judge Sullivan said that the increase may be in the number of cases resolved as violations instead of filed as violations. He said that even with the reduction in resources the court is trying to make headway on its backlog. They are making headway in civil and domestic relations cases but lack sufficient resources, for example, to afford postage to mail notices of dismissal in a couple thousand small claims cases. Mr. Mazorol said their budget had been frozen in February and there is currently no flexibility to be innovative.

Regarding the provision of public defense services Judge Sullivan repeated that there would be more misdemeanors in the coming year but that felonies would probably not increase with the district attorney taking a very close look at these cases. If the fast track program continues the court is willing to work with it. They want people to be adequately represented. They believed they were being adequately represented in the previous program. If PDSC wants to change the system of representation, the court is willing to go along with that. He said PDSC should not put the burden on the court of justifying PDSC's program. Once it is in place the court will tell PDSC if it is good enough. Overall things are working but PDSC might want to look at what it is contracting for. There are three pending murder cases in Deschutes County. The Guzek case was before the court last year. Judge Sullivan cannot hear that case since he was the person, then in the district attorney's office, who authorized Guzek's arrest. Judge Sullivan provided more data on the total number of criminal cases for the past two years but said there would probably be continued changes coming from the district attorney's office.

Commissioner Ozanne asked whether in view of the changes that were occurring an early disposition program was even needed. He said that as an individual Commissioner he did not like paying for group consultation. Judge Sullivan said the program was still being used but to a lesser degree. There were certainly cases resolved and people got good dispositions. No one who went through the program has complained. It is up to PDSC whether it wants to provide representation in this program or not. There is a waiver form the court goes over with people who want to waive their right to counsel. People often waive on DUII diversions, for example.

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

The current public defense service delivery system in Deschutes County appears to be working satisfactorily, with a non-profit public defender and a consortium being the principal providers and one or more law firms handling the balance of the cases. Some of the issues identified in the initial report appear to have been resolved, such as the use of a hybrid court docket, the scarcity of attorneys qualified to handle serious felony cases, and access to incarcerated clients. With respect to juvenile representation, since the identity of the lawyers whose representation was described as unacceptable appears to be known, in its current contract negotiations OPDS should determine whether the quality of their work has improved significantly and if it has not, juvenile cases should no longer be directed to these attorneys. All juvenile providers are reminded that they need to observe the Oregon State Bar's performance standards for representation in these cases. With respect to the fast track or EDP program, the volume of cases currently being processed through the program does not require a special contract rate. These cases should be assigned in the same manner as other misdemeanors.

# Attachment 3

## **PDSC meeting schedule and agenda items for 2011**

March 10, 2011, Newport, Oregon

- Lincoln County Service Delivery Review
- Lane County – Service Delivery Update
- Discussion of PDSC Policy and Procedures on Contracts
- Executive Director’s Annual Report
- OPDS Monthly Report
- Executive Director Recruitment Plan

May 5, 2011, Salem, Oregon

- Lincoln County Service Delivery Plan
- PDSC Budget Presentation Report
- PDSC Review and Approval of RFP
- OPDS Monthly Report
- Executive Director Recruitment

June 16, 2011, Bend, Oregon

- Deschutes County Service Delivery Plan
- Approval of Lincoln County Plan
- Budget Update
- Contractor Recommendations for Contracting Priorities
- OPDS Monthly Report
- PDSC Review of Contract Proposals
- PDSC Review of ED Applicants

June 30, 2011, Portland, Oregon

- PDSC Interviews of ED Candidates

July 8, 2011, Telephone Conference

- PDSC Discussion of ED Candidates

July 13, 2011, Telephone Conference

- PDSC Discussion of ED Candidates
- PDSC Selection of ED

July 28, 2011, Salem Oregon

- Deschutes County Service Delivery Plan
- PDSC Budget Update
- PDSC 2011 Schedule of Meetings and Topics
- Dependency Report
- OPDS Monthly Report
- Presentation by Forrest Rieke re Response to RFP
- Review of Statewide Service Delivery Plan Draft
- Approval of Statewide Service Delivery Plan

September 15 - 16, 2011, Tillamook, Oregon?

- Service Delivery Review – Tillamook County?
- Commission Review and Approval of Contracts for 2012-13
- OPDS Monthly Report
- Commission Retreat with New Director (?)

October 21, 2011, Pendleton, Oregon

- Update on Umatilla/Morrow Service Delivery Plan
- Discussion/Approval of Service Delivery Plan for Tillamook County
- Update of Agency Strategic Plan
- OPDS Monthly Report

December 8, 2011

- Service Delivery Plan for Umatilla/Morrow Counties
- Outline of Biennial Report to Legislature
- Annual Report of ED to PDSC
- Discussion of 2012 Schedule - Possible Topics:
  - Service Delivery Reviews for Linn, Douglas Counties?
  - Review of Service Delivery in Civil Commitment/PSRB Cases?
  - Review of Service Delivery in Delinquency Cases?
  - January or February Update on Service Delivery in Clackamas County
  - May or June – Update on Service Delivery in Lincoln County
- PCR Update
- OPDS Monthly Report (including planning for 2012 Legislature)

# Attachment 4

## MEMO

To: Public Defense Services Commission

From: Ingrid Swenson

Re: Representation of Parents and Children in Juvenile Dependency Cases

Date: July 28, 2011

### Percentage of Public Defense Caseload

In FYE 2010 approximately 32% of Oregon's public defense cases were juvenile dependency cases, including termination of parental rights cases.

### Role of Counsel in Juvenile Dependency Cases

A public defense attorney may be appointed to represent a parent, a child, or a guardian in a juvenile case<sup>1</sup>. The obligations of attorneys to these clients are similar to the obligations of a lawyer to a client in any other type of case. In the representation of a child, however, the relationship between the lawyer and the client may depend on the ability of the child to exercise "considered judgment" in making the decisions that are the client's to make. Confusion about the role of counsel caused OPDS to issue a statement about its expectations of lawyers for children in court appointed cases. "The role of counsel" document may be found on the PDSC website: <http://www.oregon.gov/OPDS/CBS/RoleOfCounsel.page?>

Performance standards for attorneys in dependency cases were approved by the Oregon State Bar in 1996 and revised in 2006<sup>2</sup>. The standards set forth recommended actions and considerations for counsel at each stage of the proceedings. For example, the standards require attorneys to do the following at the initial shelter hearing:<sup>3</sup> obtain relevant documents; meet with the client; assert the client's constitutional rights; assist the client to exercise his or her right to an

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<sup>1</sup> In juvenile dependency cases whether there is a right to appointed counsel depends on the nature of the petition and the complexity of the case. ORS 419B.195, 419B.205. The latter section includes a provision, however, requiring appointment of counsel for a child upon request. Financially eligible parents are entitled to appointed counsel in termination of parental rights cases. ORS 419B.518. Some courts routinely appoint attorneys for all financially eligible parties, others appoint for children only in rare cases. Appointment of counsel for all eligible parties is a best practice endorsed by the American Bar Association and by a number of child advocacy organizations. See "The Unfulfilled Promise: the Right to Counsel for Parents and Children in Child Welfare Proceedings," LaShanda Taylor, ABA Center on Children and the Law, May, 2009.

<sup>2</sup> The Oregon State Bar has appointed a taskforce to update the standards in 2011.

<sup>3</sup> The Specific Standards for Representation in Juvenile Dependency Cases can be found on the bar's website: <http://www.osbar.org/docs/resources/juveniletaskforce/JTFR3.pdf>.

evidentiary hearing; present arguments about the jurisdictional sufficiency of the petition, the appropriateness of venue, the adequacy of notice, the need for shelter care and why continuation of the child's placement at home would or would not be contrary to the child's welfare, whether reasonable or active efforts were made to prevent removal, whether available services can prevent the need to separate the family, whether DHS's proposed placement is the least disruptive and most family like setting that meets the child's needs, the possibility of placement with relatives, arrangement for visits, applicability of the Indian Child Welfare Act; and request temporary orders that the client directs such as temporary restraining orders, child support orders, visitation orders, orders to the agency to investigate particular placements and the like.

The standards set forth similar performance guidelines<sup>4</sup> for all succeeding stages of the dependency case.

### Representation at Shelter Hearings in Oregon Counties

Despite the importance of the issues at stake at the shelter hearing and the fact that both the performance standards and PDSC's contracts with juvenile providers require that representation be provided at all hearings in the case including shelter hearings, information received in the fall of 2010 from 26 Oregon counties in response to a survey of PDSC providers indicated that in nine counties no attorneys are present at shelter hearings; in four counties one attorney is usually present and is appointed to represent one party while the other parties are unrepresented; in thirteen counties attorneys for all parties are present. In these latter counties some attorneys receive extensive discovery and have an opportunity to meet with the client before the hearing; others receive only limited information and are appointed at the hearing, leaving no opportunity for preparation<sup>5</sup>. Results of a statewide survey conducted by the Oregon Judicial Department's Juvenile Court Improvement Program for its 2011 "reassessment report" indicated that only 44% of the time are attorneys for both parents and children routinely appointed at shelter hearings.

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<sup>4</sup> While the bar's standards are considered guides to good practice, PDSC requires public defense attorneys to certify that they "have read, understood and agree to observe applicable provisions of the current edition of the Oregon State Bar's Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases," (Emphasis added) page 2, Public Defense Services Commission Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense, revised 5/21/09. <http://www.oregon.gov/OPDS/CBS/QualificationStandards.page?>

<sup>5</sup> One might assume that representation for all parties at shelter hearings is more common in urban counties than in rural counties but that is not the case. For example, attorneys are generally present for all parties in Union, Wallowa, Malheur, Baker, Grant and Harney Counties but not in Clackamas, Jackson, Linn or Polk Counties. In some counties, OPDS believes its contractors have made genuine efforts to make representation available to all parties. In others, it is not clear why it has not been possible to provide such representation.

## General Quality of Representation in Dependency Cases

In 2004 the Oregon Audits Division of the Oregon Secretary of State's office reported above average management risks for the Office of Public Defense Services after a review of its operations. One of the areas of risk identified by the division was that "OPDS may not ensure that contract and private bar public defense attorneys provide adequate representation in juvenile cases."

This finding was not surprising in view of the fact that the Oregon State Bar's Indigent Defense Task Force III report in 2000<sup>6</sup> had concluded that representation in this area was deficient and in need of significant improvement.

## Efforts by OPDS to Improve Quality of Representation

Since assuming responsibility for trial level public defense services in 2003, PDSC has evaluated and sought to improve the work of its juvenile contractors through a number of strategies.

- (1) Site Review Process – PDSC, with the assistance of its Quality Assurance Task Force, has brought together volunteer teams of attorneys and administrators to review the work of its providers. A summary of the findings made in the evaluations completed between 2004 and June of 2008 was presented by PDSC's General Counsel in a report to PDSC in June of 2008. He reported that:

...[J]uvenile representation is consistently rated as inferior to the representation that is being provided in criminal work. The reasons for this are ones that you are familiar with, the complexity of the cases, the need for specialized skills and knowledge, and high caseloads. .... What we hear across these site reviews in the juvenile area most frequently is inadequate client contact. What is often reported to us by a variety of sources is that attorneys are thought to be meeting with their clients only at court hearings and only shortly before them. We know from our own database, and this is also reported to us, that attorneys in juvenile work make minimal use, sometimes shockingly minimal use, of investigative and expert resources. There is often confusion about the role of counsel in these cases. There is confusion about basic statutory and regulatory processes. .... Across the board in these reviews, we are hearing that manageability of workload and caseload is a major problem for our providers.

Many site visit reports directed to juvenile providers between 2004 and 2011 have included specific recommendations for improving representation for clients and some recommendations to OPDS regarding

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<sup>6</sup> The task force report may be found on the bar's website:  
[http://www.osbar.org/surveys\\_research/idtf3/intro.html](http://www.osbar.org/surveys_research/idtf3/intro.html)

caseloads and other factors affecting quality. (These reports are confidential and copies are provided only to the contractor and OPDS.)

- (2) Complaint Policy – PDSC established a formal complaint policy in 2004 that permits clients and others to report complaints about the performance of public defense attorneys. OPDS staff determines whether there is a facially reasonable ground for complaint and whether an investigation is required. Complaints regarding representation in juvenile matters have been received from judges, attorneys, clients and others. In some instances attorneys have been required to seek and obtain additional training and/or mentoring. In other instances attorneys' eligibility for appointment to juvenile cases has been suspended or revoked.
- (3) PDSC Review –In June of 2006 after reviewing reports prepared by the Juvenile Court Improvement Project and the Oregon State Bar, and hearing testimony from a variety of experts on juvenile court practice, the Public Defense Services Commission completed its own review of the delivery of services in juvenile dependency cases. Among its conclusions was that, "Adequate state funding for public defense is essential to (a) retain and recruit qualified attorneys and (b) reduce the excessive dependency caseloads of currently qualified attorneys."
- (4) Juvenile Law Training Academy Workgroup – In order to ensure that attorneys in juvenile cases had access to adequate training, OPDS worked with a number of other interested groups<sup>7</sup> to form a Juvenile Law Training Academy workgroup. The purpose of the workgroup was to identify a comprehensive training curriculum for juvenile court attorneys and to assist in providing training opportunities for these attorneys. The academy is sponsoring its seventh annual training event in October 2011. The two-day seminar is accessible to most public defense attorneys (as well as state's attorneys) since grant funding helps to offset the cost of the seminar.<sup>8</sup>
- (5) Juvenile Appellate Section – As part of its budget request in 2007, PDSC sought and received approval of a policy option package that funded the creation of a juvenile appellate section within the Office of Public Defense Services. Four FTE positions were approved. That section is now

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<sup>7</sup> The Juvenile Court Improvement Project, the Juvenile Law Section of the Oregon State Bar, the Juvenile Rights, Project (now "Youth Rights and Justice"), the University of Oregon School of Law, the Oregon Criminal Defense Lawyers Association and others.

<sup>8</sup> In addition to the Juvenile Law Training Academy, there are a number of other organizations including the Oregon State Bar and the Oregon Criminal Defense Lawyers Association that sponsor annual seminars that focus on juvenile representation. In view of the training opportunities available OPDS included a requirement in its 2010-11 contracts with juvenile court providers that they obtain at least 16 juvenile law CLE credits during the contract period and has requested that a list of credits obtained be included in each contractor's response to the Request for Proposals for contracts beginning in 2012.

functioning at a very high level and appreciation for the quality of its work and for its role in clarifying the law applicable to juvenile dependency cases has been expressed by the appellate courts, state's attorneys and members of the trial bar. Court of Appeals Chief Judge David Brewer was instrumental in bringing together the workgroup that identified the need for such a unit and advocated for its funding in the legislature. Over time it is anticipated that this group of lawyers will be able to assist trial level defenders to improve the quality of their representation. Juvenile section lawyers are frequent presenters at juvenile law CLEs, are available for consultation with trial lawyers and are involved in multiple law and practice improvement efforts.

- (6) Juvenile Law Resource Center – In an effort to provide training and support to parents' attorneys in juvenile cases, PDSC contracted with the Juvenile Rights Project (now Youth Rights and Justice) to operate a juvenile law resource center. As of the date of its first progress report in 2010 the JLRC had developed and published "A family's Guide to the Child Welfare System" for parents in dependency cases, had provided "advice and assistance to 53 parents' attorneys in 18 Oregon counties, including general and case-specific advice as well as legal research, in-depth analysis of particular issues and motion and brief writing" on a variety of issues, had prepared monthly case law summaries for parents' attorneys, had provided written resource material and tools for attorneys on its website, had trained approximately 80 juvenile lawyers in 10 locations on issues specific to parent representation, and had provided a two-day practical skills training for 25 new parents' attorneys.
- (7) Juvenile Law Reader – Youth Rights and Justice publishes a newsletter that is provided without cost to all public defense attorneys handling juvenile cases. The Reader is published six times per year and includes law and practice updates and in depth articles on issues of current interest to juvenile lawyers. Most issues include a "View from the Bench" article from a respected juvenile court judge.

#### Compensation of Public Defense Attorneys in Juvenile Dependency Cases

Payment for public defense representation in juvenile cases is provided either by the hour (\$45 per hour) or under contract. The great majority of cases are handled by contract lawyers. All but one of OPDS's contracts are unit contracts in which there is a flat rate for representation in each case type. The typical contract rate for representation in a dependency case is \$700. Under their contracts attorneys are required to represent clients in these cases from the time of their appointment for the duration of the case or of their appointment. If the case ends after the jurisdictional hearing, no additional compensation is provided. If a review hearing or a hearing before the Citizen Review Board is

held post jurisdiction, the typical amount of additional compensation provided to the contractor is \$290 per hearing<sup>9</sup>.

### The Need for Additional Funding

As a result of a “sensitive case review” of a DHS child welfare case conducted by a group of legislators<sup>10</sup> during and after the 2005 legislative session, a number of legislative proposals were introduced in the 2007 legislature in an effort to remedy some of the problems identified in that case. Senate Bills 408 to 410 and 412 to 414 introduced by this group, were all passed and signed into law. This body of law addressed some of the major issues in child welfare. Only one of the group’s proposed measures, SB 411, remained in the Ways and Means Committee upon adjournment.

SB 411 would have allocated \$23 million to PDSC “for the purpose of improving legal representation of parents and children in dependency cases, including, but not limited to, improving training, support and other resources to support court-appointed counsel.” Passage of the proposal was recommended by the Juvenile Dependency Work Group, which had been convened in 2006 at the request of the group of four legislators. The Juvenile Dependency Workgroup established two subcommittees, the Subcommittee on System Impacts and the Subcommittee on Quality Assurance. The former workgroup was directed to identify potential systemic effects of increasing state funding for public defense services in juvenile dependency cases and the latter was directed to make recommendations for improving the quality of representation afforded to parents and children in juvenile dependency cases. The Quality Assurance Subcommittee’s recommendations were grouped into three categories: additional training and technical assistance combined with enforcement of performance standards, reduced caseloads, and increased compensation.

After hearing testimony regarding the need for improved representation, the potential benefits of such representation, and the successful implementation of a similar program in Washington State, the Senate Judiciary Committee determined that significant improvements could be expected if caseloads could be reduced by 20% and compensation increased by 25%. The cost of reducing caseloads and increasing compensation in these amounts was estimated at \$23 million.

The legislators recognized that additional funding is key to addressing the problem of unsatisfactory representation in juvenile dependency cases.

As the Oregon State Bar’s Task Force III Report<sup>11</sup> noted in its summary:

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<sup>9</sup> A typical contract rate for representing a child or parent in a termination of parental rights case is \$2,200.

<sup>10</sup> Senator Kate Brown, Sen. Jeff Kruse, Rep. Wayne Krieger and Rep. Mike Schaufler.

<sup>11</sup> See note 6 above

The theme that arose again and again, throughout our many interviews, was that funding is the key to fulfilling the state's obligation to provide adequate representation to people charged with crimes or facing other serious restrictions of their liberties. Although some mechanisms exist for promoting high quality indigent defense services, those mechanisms are dependent, finally, on a provider organization's ability to fund them. Supervision and training require time, and that time can only be provided when adequate funding is available. Perhaps most importantly, based on the responses we received from participants across the criminal justice spectrum, sufficient funding must be available to adequately staff provider organizations so that caseloads do not overwhelm the ability of individual attorneys to perform necessary services.

Unfortunately the 2007 legislature approved only \$1.8 million of the agency's request for \$30 million in policy option packages and provided that the additional funds be used to increase the attorney hourly rate and reduce the differential between public defender and deputy district attorney compensation.

In its 2009-11 budget request PDSC included a policy option package to increase funding for representation in juvenile cases by \$17 million. None of those funds were approved.

As part of its contracting process for contracts beginning 1/1/10, PDSC sought to direct more existing resources to representation in juvenile cases by maintaining compensation rates while reducing caseloads in the belief that with adequate training and support services in place, the major remaining obstacle to improving representation was excessive caseloads. During contract negotiations applicants seeking rate increases were advised that any increases would come with the expectation that attorneys would observe the Rules of Professional conduct, their contractual obligations to OPDS, and the Performance Standards. In a snapshot survey conducted on September 29, 2010, some contractors reported that the number of clients per attorney had declined significantly. Unfortunately, the number of clients per attorney in one county still exceeded the number of clients per attorney in the county with the lowest rate by between 100 and nearly 200 more clients per attorney.

Washington State's Enhanced Parental Legal Representation program serves as a valuable model for Oregon. As noted in the most recent discussion paper on the program,<sup>12</sup> it continued to show impressive results in increasing the rate of family reunification as well as the likelihood of adoption or legal guardianship for children who did not return home. This model, in place since 2000, limits the number of clients per attorney at any given time to 80 per full time attorney. Some Oregon lawyers reported having as many as 235 clients at the time of the snapshot survey.

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<sup>12</sup> A summary of the report is attached as Exhibit A.

In its 2011-13 budget request PDSC sought approval of an \$11 million policy option package that would have allowed the agency to reduce juvenile caseloads by 20%. It was not approved.

Throughout the interim period between the 2009 and 2011 legislative sessions, the Juvenile Dependency Interbranch Workgroup, that included representatives of all three branches of government,<sup>13</sup> met regularly to consider ways of improving the outcome in child welfare cases. The group developed three goals for the 2011 legislative session: preventing decreases in funding for the child welfare and juvenile court systems, supporting legislative efforts to reduce the number of children in foster care, **and securing funding targeted at increasing the number of children and parents with legal representation at the first hearing scheduled in a dependency case.** (Emphasis added.) The group made a presentation to the Joint Interim Judiciary Committee in December of 2010. The presentation included a skit depicting the principal events in a typical juvenile dependency case and the roles of all the involved agencies. The group advised the joint committee that one of the most effective things that could be done to improve outcomes in these cases would be to ensure that adequate resources were available at the time of the initial hearings in dependency cases. These resources included having attorneys available to represent parents and children. No legislative measures were enacted in response to the recommendation of the work group.

#### Some Guidelines for Improving Representation

In a March 6, 2007 letter to Judiciary Committee Counsel, PDSC identified some of the steps PDSC could take to ensure that any funds allocated for improving the quality of representation in juvenile dependency cases would have the intended effect. A copy of the letter is attached as Exhibit B.

#### Recent Indications that Progress is Being Made

PDSC conducts annual surveys of judges, district attorneys, juvenile department directors and Citizen Review Board coordinators regarding the quality of public defense services being provided in juvenile dependency cases and any significant changes that had been observed in the last year. Paul Levy reported on the results of the December 2010 survey at the PDSC meeting on March 9, 2011. He said that although the survey was not a scientifically validated measure of the quality of representation, it did indicate changes and trends over

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<sup>13</sup> Members and organizers of the group included Chief Justice Paul DeMuniz, Chief Judge David Brewer, Circuit Court Judges Kip Leonard, and Nan Waller, State Representatives Wayne Krieger and Mike Schaufler, as well as representatives of the Department of Justice, the Department of Human Services, The Office of Public Defense Services, trial level public defense attorneys, deputy district attorneys, the Chair of the Commission on Children and Families and others.

time and that the 2010 results indicated that the quality of services in juvenile cases was continuing to improve<sup>14</sup>.

### Recommendations for Future Action

Close study of the Washington Enhanced Parental Legal Representation project reports over the last several years discloses the obvious. When attorneys for parents are provided with adequate resources, appropriate training and

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<sup>14</sup> A total of 155 persons responded to the survey, including 109 judges, 20 prosecutors, 15 juvenile department directors and 11 Citizen Review Board coordinators. Eighty-four respondents commented on juvenile dependency representation. 60 percent rated the quality of representation as “good” and 31.8% rated it is excellent. The other 8.2% rated it as “fair” and none as “poor.” The majority did not see significant changes in quality over the course of the year but 40% did observe improvement with 4.7% seeing “significant” improvement. When asked how often public defense attorneys provided satisfactory representation, 64.7% responded “often and 29.4% “always,” with only 5.9% reporting satisfactory representation only “sometimes.” When asked whether they “questioned the competence” of any of the public defenders representing juvenile court clients 81.7% responded “no” and 18.3% “yes.” Sixteen of the respondents included specific comments in response to this inquiry. The principal concern was the adequacy of contact with clients. Interestingly, when asked about caseloads, 59.3% thought caseloads were “about right” and 32.1 percent thought they were “somewhat too large,” and 7.4% “significantly too large.”

performance oversight, the quality of representation and the outcomes for clients are significantly improved.

In Oregon training opportunities should be maintained and enhanced, performance oversight should be systematized, and adequate resources should be provided to permit a Washington-like limit on the number of clients full time attorneys may represent. There may be incremental steps that can be taken but a significant increase in funding is probably necessary to achieve meaningful improvement.

# Exhibit A



## Executive Summary: Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care

by Mark E. Courtney, PhD. and Jennifer L. Hook, PhD.

Partners for Our Children at the University of Washington

In 2007, the National Council of Juvenile and Family Court Judges (NCJFCJ) conducted a review of research from the prior ten years that involved juvenile dependency court processes or outcome measures in an effort to assess the state of research involving juvenile dependency courts. The research review identified inadequate methodological rigor, limited research on outcomes of the juvenile dependency court process and child welfare system, and a dearth of research on legal representation as some of the deficiencies of the existing research literature. In particular, research on parental representation is lacking; of the five studies of parental representation reported in the NCJFCJ review, three involved a single program in one state and only two provided any data on outcomes associated with efforts to improve representation (Summers, Dobbin, & Gatowski, 2008).

This study addresses these gaps in knowledge about the functioning of child welfare services and juvenile courts by evaluating the impact of a program of enhanced parental legal representation on the timing of permanency outcomes for children entering court-supervised out-of-home care in Washington State. The study employs methods that are methodologically superior to prior efforts to evaluate parental representation and focuses on key outcomes of the child welfare and dependency court systems. Study findings provide evidence that the availability of adequate parental legal representation speeds reunification with parents, and for those children who do not reunify, it speeds achieving permanency through adoption and guardianship.

### The Parental Representation Program

In 1999, in response to a request from the state legislature, the Washington State Office of Public Defense (OPD) conducted a study of inequalities in attorney funding in dependency and parental rights termination cases (Wash-

ington State Office of Public Defense, 1999). The disparities found called into serious question whether parents in Washington were being provided adequate legal representation in processes that have significant consequences for parents and children; state and federal courts have long recognized the crucial importance of these proceedings and the necessity of providing legal representation for the parties.

In 2000, the OPD succeeded in obtaining a legislative appropriation to create a pilot Parent Representation Program (PRP) which was then established in Benton, Franklin, and Pierce counties. The legislature established five program goals to enhance the quality of defense representation in dependency and termination hearings:

1. Reduce the number of continuances requested by attorneys; including those based on their unavailability;
2. Set maximum caseload requirements per full-time attorney (the OPD sets the fulltime maximum caseload at 80 open cases per attorney);
3. Enhance defense attorneys' practice standards, including reasonable time for case preparation and the delivery of adequate client advice;
4. Support the use of investigative and expert services in dependency cases; and
5. Ensure implementation of indigency screenings of parents, guardians, and legal custodians.

To achieve these goals, program implementation includes reasonable compensation for attorneys, reduced caseloads, access to social worker staff (social workers are assigned to attorneys on a ratio of one social worker per four attorneys), investigative resources, periodic attorney trainings, and oversight of attorneys' performance by OPD staff.

To our knowledge, the PRP is the only program of parent representation in juvenile dependency proceedings that has been the subject of evaluation research. Prior studies of PRP have concluded that PRP results in more timely action in dependency cases, increases the likelihood of family reunification, and increases the likelihood of case resolution (i.e., reunification or entry of a third-party custody order; a dependency guardianship; or the child becoming legally free for adoption due to termination or relinquishment of parental rights) (Oetjen, 2003; Harper, Brennan, & Szolnoki, 2005; Washington State Office of Public Defense, 2009). However, these findings should be regarded with considerable caution given the methodological limitations of the prior research.

## Research and Findings

Our analyses address the following research question: *Is the presence of the PRP associated with a change in the timing of children's transitions to permanency through reunification with their family, adoption, or legal guardianship?* To answer this question, we followed 12,104 children who entered care for the first time in 2004 to 2007 through the end of 2008 to see whether they experienced one of the study outcomes. This period coincides with the implementation of PRP. In essence, our research design takes advantage of the staggered roll out of PRP across Washington's counties. Our models leverage this variation in implementation timing, examining differences across counties with and without PRP and differences within counties prior and post implementation. Data come from the Case and Management Information System (CAMIS) provided by the Department of Social and Health Services (DSHS) and from the Administrator of the Courts (AOC).

All else being equal, the exit rate to reunification is 11% higher when a child is living in a county where PRP is in operation than when a child lives in a county where PRP is not in operation, a difference that is marginally statistically significant at  $p < .05$  ( $p = .051$ ). The rate at which children are adopted is 83% higher, and the rate at which child children enter guardianships is 102% higher ( $p < .001$ ). Although PRP's impact is greater on adoption and guardianship than on reunification, the decrease in time to reunification affects many more children because reunification is the most common outcome for children. Of children achieving permanency during the study period 68% reunified, 26% were adopted, and 6% exited to guardianship. Additionally, reunifications generally happen much more quickly than adoptions or guardianships, so there is less room to decrease days in care.

## Conclusion

In spite some study limitations, we believe that the findings of our evaluation of the impact of enhanced parental

legal representation on the timing of permanency outcomes for children in foster care should be taken seriously by policymakers interested in improving the prospects of legal permanency for children who become dependents of juvenile courts. Based on these findings we recommend that Washington extend PRP to all counties. While there are no reliable data on the availability and quality of parents' counsel in dependency proceedings around the country, anecdotal evidence suggests that the poorly resourced situation that existed in Washington prior to the development of the PRP was not unusual. Jurisdictions with poor parental representation that wish to address that deficiency in their dependency court process, while potentially shortening the time children spend in foster care, should consider implementing something akin to the PRP. Moreover, while our study cannot identify which aspects of the PRP might be responsible for the observed impact on exit rates, the PRP is a fairly straightforward intervention without lots of moving parts that could be readily replicated in other jurisdictions. Lastly, while we acknowledge that our evaluation design is not experimental in nature, we believe that our ability to take advantage of discontinuities in county-level court practices over a several-year period, owing to the staggered implementation of the PRP, provides a very strong quasi-experimental test of the PRP. Our analysis of child welfare and court data in Washington and our conversations with child welfare system and court personnel in the state did not uncover any evidence that the timing of PRP implementation in counties coincided with other changes at the county level in child welfare practice, court practice, or the characteristics of children and families served.

If the results of the PRP evaluation are taken at face value they are very impressive indeed and provide support for the arguments of advocates for adequate parental representation in the dependency court process. We find that enhanced parental representation is associated with an increase in the rate of family reunification. This finding might not be considered surprising since most parents involved in dependency proceedings want their children back and the availability of adequate counsel might improve parents' ability to prevail in court. However, the finding that enhanced parental representation nearly doubled the likelihood of adoption and doubled the likelihood of legal guardianship is striking. It calls into question the concerns expressed by some social workers and state's attorneys about parents' attorneys delaying the process of moving from a case goal of family reunification to adoption or guardianship. Our findings suggest that, far from serving as an obstacle to adoption and guardianship, the availability of adequate legal counsel might facilitate a parent's acceptance of the need to find another permanent home for their child if they cannot reunify.

# Exhibit B



# Oregon

**Office of Public Defense Services  
Contract & Business Services Division**

1320 Capitol Street NE, Suite 190  
Salem, Oregon 97301-7869  
Telephone: (503) 378-3349  
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March 6, 2007

William E. Taylor, Jr.  
Judiciary Committee Office  
900 Court St., NE, Room 354  
Salem, Oregon 97301

Re: SB 411 – Office of Public Defense Services -- Proposed Quality Improvement Plan

Dear Mr. Taylor:

I am setting forth, at your request, an expanded version of a report that the Office of Public Defense Services (OPDS) presented to the Juvenile Dependency Workgroup in October of 2006 setting forth steps that we would propose to take to ensure that any funds allocated by the Legislature for the specific purpose of improving the quality of representation in juvenile dependency cases would have the intended effect.

## **1. Mandatory “Best Practices”**

OPDS would establish a minimum “best practices” list for contractors handling juvenile dependency cases<sup>1</sup>. OPDS would require contractors wishing to receive enhanced compensation for juvenile dependency representation to fulfill the “counselor-at-law” role outlined for attorneys participating in the Washington State Pilot Program for Improving Representation of Parents in Dependency Cases<sup>2</sup>, namely:

- A. Meet and communicate regularly with the client<sup>3</sup>
  - (1) Describe case procedures and timelines
  - (2) Enable parents (and children capable of considered judgment) to candidly communicate
  - (3) Facilitate agreements by realistically evaluating allegations and evidence with client
- B. Ensure client has adequate access to services, including visitation

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<sup>1</sup>OPDS, through the efforts of its Qualify Assurance Task Force has already developed a list of recommended best business practices for its public defense contractors but the list is not directed specifically at improving the quality of representation in juvenile dependency cases.

<sup>2</sup>Technical Assistance Brief: Improving Parents’ Representation in Dependency Cases: A Washington State Pilot Program Evaluation, National Council of Juvenile and Family Court Judges, 2003.

<sup>3</sup>For child clients not yet capable of considered judgment, meet regularly with the child and the child’s care provider to become fully aware of the child’s needs and circumstances.

- (1) Explain the importance of “reasonable/active efforts” services to client
  - (2) Develop a thorough knowledge of resources available to clients
  - (3) Explore with client ways to effectively participate in services
  - (4) Ask client for feedback if obstacles prevent their participation, and follow up with DHS and in court when appropriate
- C. Prevent continuances and delays within attorney’s control
- (1) Treat dependency and termination cases as the highest priority
  - (2) Avoid over-scheduling whenever possible
  - (3) Request unavoidable continuances if they are needed for substantive reasons
- D. Prepare cases well
- (1) Conduct high-quality, early case investigation
  - (2) Use discovery appropriately
  - (3) Prepare for and participate in settlement conferences and other resolution opportunities
  - (4) Obtain experts and evaluators for cases involving psychological, bonding, or similar issues, when appropriate
  - (5) Draft well-researched and written trial memoranda and other documents
  - (6) Litigate hearings and trials if no agreement is reached.
- E. In addition, Oregon lawyers would be required to:
- (1) Provide representation at or before the initial shelter hearing if possible
  - (2) Commit to meeting with the client within the contractual time frames (24 to 72 hours) after appointment
  - (3) Thoroughly explain to the client (other than a child who is not yet capable of considered judgment) the nature of the proceedings, the client’s rights, the decisions which are the client’s to make, the likely result of each possible course of action, the function and obligations of DHS, the need for the client to remain in good contact with the attorney, and the need to notify the attorney if there is a change of circumstance or a need for information or assistance
  - (4) Explore possible relative placements at all appropriate stages of the case
  - (5) Prepare for and attend all court and Citizen Review Board hearings and any meeting at which the client is present and which is for the purpose of planning services for the client or a change of placement for the child
  - (6) Maintain regular communication with DHS, treatment providers, and other parties to the case
  - (7) Maintain in each client’s file a comprehensive list of events in the case and actions taken by the attorney and the date of each event or action
  - (8) Initiate contact with the client at least monthly (if the client has not contacted the attorney) to determine whether the case plan is being followed and, if not, why not

## **2. Caseload Limits, Training and Evaluation**

In addition to adopting recommended best practices, contractors receiving enhanced compensation would be required to:

- A. Commit to reducing caseloads to a stipulated level
- B. Commit to having attorneys obtain 15 CLE credits per year in juvenile law training
- C. Cooperate in evaluations to be performed by OPDS (or the attorney resource center) after six months' participation in the program, after one year's participation and annually thereafter. Evaluations would include information obtained from questionnaires, from judges, district attorneys, assistant attorneys general, CASAs, Citizen Review Boards, DHS, the juvenile department (when appropriate) and other members of the juvenile court community.
- D. Agree to a contract provision that attorneys determined not to be providing satisfactory representation at the time of any evaluation could be required by OPDS to receive additional training and mentoring if it appeared that additional training and mentoring would resolve the problem, or could be prohibited by OPDS from further representation of public defense clients in juvenile cases.

## **3. Attorney Resource Center**

OPDS will establish (in house, or under contract with a private or public entity) a resource center to provide training and support for juvenile dependency attorneys. Services provided by such a center could include: training coordination; publication of a regular newsletter on juvenile law issues; responding to difficult cases by offering advice, briefs, technical assistance, or even co-counsel; operating a toll free advice and assistance line for attorneys; creating and maintaining a web site and list serve; coordinating and developing volunteer, law student and *pro bono* efforts.

## **4. Monitoring of Relevant Data**

OPDS will monitor data maintained by DHS, the Judicial Department, and by OPDS to determine whether improved representation has the anticipated effects.

- A. If Oregon's experience is similar to Washington's, Oregon could expect to see reduced lengths of stay in non-relative foster care, a higher percentage of children in relative foster care, a higher percentage of reunifications and a reduction in terminations. Data on these measures is available from DHS.
- B. If lawyers' caseloads were reduced it is expected that there would be reductions in the number of days to jurisdiction. If lawyers were better prepared and worked more effectively with parent clients there should be fewer contested hearings but the contested hearings that do occur

- should be longer. Data on the time to jurisdiction and the number and length of court hearings is available from the Judicial Department.
- C. Improved representation should result in an increase in the use of investigators and experts. OPDS must approve all such requests and is able to monitor the number of such requests. In addition, the Public Defense Services Commission's Key Performance Measure No. 6 tracks the number of contractors participating in the "contractor site visit process" which have adopted best practices. OPDS anticipates that all of the contractors receiving enhanced compensation will adopt best practices even if they have not participated in a site visit review. A process very similar to that used for site visits would be employed to evaluate the work of juvenile contractors receiving enhanced compensation under SB 411.

Please let me know if there is additional information we can provide.

Sincerely,

Ingrid Swenson  
Executive Director

ILS/

# Attachment 5

July 2, 2011

Memo to: OPDS Commission and Staff  
From: Forrest N. Rieke

Ladies and Gentlemen:

This proposal is in response to the Commission's Request for Proposal for Contracts for the two years January 1, 2012 through December 31, 2014. The closure date was June 13, 2011. The notice of this date went out in May as I understand it, by email to all effected contractors like myself. In an effort to show cause why my response is late I offer the following explanation in the hope my contract can continue through the process and into the next two years.

1. The notice that I failed to become aware of is attached to this letter. Billy Strehlow graciously re-sent it to me on June 30, 2011 at my request. I had called Billy to ask him whether my next contract was to be a "home county" of a Multnomah County contract again. My reason for calling was that both of the cases I have been working on recently have been outside Multnomah County (Washington and Tillamook Counties) and I felt I may not need to maintain an office in Portland any longer. My Portland office lease is up shortly. All of my prior death case assignments had been in Multnomah County. Costs and taxes are too high there. Billy advised me that I had missed the deadline, and that he needed to protect the RFP procedure and felt he had to consult with others in the OPDS office to decide what to do.
2. With the help of other attorney friends I acquired a copy of the recent RFP and found a provision (paragraph 2.1(B) Deadline) "PDSC will disqualify the proposals, unless authorization for late submission is granted." I am seeking permission due to my failure to be aware of the deadline. This is explained by a program in my "Outlook" email which

sends solicitation type emails directly to “junk” and, this was verified by Billy’s email of June 30, 2011. The notice memo was found in my junk email folder. My IT person is working on protecting emails from specific sources for the future and taught me and my legal assistant how to regularly view the junk emails for mistakes. But, we simply were not aware of the May 6, 2011 memo from Kathryn Aylward (attached to this letter) which we found in the junk after Billy resent it to me on June 30, 2011.

3. My legal assistant, my IT person, and the OPDS office had worked out a glitch within the last year which had to do with my email not being able to receive OPDS authorizations. It was about that same time my IT person changed my email address from [joe.rieke@forrestrieke.com](mailto:joe.rieke@forrestrieke.com) to [joe@forrestrieke.com](mailto:joe@forrestrieke.com). He reassured me that anyone emailing any of those two addresses would get through. (And that has been the case). So maybe the problem of junk email and a change in the address could have triggered the emails from OPDS going in to the junk box. But, we have now designed this program to allow all relevant email sources through our screening mechanism.
4. I have connected a completed Part III of the 2011 RFP to this letter as it would have appeared were it on time. This was all that was required of prior contractors as I understand the instruction.
5. I have been a Death Penalty Contractor in good standing since 2004. When I called Billy about this problem he admitted that he was surprised that I hadn’t sent in a new request for a contract. From this I surmise that I was in good standing (at least with my analyst) and he had assumed that I had been notified. He had not called to ask if I had a problem, but of course, he had no obligation in that respect.
6. Kathryn advised me that there had been several other ways that the RFP had been announced by OPDS, but that no notice was sent out by “snail mail” reassuring that every

means possible was used to notify contractors. This was confirmed by Ingrid when I called her, but she added that this RFP had been sent out a good deal earlier than in previous cycles. I was impressed that this did go out in the middle of the agency handling the end of the legislative session simultaneously, but this is not the issue.

7. I have been contracting with OPDS since 2004 in the death penalty area. I have yet to lose a client to the penalty although this is a fragile record as you all know. But, it speaks to my love of the work and a reason for OPDS to retain my experience so I am filing the attached proposal.

Thank you for considering my request. I am seriously chastened by this experience, but unfortunately I am of the wrong generation to be facile with the systems extant on my computers. I am getting better, which is partly why I no longer need a Portland office next to the courthouse. I appreciate your considering my problem and would appreciate being called on 503 222-4448 with your decision.