

**Members**

Barnes H. Ellis, Chair  
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John R. Potter  
Janet C. Stevens  
R. Jon Yunker



**Ex-Officio Member**

Chief Justice Wallace P. Carson, Jr.

**Executive Director**

Peter A. Ozanne

**PUBLIC DEFENSE SERVICES COMMISSION**

**Public Defense Services Commission Meeting**

Thursday, August 12, 2004 – 9:00 a.m. to 12:00 p.m.  
Room 50, State Capitol Building  
Salem, Oregon

**Agenda**

1. **Action Item:** Approval of Minutes (*Attachment 1*) Barnes Ellis
2. OPDS's Monthly Report OPDS staff
  - The June 24th Emergency Board Meeting
  - CBS's Status Report
  - LSD's Status Report
  - OPDS Contractor Site Visits
  - Juvenile Training Academy
  - A Proposed Legislative Concept (*Attachment 2*)
3. **Action Item:** Review and Approval of Preliminary Agreements (*Attachment 3*) Kathryn Aylward
4. Further Discussion of OPDS Proposed Complaint Policy Peter Ozanne  
Ingrid Swenson
5. Further Discussion of Agency Performance Measures for the Legislative Audit Committee Peter Ozanne  
Kathryn Aylward
6. Follow-up on Region 4 Service Delivery Plans Peter Ozanne
  - Lane County (*Attachment 4*)
  - Linn County
7. Preliminary Discussion of Region 1 (Multnomah County) Service Delivery Plan (*Attachment 5*) Peter Ozanne
8. Initial Review of a Proposed Policy for Early Disposition Programs (*Attachment 6*) Peter Ozanne
9. New Business Barnes Ellis

**Next PDSC Meeting:**

Thursday, **September 9, 2004**; 10:00 a.m.-3:00 p.m.  
Location in **Portland, Oregon** to be Announced

PUBLIC DEFENSE SERVICES COMMISSION

June 17, 2004  
Inn of the Seventh Mountain

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Janet Stevens  
John Potter  
James Brown  
Chip Lazenby (by phone)  
Chief Justice Wallace P. Carson, Jr.

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

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**TAPE 1, SIDE A**

**Agenda Item No. 1 Approval of April 2004 Meeting Minutes**

001 Chair Ellis Calls meeting to order at 11:10 a.m.

Let me just say I thought the minutes were extraordinarily well done. They really are remarkably accurate and give a lot of detail of the discussion we had in Salem. The only change I have is at page 19, line 138. The word relevant should be relative. Other than that, I didn't have any other changes. Any other changes by Commission members?

008 S. McCrea I just have two very small ones regarding typos. At page 26, line 201 where Commission Potter is saying "I'm not convinced that this is moment," we should add "moment." And then page 33, line 240, where Mr. Ozanne is saying, "So pleased tell me. . .," it should be "So please tell me what I am missing here."

**MOTION:** S. McCrea moved approval of the minutes; J. Potter: 2nd

**VOTE: 5-0**, hearing no objection, the motion **CARRIES**

019 Chair Ellis Okay, we have had about 60 days since our last meeting, so there is a lot to cover in terms of catch-up between the April meeting and now. Peter, do you want to take the items under Item No. 2?

**Agenda Item No. 2 OPDS's Monthly Report**

022 P. Ozanne I do. If I can just summarize today's agenda for the audience and refer to some of the attachments to the agenda. As the Commission knows, Item No. 2 of the agenda is our agency's report and there will be reports from both of the divisions of OPDS: Contract and Business Services, which we refer to as CBS, and our Legal Services Division, LSD. We will begin with a report on our budget and the Legislative Emergency Fund. There is a new letter to the Emergency Board, which I will explain in just a minute and which the Commission has before it. In the right-hand corner, it indicates that it is a replacement to an original letter that was sent to the E-Board. There are copies

for the audience on the table in the back of the room. It is a very detailed letter. It will inform you of the condition of our budget and it involves news that is largely good, which I will summarize in a minute. Pete Gartlan is going to present Attachment 2 to the agenda, which proposes a panel process to handle cases that aren't handled within the Legal Services Division. Ingrid Swenson and I will be reporting on an OPDS site visit to your contractor in Deschutes County. I will give a short summary of OPDS's preliminary investigations of the service delivery system in Multnomah County. Ingrid will also be presenting a proposal for a new complaint policy, simply at this point for public comment and not as a subject of discussion at this meeting. Action Item No. 3 on the agenda addresses a new substitution policy, which was developed by OPDS as required by a statute enacted last session. The proposed policy is contained in Attachment 3 to the agenda. OPDS is proposing to the Commission some changes to payment policies, which are contained in Attachment 4 to the agenda. Item 4 addresses a legislative requirement for OPDS to develop agency performance measures that fit within the overall performance measurement system for state government performance measurement system developed by the Oregon Progress Board. We will be taking that up as an action item on the agenda.

Finally, we will be returning to our service delivery plans in Region 4, which is Benton, Lane, Linn and Lincoln Counties. Last April the Commission did take action with respect to Benton County and we have done some of the implementation. The key decision today will be with regard to Lane County. In Attachment 6, OPDS has proposed a model RFP, which was requested by the Commission at its last meeting. a Request for Proposals for a consortium in Lane County. Its purpose was to serve as a think piece, if you will, for the Commission's consideration and further deliberation. It isn't by any means a policy or proposal yet. John Potter has submitted another concept, which is being distributed as a handout right now. It's a draft dated 6/12/04 and entitled "A Model List System for Lane County." That handout will be part of the Commission's discussions regarding Agenda Item 5.

Regarding the agenda item for New Business, I understand Jim Hennings may have a proposal he is presenting to the House of Delegates of the Oregon State Bar. It is a full agenda, Barnes, and we welcome any reordering of items as we proceed with today's meeting. We will start now with OPDS's monthly report.

- 067 Chair Ellis Let me just ask are there people here from Lane County specifically with interest in Item 5. Are you under any time constraints?
- 071 Audience No, I can stay as long as necessary.
- 072 Chair Ellis Good then I think we will just go in the order that we have listed.
- 073 P. Ozanne We would like to take up the Emergency Board matters. As I think most of you know who are following this, the 2003 Legislature reserved \$7 million in the Emergency Fund for caseload growth, including the bulge of the deferred cases from the 2001-03 biennium. That is the limitation on our request before the Emergency Board at its next meeting on June 24. I am reasonably confident that we will obtain by this November all of the \$7 million from the Emergency Fund to meet our budgetary needs. So that is good news. I am cautiously optimistic that we will receive additional funds to meet all of our projected budgetary needs from the Emergency Fund by the beginning of 2005. That would be extraordinarily good news. Our original expectation was that, going into the 2005 legislative session, we would not only be trying to build a budget for 2005-07; we would be seeking money from the 2005 Legislature that was taken away by the failure of Ballot Measure 30. So I am cautiously optimistic, but by no means certain, that in talking with the legislative leadership, there seems to be support for allocating funds we need for our 2003-05 budget from the Emergency Fund. That is extraordinarily good news because we can then focus on our budget for 2005-07 and we won't be saying, "Give us the money for the rest of this biennium and, by the way, let's build a budget for 2005-07."

Having said all that, there was another development which at least initially struck us as a disappointment. Kathryn and I took the action unilaterally because of the press of events of drafting a replacement for our original Emergency Board letter. As most of you know, our projections indicate that caseloads are dropping across the state. So, under the best circumstances, we can't make a case for all of the \$7 million based on caseload growth. We initially projected in our original letter to the E-Board that we would be able to claim \$6.2 million of the \$7 million for the bulge cases. In further discussions with legislative fiscal staff, we learned that they had a different interpretation of what caseload growth meant for the purposes of the \$7 million in the Emergency Fund. Since we felt that we had to comply with LFO's version because they were going to oppose our original proposal, we amended our E-Board letter. You now have before you our replacement letter, which requests \$4.1 million out of the \$7 million for caseload growth in accordance with LFO's interpretation of the 2003 budget note. We will be happy to take questions from the Commission. Certainly, when people have had a chance to read the letter, we will be happy to take questions after the meeting. But, on balance, the news is good because, whether we get money for caseload growth on June 24th or we get it later as part of our the overall shortfall overall in our budget, what we need is \$14 million, including the \$4.1 million, and I remain optimistic we will get that total amount from the Emergency Fund. So this development is a minor bump in the road. At a minimum, I think there is sentiment in the Legislature to give us \$7 million out of the Emergency Fund. Kathryn is there anything you want to add?

- 136 K. Aylward Just that I did have a message left on my machine late yesterday. The Legislative Fiscal Office will be recommending that the \$4.1 million from the Emergency Fund's Special Purpose Appropriation be released and, in addition to that, at the June E-Board meeting that the Board release the remaining \$2.9 million out of the Fund's General Purpose Appropriation. We went from a position of saying, "You know, the bulge itself is \$6.2 million," to then having to realize that the bulge was defined as caseload over a certain level, even though clearly that was bulge because the underlying caseload is dropping. The Special Purpose Appropriation could not be spent for that full amount, so there was no point in asking the E-Board to do something they could not do. So, then we went to asking for \$4.1 million. Now the word yesterday is that LFO's recommendation will be that we get \$7 million at the June E-Board. So, if the E-Board follows that recommendation, we are immensely relieved. It is wonderful news.
- 147 Chair Ellis Thank you Robin.
- 148 K. Aylward Yes. Absolutely.
- 149 P. Ozanne This is a great turn of events. Certainly more than I hoped for. Now we are hoping to get all of our remaining budgetary needs during this interim from the Emergency Fund. So keep your fingers crossed. Then our big push will be for an adequate budget in 2005-07. Of course, with changes in the economic picture, I think there is more of a can-do attitude in the Legislature. So we will keep our fingers crossed.
- 162 Chair Ellis Any questions?
- 163 P. Ozanne The next item in OPDS's report are updates from both our divisions. Just to introduce one of the key issues with the Contract and Business Services Divisions, and then I will turn it over to Kathryn to talk about the good work that is going on there, as well what we have been calling "the move." We are now about to sign a lease for space in the building where the Legal Services Division is currently located. It is on the main floor in the space the Victory Group used to occupy. Kathryn was able to negotiate rent concessions for the first year which gives us about a 10 percent lower rental rate for the new space in the first year. The lease will be combined into one lease with the Legal Services Division for a five-year term. We gave the landlord a little more time. But we didn't go back to a ten-year lease to keep our options open. We still have the one-year escape clause, if for some reason we want to move later to another location. Kathryn was told that no other state agency has such a clause in a lease, providing an option to opt out. Kathryn can give you more details. We are ready to sign the lease and move in August.

- 190 K. Aylward We've picked August 13th as the move date. It is a Friday. The movers will come in and pack up on Friday. Then we have the weekend. Theoretically, we will come back to work on Monday morning and everything will be set up. The space we are moving into has a little less useable square footage than what we are currently using. Part of the problem is, when you share a portion of the main floor in the new building, they add on your share of the lobby, hallways and common areas. So we are actually paying about \$200 a month less for the first year than what we are paying now. They have asked us to start the lease July 1. They are anxious to have the cash flow, but we are obviously not ready to move by July 1. So the Judicial Department graciously said they would not charge us rent for where we are now in July.
- 201 Chief Justice Carson We did?
- 202 K. Aylward Yes, it was very nice. So all of that is falling into place. Lorrie Railey in our office has worked very hard with the Department of Administrative Services. We want to be able to combine the phone systems and, of course, we have no money for that. So the old phone system that LSD currently has is capable of adding our extensions on to that system. This system is actually free because DAS has boxes of old phones that nobody else wants. So they are happy to give them to us. The whole phone system won't cost us anything. The Judicial Department's Information Technology Division is doing all the computer hook ups for us. So really it is just the cost of the move. We have a quote that it will be \$8,000 to actually physically pick up the furniture and move it. Although we have no budget for that, it is certainly a lot less than our original notions of what a move would cost. So this is very exciting news. Everyone in our office has been down to see the premises and we are looking forward to a change.
- 218 Chair Ellis What is the parking?
- 219 K. Aylward Free. Where we are now, people are paying \$55 a month. So it is significant.
- 221 Chair Ellis So the only other question I have about it is how are you going to handle getting to the Capitol when the Legislature is in session.
- 223 K. Aylward We need scooters. I haven't thought that far ahead. You know perhaps we could have some parking space temporarily.
- 226 P. Ozanne Probably the same way, Barnes, that I am driving back and forth now between the two divisions.
- 229 Chair Ellis I am very happy to see this take place. It is something we have talked about for two years. Good work.
- 232 K. Aylward As far as the other goings on at CBS, we have 20 contracts that are due to expire June 30. We have reached preliminary agreements on 10 or 12 of them. I'm hoping by Monday there will be 15. I'm looking for people while I'm here to get them to sign agreements. So beyond that, I think we are on target. I will be presenting those agreements to the Commission at its August meeting for review and approval. We have a new employee. We hired another contract analyst for a vacancy that I had held open for as long as we could. Her name is Shelley Dillon. She worked with Chip Lazenby when he was in the Governor's Office. He recommended her highly. She started two weeks ago. That is it for CBS.
- 243 P. Ozanne Pete, do you want to come up for the Legal Services report and also report on the appellate panel issues, which are related to Attachment 2 to the agenda?
- 245 Chair Ellis We would really prefer a podium with a time clock.

- 250 P. Gartlan I'll start with the news at LSD before we get to the panels. We have been affected somewhat significantly by Justice Carson's court because the Supreme Court has adopted a new policy with respect to briefing on the merits in the Supreme Court. That policy is a 28-day deadline for filing opening briefs with a 14-day extension in exceptional circumstances. So that creates more immediate need for our attorneys to do the Supreme Court cases and drop the Court of Appeals cases.
- 260 Chair Ellis This is supplemental briefing if they take review, right?
- 262 P. Gartlan After the Supreme Court allows review, this is the timeline for briefs on the merits.
- 264 Chair Ellis In addition to the briefs you have already filed in the Court of Appeals?
- 265 Chief Justice Carson A couple of things. We don't know whether it will be 10 or 15 pages, the petition for review in all cases. The petition is intended to tell us why we ought to take the case, not to make merit arguments. But it hasn't worked out that way. Lawyers are cautious by nature, so we are going to try it again. We are going to say that you have a very short period of time to file a petition for review. If we allow the petition, order allowing review sets the date of argument.
- 274 P. Gartlan We have also been affected because the Supreme Court is demanding quicker briefing in death penalty cases. I reported this a couple of months ago. The effect of that on us is that we have two death penalty attorneys who are doing death penalty cases in the office now. We have assigned two other death penalty cases to two attorneys in the office who had just been doing felony cases. So, essentially, that takes two more attorneys off the line due to death penalty cases. We have had two attorneys go on maternity leave for three months and one attorney on medical leave for about a month and half. So we have taken a couple of hits with respect to our felony caseload. We have also had to adjust to what we do with parole cases. Originally, we were given one attorney position to do all the parole cases. It turned out that we needed more than one attorney to do those cases. We had three attorneys, each doing a third of the parole cases. But those cases have increased significantly and now we have two attorneys dedicated solely to doing parole cases. With respect to the third attorney, what we have done is we are going to a rotation system. So an attorney will come out of the parole section for a year and then go back in. Then one of the other two attorneys doing parole cases will come out for a year and do direct appeal criminal cases. This will give people a relief from parole cases because they tend to be challenging, but really not very rewarding. What tends to happen is, if we have a good issue, the Attorney General's Office will concede by way of having the Parole Board withdraw an order. If the Board withdraws the order, that moots out the case. So it is frustrating for the attorneys doing parole cases. To alleviate potential burnout factor . . . I think we all understand that we would like to be rewarded and win cases --
- 311 Chair Ellis Why isn't withdrawal a win?
- 312 P. Gartlan It is a win.
- 313 Chair Ellis We always say in private practice that you have to define winning.
- 314 P. Gartlan Yes, define it very carefully. But some attorneys actually have egos and would prefer to see a written opinion saying that they won.

Now, with respect to the panels which are part of the written materials, I refer you to Attachment 2. The first panel is the appellate panel for direct appeals in criminal cases. This would be for non-capital cases, misdemeanors, regular felonies and Measure 11 felonies. You have seen something like this before at a prior meeting, but we have refined it. Page one lists the eligibility requirements. Roman numeral II explains what the process will be with respect to how we determine whether or not someone is eligible to be included. This is a combination of different systems from the Federal Public Defender and the California Public Defender. We have merged

some of the features of the two systems. On page two is the case valuation. This was an attempt to get a more refined rate to reflect the kind of attorney input that goes into a case without going to a billable hour system. It is divided primarily by two main factors. One is whether or not the case is a misdemeanor, a non-Measure 11 felony, or a Measure 11 felony. The other major factor is transcript length. So what we hope this will reflect is the actual number of attorney-hours per case. To do that, we have established a graph or table. This is for Balfour cases or dismissals and for form Measure 11 briefs, which tend to be the equivalent of a Balfour. Those kinds of briefs do not take as much time, so that is why there is a reduced rate for those cases. Under the prior system, there would just be a flat rate for a case under 800 pages. It didn't matter whether or not the attorney briefed the case or filed a Balfour brief. So we think this will more accurately reflect the amount of hours that go into cases. We also hope that this will encourage attorneys to write briefs as opposed to Balfouring a case or dismissing a case. So it is kind of a philosophical choice to move away from Balfour.

- 364 Chair Ellis The decision whether or not to Balfour, would that be one made by a panel member and would you review that?
- 366 P. Gartlan We will review every brief that an attorney prepares.
- 367 Chair Ellis Even if they go the Balfour route?
- 368 P. Gartlan We will get a copy of the regular brief, we will get a copy of the Balfour brief, we will get copies of motions to dismiss and dismissal orders. So we will know how cases are disposed of.
- 374 Chair Ellis What I am getting at is that decision to go Balfour or not is an important one. How are you able to review that?
- 377 P. Gartlan As of now we don't anticipate being a part of that decision-making process. That would be a decision that the appellate attorney would make.
- 380 Chair Ellis Any way to make them at least summarize to you their reasons why they thought it was appropriate?
- 381 P. Gartlan Well, we thought about that. The problem we thought is maybe attorney/client confidentiality. We didn't want to interfere too much. It is a requirement of the attorney that, if it is going to be a Balfour brief, to write the client a letter explaining what issues were facially presented and why they weren't raised; or if the client has indicated specifically the issues the client was interested in, why that issue is not raised. The appellate panel attorney has to include in that letter an explanation as why that issue was not raised. So the extent that there is an attorney/client relationship here –
- 393 Chair Ellis I can see honoring that, but I'm just concerned that the decision to go Balfour is essentially a lay down. There is no person in your position reviewing them, using the criteria that we would apply. I just raise this to give it some thought.
- 403 P. Gartlan A couple of things. We would not know whether there were good issues unless we had read the transcript as well. So we are hoping, with the different rates for Balfour briefs versus merit briefs, that it will encourage people to file merit briefs.
- 408 Chair Ellis I assume if you find a panel member that seems to have a disproportionate number of Balfour briefs, then that will send up a flag.
- 410 P. Gartlan That would be part of the evaluation process, yes. And again, we are hoping to attract really good attorneys. By definition, a really good attorney tends to do really good work, so they wouldn't Balfour that much. That last page, page 4, is an explanation of some of the case oversight under Roman numeral IV. Right above that, is C. If Supreme Court review is allowed, then we recognize that a Supreme Court case is very intense and challenging and very time consuming. We want to

have the best possible performance, so the rate is \$55 an hour for a Supreme Court brief on the merits. That would be hourly billing. The next part of the packet is the application form. I think you have seen that before. There is nothing strikingly new in it. As you can see, we intend to accept applications, check references, and check with the Bar. We hope to prepare a one-page questionnaire for appellate judges to evaluate the panel attorneys' performances. We would like to get input from all parts of the system. The next panel is the capitol appellate panel.

- 443 J. Brown Pete, I am wondering about the case valuation on briefing through the petition for review. I am wondering from a practical standpoint, when is the practitioner going to get paid? If there is a petition for review allowed, obviously there is going to be quite a significant time separation between filing the brief, arguing the case and then getting a result. I am wondering about how the work of preparing the petition is paid for. My experience is the petition for review is one of the most challenging things you do.
- 455 P. Gartlan The answer just walked out of the room. We thought about this and about setting it up where people would get one-third payments. They would get a payment when they received the case, and then another when the brief was filed, and then another when the appellate judgment came out. But Kathryn suggested that we just follow what the guidelines are right now with respect to CBS's policies and procedures for getting paid in appellate cases. There are rules out there already governing payment so we would just follow those. I think there is a provision for an interim billing under exceptional circumstances, but I'm sorry I don't know the specifics.
- 471 Steve Gorham Pete, how about the production of the brief? Is that included somewhere in here and I have missed it?
- 473 P. Gartlan Production?
- 475 S. Gorham The cost of printing?
- 476 P. Gartlan Yes, that is already in the policies and procedures. I think that cost is billed separately.
- 477 S. Gorham So that is not included?
- 478 P. Gartlan Correct. We are trying to capture attorney hours. Again, that is already in the rules. There are routine and non-routine expenses. The next panel is the capital appellate panel. We have already launched this with respect to recruiting—trying to find out who is interested. We have gotten some applications. This is obviously tailored specifically to practitioners in death penalty cases. This work is billed on an hourly rate. I believe the answer is still out of the room. But if Kathryn were here, the answer would be that, because a death penalty case is much longer in duration, there are specific events where attorneys can do interim billing. So that is unique.
- 497 Chair Ellis What is that rate?
- 498 P. Gartlan It is \$55 an hour. Again, that is set by the policies and procedures already in place.
- 511 C. Lazenby [An incoming telephone call is received at 11:50.]
- 512 Chair Ellis Hi Chip. You have entered a room with a lot of people. The Commission is here and lots of people have joined us. Peter Gartlan is halfway through the LSD report, which is Item No. 2 on the agenda.
- 517 C. Lazenby Alright thanks. It is sunny in San Francisco in case anybody is wondering.
- 520 P. Gartlan My comments on the capital appellate panel will be a lot shorter. The panel is geared toward experienced appellate practitioners in capital cases, but it is modeled on the other panel, except that the other panel is more specific as to case type. The explanatory material is followed by the

application form. Again, we are asking for writing samples, references and prior experience. We also intend to contact different parts of the system for feedback with respect to the applicants' standing in the legal community.

- 534 Chair Ellis Any questions?
- 535 P. Ozanne Kathryn had the answer to one question from Jim Brown.
- 536 K. Aylward The payment policy does say and has always said that on appeal you can submit a bill when you file the opening brief. So we are not changing that feature at this point, other than for capital cases.
- 542 J. Brown What I was wondering with respect to the petition for review, is there something set aside or reserved?
- 548 K. Aylward Are we talking about felonies?
- 549 J. Brown I was looking at the compensation as based on when the appeal was through and a petition for review was filed. I was just wondering about how the practitioner was compensated, given the separation of time between events before the Supreme Court.
- 555 K. Aylward They are paid flat amounts when they file the appellate brief.
- 560 Chief Justice Carson Opening brief as the petition or wait till it has been allowed and –
- 562 P. Gartlan The opening brief would be in the Court of Appeals.
- 570 Chair Ellis Any other questions?
- 571 S. McCrea Okay, maybe I'm just making more out of it than is called for, but let's say that a person on the panel, files a petition for review and then it is granted. Going back to the rule that you just talked about, there may need to be another brief on the merits filed. So does the process start over again?
- 578 P. Gartlan Again, probably 90% of cases will not get review allowed so the case is over after the petition for review is filed. If review is allowed, that is dealt with in III (c). So, if review is allowed, an attorney is compensated for the brief on the merits at the rate of \$55 per hour up to 100 hours. If it is an exceptional case and the attorney requires more than 100 hours, then we must bill separately for that.
- 591 Chair Ellis Ready to move on to Deschutes County?
- 592 P. Ozanne Yes. I will ask Ingrid to comment. But just to give you some context, particularly for audience members. This agenda item is entitled "Contractor Site Visit in Deschutes County." We are undertaking something that will take us a number of biennium to complete. And the project's success will depend on support from the defense community. We have a Contractors Advisory Group, which is a group of about 12 contractors from around the state. This group provides us with input from experienced members of the defense community about directions that we should take. We have formed a subcommittee of this group called "Quality Assurance Task Force." The members of this task force are addressing the question of what can we do as a community to improve the delivery of public defense services. The task force decided that we could provide one answer by sharing the expertise and insights of peers through site visits to public defense law offices with more than 10 lawyers by teams of experienced public defense contractors and attorneys. The process is not one from Salem, developing standards and imposing them on people. Instead, the process involves peers collegially looking at the best ways to run law offices and sharing information gained from site visit over time among defense attorneys and contractors. So the task force has developed a process of site visits involving volunteer peer visitors. We are

selecting offices of 10 lawyers or more as we implement and refine the process for use by the entire defense community. Ingrid will describe the details of our first site visit, including soliciting input from lawyers in the office and other constituencies, such as judges, district attorneys and corrections professionals, and then giving feedback to the director and other leadership in the office about how they are doing and assisting in the improvement of the operations of the office. The first site, Tom Crabtree's office in Deschutes County, was good enough to volunteer to be our first pilot project. That site visit was accomplished a couple of weeks ago. As we have discussed on the task force, whose members are very enthusiastic about this process, it will only work if we can get enough experienced volunteers to participate in site visits over the long haul. So we encourage all of you in the audience to step forward and volunteer. It will be easy to do the first three, or maybe even the first five, site visits. But this process will only work over time when we have successfully completed 10 or more site visits and can assure ourselves as a community that we will share information and insights we gain to everyone in public defense law practice in a positive and constructive way. It will also demonstrate to the Legislature that, indeed, we are managing ourselves effectively as a true public defense system and will allow us to credibly request more funds because we are doing a good job managing the funds we currently have. Ingrid went to Bend with our site visit team

658 I. Swenson

As Peter said, the Crabtree & Rahmsdorff firm volunteered to be the first site we visited and we are very, very grateful that they did so for a number of reasons. One of which was the tremendous support they gave us in developing the process because we didn't really have a process until we undertook this for the first time. The Quality Assurance Task Force worked very hard going through sample questionnaires and processes from other states to outline how we would proceed with this evaluation. The task force prepared a number of questionnaires. I think a total of 22 local people were interviewed, including judges, district attorneys, defense lawyers in other firms, and public officials. We sent them questionnaires in advance of our site visit and asked for responses. Their responses could be anonymous if the person chose or attributed, whichever they preferred. We also sent questionnaires to the Crabtree & Rahmsdorff office. A questionnaire which the task force developed asked the leadership to address areas of interest in terms of how they run their office. For example, what kind of accounting model they use, how they evaluate attorneys within their firm. We also sent a questionnaire to each of the attorneys in the office, and to some of the staff people in the office. Then we arranged for a two-day site visit. In the future, we will probably need to spend more time than that. Tom Crabtree's legal administrative assistant, Pam Williams, was absolutely wonderful. She set up of the interviews for us. We interviewed all of the people to whom we sent questionnaires. In addition, we interviewed all the lawyers in the office and she made that work. There were four members of our site team, so we met with all those folks. Then we managed to get together as a team at meal times every day to compare notes on what we had learned during the course of our interviews that day, exchange information and guide ourselves in terms of the balance of the site visit. We were able at the conclusion of the visit in the afternoon of the second day to meet with Tom Crabtree and debrief about what we had learned at that point. So the visit went smoothly, thanks to a lot of cooperation. We were grateful to our site team, who donated two days of their time to participate in this. Marty Cohen was the Chair of that group and we had Tom Sermak and Doug Fischer as members, all of whom are very experienced and knowledgeable professionals who were in a good position to hear what people in Deschutes County were saying, weigh that information and then give Tom Crabtree useful feedback. At this point, the Quality Assurance Task Force is recommending that its reports remain non-public documents. Tom is aware and we have talked openly about the fact that in this particular case anybody would be pleased to disclose the outcome of this evaluation. So that is not the issue. But in terms of developing a process that people will feel comfortable with, it is the task force's recommendation that site visit reports go to the law office's leadership and to Peter, and that they not become public documents. However, the results of the reports would be put to various useful purposes. Obviously, we want to share the information that comes out of each of these visits with the public defense community and the Commission so that persistent and common issues can be identified and addressed with the information gained from our visits.

730 P. Ozanne Because we want to make this information relevant to everyone, we are concerned and interested in making the information gained from our site visits useful to sole practitioners and smaller organizations. We asked Jim Arneson, whom most of you know, is very committed to issues of quality and practices in a three-person law office, to chair the Quality Assurance Task Force. So all the way along we are thinking about things that will be relevant to everyone. The site visit team's report will be given to the director of the office in order to consider and implement improvements, and a copy will come to me. Over time, I will summarize the outcomes of these reports and identify common issues and solutions for the Commission, so that you know what we are doing and learning. I will also provide this information to the public defense community. But we are also interested in keeping the specific outcomes of the site visit process confidential and useful for the offices themselves, so that other offices will be encouraged to participate and won't be anticipating that they will be reading about the results of their site visit on the front page of their local newspaper.

762 Chair Ellis Any questions?

763 Chief Justice Carson Ingrid or Peter, is there any interface with judicial department?

765 I. Swenson Yes Chief, we met with the presiding judge and some of the other judges in Deschutes County, and we sent questionnaires to them as well. So judges were definitely part of this process.

773 Chief Justice Carson I should say to the audience, as well as to the Commission, that there was an inquiry about establishing judicial evaluations statewide. We tried it one other time, you may remember. And the Judicial Conference said, "Fine, as long as we will have judicial evaluations for lawyers." That process ground to a halt, so this may be a breakthrough. I wish you well.

797 Chair Ellis Multnomah County?

798 P. Ozanne This is another initiative that most of you in the audience are familiar with. The Commission certainly is. If you stick with us for the duration of the meeting you will see how this initiative is fully implemented in Action Item 5 on the agenda. This is, again, a project that involves a multi-biennial process. It will take a number of years to examine all regions and counties of the state. Now I am not talking about reviewing individual contractors. We are talking about reviewing what we call the structure of service delivery in counties or regions of the state. We have looked at a group of counties over the last few months and we are resolving issues and making some changes in various counties that included Benton, Lane, Linn and Lincoln Counties. Now the Commission is about to embark on an analysis of the structure of service delivery in Multnomah County. The first step is for OPDS, the staff of the Commission, to gather information through investigations in the field. This really amounts to OPDS staff talking to all interested people in the county: first of all, of course, the contractor community and then judges, district attorneys, corrections officials, anybody else who has an ongoing or institutional interest in the delivery of public defense services. While it is sometimes difficult to separate individual contractor-oriented issues from structural-oriented systemic issues, we are looking at the organizational structures in the county and whether we have the right size delivery system. Do we have the right organizations of contractors and the right mix among these organizations, including consortia, non-profit public defender offices, and individual attorneys on appointment lists? As you will see from Item 5 of the agenda, we will be addressing the types of issues we addressed specifically in Lane County.

In Multnomah County, based upon my interviews and discussions with interested parties over the past five or six weeks—and I have talked to over half of our contractors in the county and a number of judges, will continue to do so through July and August, and expect the Commission will have a written report from me by the August meeting—it looks to me at this point that the issues are the same ones that have been coming up since the Commission has taken over administration of the contracting process. Number one, in a context of what appears to be declining caseloads, do we

have the right size contractor capacity. Are we over-contracted or not, that may be one of the questions for the Commission to address. A related question, is the service delivery system organized appropriately? Do we have too many organizations or is the system about the right size, and do we have the right types and balance of organizations? Another issue that has come before the Commission numerous times in other counties, but particularly in Multnomah County, is the difference in rates among contractors who appear to be similarly situated or handling the same kinds of cases. (End of tape)

**TAPE 1, SIDE B**

- 036 P. Ozanne As I said, I will present a preliminary written report to you in August. I expect that we aren't going to have a July meeting, so that will give us more time to conduct our preliminary investigation in Multnomah County. And we will be welcoming input from those of you in the audience from Multnomah County.
- 040 Chair Ellis The last item under Agenda Item No. 2 is a new complaint policy.
- 043 I. Swenson What I am handing out is a draft of your proposed Complaint Policy. I will leave copies in the back, but nobody has really seen this yet. We are introducing it today, but no action is being requested of the Commission today. There are basically two parts to this policy. The first part has to do with complaints regarding the expenditure of public funds. That piece was mandated by House Bill 2074 last session, which required the Commission to adopt a policy regarding complaints about the expenditure of public funds from district attorneys, defense lawyers and the public. The second piece is a complaint policy regarding the quality of public defense services. This policy is in response to a requirement in the Commission's Strategic Plan that OPDS adopt such a policy. So we are offering this draft for your review and consideration at our next meeting. Neither part of this draft has been circulated widely at this point. It was our intention to get it in as good shape as possible today so that people can look at it, consider it and get back to us with comments. The piece regarding the expenditure of public funds has been provided to the district attorneys for comment. The Contractor Advisory Group has reviewed the other piece involving the quality issue. We reviewed as many other policy models as we could locate. There aren't many, unfortunately. The State of Kentucky has a statewide public defense system and they have a formal complaint policy which was very helpful to us. Most other states do not. I contacted a number of states with statewide offices and they all basically admitted they have an informal policy, but nothing in writing. We were able to look at a Washington State model, the San Mateo County model in California. Steve Gorham provided me with a copy of the complaint policy he uses for Marion County defenders. So looking at all of these gave us a good deal of guidance. The real goal in creating this policy is to create a formal process which preserves the flexibility of the informal process that has been in place for some time while establishing a formal policy that reflects the Commission's commitment to accountability and quality. Very often a client, for example, will report having difficulty contacting the client's lawyer. We can assist and facilitate that communication, which is certainly our preference rather than handling it as a complaint. But in addition to what has been in place, we also felt that there was a need to articulate what that policy and the procedures are for making complaints, as well as to establish express provisions to inform lawyers of complaints and the procedures for responding. So I hope the folks here will give it their full attention and get back to us with any concerns about the policy, as well as the Commissioners. We are expecting to circulate it very widely at this point. The State Bar is interested in seeing it. They recently revised their own policy to commit to more informal handling of complaints, which was helpful to refer to.
- 093 Chair Ellis Is it your expectation that within OPDS this will be the principle complaint process?
- 094 I. Swenson Mr. Chair, that raises an interesting unresolved issue. LSD also needs a process. This policy may or may not work for them. We want to think about that a little more and decide if this is something that will work for them.

100 J. Potter It says here, Ingrid, that OPDS is going to maintain a record of each complaint filed.

101 I. Swenson Yes.

101 J. Potter Are these records public?

102 I. Swenson It would be our intention to not make them public in the nature of the personnel matters, which are exempt from public records disclosure.

104 Chair Ellis That is a little different than how the Bar handles it.

104 I. Swenson It certainly is. They have opted to have a very, very open policy.

107 Chair Ellis I'm guessing that there is no legal requirement that it be public?

108 I. Swenson I will certainly explore that more, but I don't believe, after initial discussions with representatives from the Attorney General's Office, that they are public records.

111 C. Lazenby I'm sorry, Ingrid, I couldn't hear that last part. Did you say you have an opinion from the Attorney General?

112 I. Swenson No, certainly not. I had a discussion at a seminar on the public records law offered by the Attorney General's office, just chatting about complaint policies. On its face and without committing formally, they felt it was appropriate not to make such complaints public until they are resolved. If a complaint is determined to be founded, it would be appropriate, in their judgment, to make that record public.

118 Chair Ellis I'm not sure that today is the time to debate it, but I think this is a policy issue. When you come back to us with the policy for adoption, if you would include a memo outlining both the legal issues and what you see as the policy arguments. I think we ought to discuss that as well.

125 J. Stevens Are you distinguishing between the first type of complaint and the second type of complaint?

126 Chair Ellis I was not. One has to do with the spending money and one has to do with quality of lawyers.

128 J. Stevens Right, but one has to do with spending public money. I'm not sure from a newspaper's standpoint that I would be comfortable accepting the same rules for both if you agreed that the second type be kept quiet.

130 Chair Ellis I think that is a valid point.

133 I. Swenson We can certainly discuss this at a future meeting. One concern is the fact that clients, when they report complaints, often provide us with what would otherwise be confidential information.

137 Chair Ellis Which is another reason to make clear what our policy will be because the client who does that needs to know whether they are waiving confidentiality rights.

140 J. Brown If I may, one other thought as this policy is developed. The Bar within the last year, and hopefully everyone is aware, has implemented a program involving the client assistance office. So those complaints that come in by phone can be triaged in a meaningful way--often about the lawyer returning a client's phone call. The reason I mention that is, if a complaint is defined as needing to be in writing and signed, I'm wondering as this proposed policy progresses if we can leave room within the process, both on the appellate and contract side, for the kind of remedial informal communication before we get into the formal complaint process. It looks like that type of process is working very, very well for the Bar.

157 Chair Ellis Any other questions or comments on the complaint policy? Ingrid, while you are still here, let's go to the substitution policy.

**Agenda Item 3: PDSC's Substitution Policy**

162 I. Swenson On January 1 of this year, a law took effect, which was House Bill 2074, that basically deprived the courts of the ability to substitute one attorney for another except pursuant to a policy of this Commission. That legislation was intended to address concerns that were raised during the course of the legislative session about multiple attorney substitutions in a couple of cases. On January 15, the Commission adopted a substitution policy which is reflected in a document that you should have before you. At the time of its original adoption, the Commission was concerned that the defense bar had not had sufficient time to respond and react to it. The Commission felt nonetheless that it was important to go forward with a policy, so it adopted Section 1.7 as a temporary rule effective until July of this year and indicated that it would revisit this issue and seek additional input. I would like to report that, after the Commission adopted that policy, we did communicate by e-mail with all of the presiding judges, sending them a copy of the new policy and suggesting that we would like to talk with them if they had questions about the policy. I received a couple of calls from presiding judges and Kathryn received additional ones, but I think there were really only two judges who called and wanted to discuss it. Shortly thereafter, the OPDS contract analysts contacted each of the trial court administrators and explained the new policy. They invited the TCAs to think about categories of cases in which substitutions were necessary and ordinary and that we could discuss in general, without having to consult with OPDS on each occasion when there was a request for substitution. Those general consultations have taken place. The defense bar has responded. Since the January Commission meeting, they have had an additional opportunity to respond. I think it was on April 21 we sent out a reminder to OCDLA members that this policy would be coming up before the Commission again at this meeting and asked them to notify us of any problems that they may have identified. Very briefly, what the policy does as it appears before you today is acknowledge that, when lawyers seek to be relieved in cases because of ethical concerns, the court needs to make a decision in its discretion about whether that is appropriate. There is no need to consult with the Office of Public Defense Services on that question. Should the court decide that substitution is appropriate, then we do ask that the court confer with us regarding to whom the case will be assigned. We have exempted from the category of cases for which consultation needs to occur, reassignments within the same contracting entity. So the court is going to simply tell a consortium, "This lawyer is off. Do you have another lawyer for us?" Then there is no need to contact our office because that is exactly what we would expect to happen under our contracts. In cases other than those situations where lawyers are seeking to withdraw because of ethical concerns, we do ask that the court call us, notify us, confer about substitution in those cases. Our main concern in those circumstances is that we be made aware of circumstances in which the court has concerns about the quality of representation. Obviously, that is of interest to us. Furthermore, in those cases the court pursuant to this policy is obligated to confer with us about the attorney to whom the case will be assigned. The policy limits the matters which OPDS can confer with the court about. We don't want to interject ourselves into the substance of the decision that is clearly between the lawyer, client and the court. We simply want information made available to us so we can offer to the court suggestions when that is appropriate about to whom the case might be assigned. The final portion of policy basically provides for consultation in case types. So the various categories of substitutions can be dealt with as a category rather than one-by-one. I have to assume that things are working satisfactorily. Kathryn advised me that there have been 10 formal consultations as far as we are aware.

240 Chair Ellis Since January 1?

241 I. Swenson Yes, and we haven't heard from the defense bar since January. There may be folks here today who have some comments. The Commission did ask that those comments be submitted prior to today's meeting, but we have not received any.

247 Chair Ellis Any questions?

- 248 Audience I have a question. You mentioned presiding judges and this is probably the biggest issue in Multnomah County. I don't know if anybody has talked to Judge Frantz or spoken with her, but she is far and away the source of most of the substitutions that go before her with conflicts between the lawyer and client. Often she takes a client's complaints, finds that the lawyer's performance has been satisfactory, but in order to try something new or to mollify the client, she assigns a new lawyer. I just wondered if she is going to be consulted on this policy.
- 256 I. Swenson I don't know. Kathryn may have had direct contact with her.
- 257 K. Aylward If the substitution is within a consortium, then they are not required to consult with us.
- 260 C. Lazenby [The telephone call with Chip Lazenby ends at 12:25 p.m.]
- 261 Chair Ellis Okay. Thanks.
- 265 Chris Hansen I am a member of the Board of OCDLA and also a public defender in Lane County. It caught my ear that there have been 10 consultations since last January. Are those individual matters or have there been batches or what?
- 268 K. Aylward When the analysts contacted the TCAs in each county, the category of cases that they decided would give us the information we wanted without unnecessarily hampering the court's ability to function was to say, "A first substitution is fine." By the time you got to a second substitution, then we began to think that perhaps the client needs a special attorney or perhaps the client is causing the need for a substitution. So we have received 10 individual calls from the courts around the state that have said, "Here is a case where I have already made a substitution and now the attorney is requesting to be substituted off again."
- 267 C. Hansen We have three days a week where we have 35-day calls and, frequently, motions to withdraw are made at that point. We have 10 a week it would seem that fit under the categories or descriptions that you have made and are contained in your rule. I was just wondering how accurate your information gathering is and whether judges are just ignoring it.
- 286 K. Aylward Well, I think because the substitution policy is scheduled to sunset and, if the Commission either readopts it now, it might be a good time for a little publicity to make sure the judges are all aware that this policy is out there. We can certainly do that.
- 288 S. Gorham Is it the court's obligation or the attorneys obligation because I am assuming a lot of the judges won't contact you? Let's assume some judge wants to substitute me in some other county and it is not my consortium. Do I have an obligation to consult with you or, if the judge does it, that's their business?
- 294 K. Aylward What the statute says is that the court may not substitute counsel other than pursuant to our policies. And our policy is that the court needs to consult with us. Again, I think it is just an education issue at this point.
- 298 S. Gorham Say I get substituted in another county where it is not in my consortium. I guess my concern is, if the judge for whatever reason does not to consult with you and I am substituted, are there going to be any consequences to me if the judge is not doing what the statute tells him to do.
- 305 K. Aylward We will confer on that.
- 306 S. Gorham I mean, you could say that I might not get paid and then I guess I would make sure the judge consulted. But if you don't do that and it is the judge's obligation, they are independently elected, we can't force them to do much.

- 311 K. Aylward We are pretty good about not leaving attorneys out in the cold. If you are appointed and it was an appropriate appointment in any way, we will try to compensate you. I'm not sure that is likely to come up, but we will find out.
- 314 David Carlson I have done quite a bit of post-conviction work in the past. I have thought about a few issues. First of all, and I don't know if this is directly related or a collateral issue, but when inmates get transferred from Snake River or any institution to another institution, perhaps 400 miles away, they are no longer reassigning a new attorney. They are keeping the original attorney. That was an assumption of a cost that was never factored into our contract. That is very burdensome to take two days to go meet with a client across the state, even if we recoup the traveling expenses we lose two days of work. I understand that saves the state and overall we don't want to have them attorney shopping. I don't think that is in my best interest anyway, but that is a concern I have that is diminishing with the amount of prison work I do. The next thing is I have found that when the judges tell clients, "No, just because you don't want to behave or you don't want to get along with your attorney, I am not going to give you a new one," it doesn't take clients very long to figure out that if they file a Bar complaint they will get a new attorney. Those Bar complaints are and will continue to rise expeditiously with the rigidity this policy is being enforced. If the folks in Lake Oswego recognize that, great, but it is still a public black spot on the attorney's record, and that is a concern. I think anybody that does post-conviction will know that this is accurate. Then there is a recent phenomenon that is going on in our county, and I don't know if it is widespread or not, in this desire to prevent conflicts, the clerk's office has gone to the district attorney and said, "Do you think attorney A will have a conflict?" They have discussed it with judges, they have discussed it with the juvenile department and, you know, they don't know if I have a conflict or not. They may in some cases have an idea that I might have a direct conflict, but I think this is really inappropriate. They should be discussing this with me. What they are doing is they are saying, if there is really any risk of a conflict, we are going to appoint somebody else who is new in a county or has not had a contract, so that there is no potential for having represented a co-defendant 11 years previously. I really don't think they should be asking the DA and letting the DA decide if I have a conflict. That is all I have to say.
- 362 Chief Justice  
Carson David, I talked to Scott Taylor several months ago. The Corrections Department, as most of you know, is probably the biggest passenger transportation organization in the state, if not on the West Coast. There are buses running every day full to capacity moving our inmates from one place to another some because they are breaking up gangs or because of other reasons. I think some they are just moving. It is horrible what it does to the legal side, as you pointed out. So I have talked to presiding judges to help me help Scott Taylor and the DOC. He said, and this was before Max Williams got appointed, that they would be willing to set up a system where the corrections file for the inmate would be flagged, and that they would not be transferred unless there was a superior interest for safety or something else. So, if the PCRs are filed in Snake River and that is where the person is, then our goal would be that they would stay in Snake River until the matter is resolved.
- 377 D. Carlson That would be good if they did that. Right now, I have at least a half dozen clients in different institutions and one of the neat tricks that they do is they said, "Well, it is your client, so give us your credit card so that you can pay for the phone call for the next couple of hours." It is little things like that add up and was not anything that was contemplated in the contract.
- 389 John Connors Also on behalf of the OCDLA board, the board did have a long discussion of this topic at our last meeting. It seemed to us that the purpose of the rule is too make sure that judges didn't appoint people off the list. A lot of work goes into bringing out who gets the cases, people obviously depend on that. Given that, we thought it made more sense to have the process be that the court would appoint new lawyers after substitutions based on the assumed schedules within jurisdictions. It seemed like that is a better way to do it and a better way to get at the quality control issue Kathryn describes, especially since you are going through all the trouble of going through reviews in all these different areas. Can it be that the expectation that lawyers are going to be appointed off

the list, and is that what you are talking about? Is that what is contemplated by broad categories of cases where they will have to consult with you?

- 404 K. Aylward No. I think the purpose of this policy is to keep clients from repeatedly firing attorneys and starting over again, and to not have that repetition of the cost of paying for attorneys. At the same time, if there is an attorney that every client fires, then we need to know about that as well. I think the policy is here for us to get information and for the Legislature to control costs. So, when someone calls and consults me and says it is the third substitution, here is the situation, it has nothing to do with a bad attorney or bad client whatsoever. My consultation then is, "Okay fine, pick whoever is next on your list." So, to the extent that our office is then micromanaging who next is substituted, that is not really what is happening. We just want to make sure that we are in the loop so we know what is going on.
- 418 J. Connors Well, the rules should be written more along those lines then because, in Multnomah County, it is set up in some courtrooms where there are maybe a dozen substitutions within a week and, the way the rules are written now, we would expect somebody to be contacting you about every one of those, and obviously that is not what you mean.
- 422 Audience I second what John is saying. The rule says in all cases you have to be consulted.
- 426 K. Aylward Right, but as far as categories of cases, if we agree that a category of case on which you don't have to consult us is the first substitution, any case type where you are making just the first substitution, then we don't need to hear about that. That is going to be hundreds of cases and that is fine because what we are trying to do is not prevent substitutions, but prevent repetitive unnecessary substitutions.
- 431 C. Hansen That is a fine policy and goal but this says every one. Is this the law that you were talking about, this is mandatory on everybody?
- 435 I. Swenson She is talking about the statute, which required the enactment of this policy. The statute says the court shall not appoint, except according to the policy. But check out Section 1.7.4, which applies to all the preceding categories. It says that in any given judicial district you can arrive at an agreement concerning case types where a single consultation will be satisfactory for dealing with all of those, such as in those counties where attorneys are appointed at arraignment and then decide that their clients will participate in a drug court. There will be automatic substitutions in those cases. They don't have to talk to us in every single one of them. We have already talked to them about that category of cases and agreed that this is appropriate.
- 448 C. Hansen So every county could have a different arrangement and agreement?
- 449 I. Swenson That's right. And the analysts spoke to the trial court administrators in each judicial district to arrive at an agreement with them about the policy. If there are questions about whether the policy is being appropriately utilized in a county, we would like to talk and hear about those and have further discussions.
- 452 K. Aylward You know, there are lots of counties where the only provider is a consortium so, for that district, we never need to be consulted unless it can't be handled within a consortium. When we need to find somebody from outside of the county, they need our help doing that. So for a lot of counties, it is not a major change from what is currently happening.
- 460 Chair Ellis Do I understand that the staff is recommending that we renew the policy? Are there comments or questions?
- 462 S. McCrea As I read the policy, OPDS provides information and gets information, and then OPDS can tell the court what options are available. But the decision remains with the judge.

- 467 I. Swenson That is correct.
- 468 S. McCrea So my question is if you can tell us, of the 10 consultations you have had since January, have there been any situations in which, after the consultation, the court has determined not to allow substituted counsel?
- 472 K. Aylward No, in all of those 10 we agreed with the court that the substitution was clearly necessary.
- 474 Chair Ellis Any other questions or comments?
- 477 J. Potter Back to John or Chris. John, did you have substitute language that you were suggesting?
- 478 J. Connors The OCDLA board had come up with some language that reads as follows: “In the event the court makes a substitution of counsel under either of the above sections it is the expectation of PDSC and the court that such appointments would be made from the list of approved contracts within that jurisdiction unless extraordinary circumstances require an alternative.” Again, the way we read into things, you were just trying to prevent judges from ignoring the contracts and ignoring the schedule and appointing whomever they wanted. It sounds like that is not the case. But to answer John’s question, that was the language we were going to recommend.
- 490 J. Potter So, Ingrid, having heard that language, do you think that is a redundancy?
- 491 I. Swenson John, I do. I think that the policy clearly requires that we be consulted about to whom the case will be assigned. Our preference is, of course, to use the systems that are in place. I don’t imagine that they would ever vary from that, unless there were a very good reason to do so. It serves our purpose, as well as the courts and the attorneys, to have that system available.
- 501 Chair Ellis Any other questions or comments? Is there a motion?
- 503 C. Hansen I’m probably out of order.
- 503 Chair Ellis Not if you are recognized.
- 504 C. Hansen Could we perhaps consider bringing this up again in a year for a review to see how this has actually played out?
- 508 Chair Ellis There is nothing to prevent that.
- 509 Chief Justice Carson We could sunset it again.
- 511 Chair Ellis We could make ourselves do it by making it a one-year policy and force ourselves to look at it again.
- 512 K. Aylward That is fine. Our office has kept track of the substitutions, not for the purpose of determining whether the policy should be kept or changed, but because we wanted to keep track. So that is no problem. We will continue to do that.
- 517 Chair Ellis Is there a motion?
- 518 J. Stevens I move to accept the policy as laid out in Attachment 3 for the following 12 months and that we reconsider it then. J. Potter 2<sup>nd</sup>.
- 520 S. McCrea Well, I think that John Connors’ concerns and the language that was addressed is redundant because, when it starts out under 1.7.1 and it talks about a court may substitute one appointed

counsel for another, I believe that is the status quo with providers under the current system. So I am okay with the language as it is.

528 Chair Ellis **MOTION:** J. Stevens moved; J. Potter: 2<sup>nd</sup>  
**VOTE 5-0**, hearing no objection, the motion **CARRIES**

530 Chair Ellis I sometimes get criticized for never taking a break so let's take a half hour break.

[Break at 12:50 p.m.]

544 Chair Ellis [Meeting called to order at 1:12 p.m.] Kathryn, the next agenda item is one for you, which is changes in the Payment Policy, Attachment 4. I am sure this has no interest for the audience.

### **Agenda Item No. 3 Changes to PDSC's Payment Policies**

547 K. Aylward They are all improvements. In fact, since there is an audience, I just wanted to mention that I recently joined OCDLA and am on the Pond. In the first 24 hours, I got an e-mail probably every minute and a half. But I have been reading them. And some of the changes that are proposed here came about because of things that I read on the OCDLA Pond. I had no idea that something was an issue and the attorneys were complaining, "Isn't this awful," and I agreed: "Are we really doing that?" So please, if you have concerns about the payment policy and how we operate, contact me and let us know. Because in one particular example which I will get to, I wasn't aware that this was what was happening. So, by changing our policy, we can fix some of the practices that are causing you problems. The first one, section 2.5, is being changed. A lot of times, attorneys are asked to do things after a case is closed and we want them to do that and expect them to. So we have added this 60-day window after disposition. If there are other things that come up, like you have to review the judgment or file a notice of appeal or whatever else is involved afterwards, that time is covered as well. Also, a little further down in that section, if there is a break in the case or if the client is unable to aid and assist, we don't want to leave you hanging with an unpaid bill. In section 2.6, it was our intent that, in capital murder and murder cases, interim billing is okay. But what our policy actually said was, "You still have to request it and we will only approve it in capital murder and murder cases." But what we really mean is we don't want you to have to ask. So section 2.6 has now been split into 2.6.1. That subsection simply says that interim billing is okay in murder and aggravated murder cases, and then 2.6.2 says that, in other cases, you have to ask and we will consider approving the billing. See it is all good stuff. Section 3.2.2 used to say that when we had a request for a certain level of expenses, under \$75 for things like medical records, for example, you didn't have to get preauthorization. But what we were finding is that, in aggravated murder and murder cases, a lot of times you had larger expenses for those kinds of records. So we have simply said now it can be up to \$150 and you don't need preauthorization. Section 3.2.3.1 basically says we have guidelines and we won't deviate from that. Near the end, it is b) section 2) for expenses other than for transcript services. What we were saying is we have a guideline rate for transcripts and we will never deviate from them. But occasionally, you need a transcript for a portion of a hearing that was yesterday and you need it by tomorrow morning. And the only person who is willing to work around the clock wants a little more than the \$2.50 a page. So there are instances where we would want to be able to deviate from that guideline. But that is why we have added a provision for cases on appeal, so we won't deviate if it is a transcript on appeal. Regarding the next underlined sentence, in January 2004, when we presented to the Commission the substitution policy and the policy on out-of-state experts, the two were linked together in terms of your sunset provision. So I have put this back on the agenda because otherwise it would sunset. But it is the same policy that was originally adopted in January. Mr. Chair, you may recall that we just added the word "qualified" when we met in January, so that is the only change. Section 3.3 is the one that most recently came up on the Pond. This deals with our policy for paralegals and secretarial time. It provided that you may have a secretary in your office and he or she is salaried, but if there is something that comes up and you need to have extra time spent on a particular case by that person over and above what you pay them for their salary, that needs to be preauthorized.

Our policy had always said that, if it is preauthorized, that paraprofessional cannot bill us directly because they are either salaried by you or hired by you. What our policy said is that you have to pay the paraprofessional and then prove to us that you paid them and we will reimburse you. That had always been the policy, but apparently it hadn't always been applied. When PDSC took over July 1, we hired all new staff to pay the bills and, of course, the first thing they did was to read the policy and they said: "Oh, we can't pay this person directly." So everyone was following policy, but the word on the Pond was, "Oh, they have changed and it is terrible!" So I took a look at it and agreed that it is terrible. We don't need you to front the money for paraprofessionals. That was never our intent. However, I believe the reason the policy was originally written was that we needed some kind of verification that the work you asked for was accomplished and satisfactory. So we considered a variety of ways of doing it. What we have done now is, when you get a preauthorization for paraprofessional services, there is a little note in the center of the preauthorization form, a place for the attorney to sign, and all it says is "I am the attorney on this case, the work that was preauthorized and requested was necessary and was accomplished," something like that. You are not actually swearing that every minute was spent, but you're saying you got what you asked for and the billing is appropriate. So that seemed to solve both problems at once. Section 3.4 is similar, but this deals with investigator out-of-pocket expenses. If the expense is now less than \$150 for murder and aggravated murder cases, it just mirrors section I. We had a lot of people submit bills for faxing at \$2.50 a page because that is what Kinko charges. I think in this day and age most people could be expected to have their own fax equipment or can fax online. So we have now limited that the expense to the cost of the long distance call. If you are receiving, then it is just the same as a regular copy. Section 3.4 specifically addresses the issue of paralegals. We took out all the language that says the attorney has to submit a statement that they have already paid the person in Section 3.4.11. Our attorney contracts have a clause in them for client clothing and it talks about contacting the local public defender's office with a clothing room. But we didn't have anything that applied to the hourly private bar attorneys. We thought we would just put that in so they would know that there are clothing rooms out there and we would have some sense of when to approve the expense. Section 4 – Billing Dispute Resolution: We have added a provision that, if we make an adjustment that is less than \$5 dollars, we don't send you a notice of adjustment. Often, for amounts less than that, it is a math error or it is negligible. I just think that this is an efficiency. When you get the adjustment, you will see that it is a few dollars less. If you call us up, we will say your adding was wrong. The other thing that we changed a little further down, the existing policy provided for an appeal process. If there was an amount that was disallowed, the provider has 21 days to submit additional information saying, "Here is why you shouldn't do that." If that is disallowed, then the appeal process is to the presiding judge of the court. All it said before was, "You can appeal to the presiding judge." We have had this come up a few times and, of course, the presiding judge called me and said, "Do I have to have a hearing or can I just write a letter?" The attorney likewise was saying, "Where is the form to do this and how do I do it?" What we have put in our policy is a sentence that says the attorney just needs to write to the court and request review of the disallowance and the court, when the decision is made, has to notify our office as well as the attorney. We haven't added any more formality to it, at least for now. The very last thing involves exhibits to the policy. I didn't bring them with me, but exhibits are the forms that we use. We actually change them all the time and then we ask, "Do we need permission or approval when we add a signature line?" I would like to have our office be able to change the forms themselves without requiring Commission approval. One of those exhibits is actually the guideline rates themselves, the reimbursement rates. We had this come up yesterday where our guideline rate for renting a car is \$48 a day and we found out that the state has signed a contract with Budget Rental and Azumano Travel. What that contract says is no state funds may be expended for car rental other than under this contract unless you get a case-by-case exception. Well, DAS didn't tell us this, so we didn't know. We have now found out that car rental has to be booked through Azumano Travel. So then Azumano Travel says, "Under the contract, we can't get a car in Phoenix, Arizona for \$48." If our guideline rate is only \$48, to make a long story short, we want to be able to make adjustments to our guidelines rate for reimbursement as costs such as accommodations change without bringing it back to the Commission each time.

- 783 Jim Hennings On your page two, section 3.2.3.1, the authorization for out-of-state witnesses. Who determines whether there is a qualified in-state expert? I think it has to be the judge, but you don't have any process or procedure for a judge to make that determination. There are many times that you may have an expert in the state, but it may be in that particular case that the in-state expert is not qualified to be doing that work. You need to tell us who makes that determination, and if it is not a judge, because then it will have to come up on appeal or in post-conviction relief.
- 804 K. Aylward They come in as non-routine expense requests. You submit a request for an out-of-state expert and Ingrid Swenson in our office reviews most of those. She would call and say, "Do you know that we have someone in-state that is cheaper?" At which point the attorney says, "Yes – but (end of tape)"

**TAPE 2, SIDE A**

- 001 J. Hennings That is not in your procedure. That is all in the final billing and you don't want to do that during the process of the case, unless you want to slow down the process of the case. This is a decision that needs to be made fairly quickly so the case can be processed appropriately. I don't think it makes sense to put in an appeal process that is really after the case is over and you are disputing over the fee. Where is the process?
- 007 I. Swenson It is just the statute.
- 008 J. Hennings The statute allows that?
- 010 Joe Rieke Sort of a follow-up on something earlier that I thought about when Kathryn was talking about that appeals process. If that appeals process ends up going to the judge, especially if it is during the course of the case where you are requesting an out-of-state expert, obviously I want all that done ex parte, sealed. I want that proceeding with the judge in the same fashion. I don't know if there is anything that sets that out and actually outlines how it is done. Obviously, there is confusion about even what format is being used. The DA shouldn't be sitting in on that hearing. Maybe this should be a little more formalized and clarified if we are doing it, especially if it is not post-completion of the case but while the case is ongoing.
- 020 K. Aylward I don't believe we have had a denial of a non-routine expense request on which there was a subsequent request for review. It is an ongoing process where, if you get a denial, you pick the phone up and say, "Why was it denied?" and there is conversation. I don't think we have had anything that was ultimately denied where someone came back and said I want reconsideration.
- 026 J. Hennings You are trying to set up processes and rules that apply, whether everyone is acting reasonably or not, and we don't have that yet here. I want to make sure that we have a protected record so that if there is a denial that that is on record somewhere. I want to make sure, as David said, that this is an ex parte process. I think it is important that we draft these rules like contracts, so that if things come apart we still have the rules to fall back on and we have the processes and procedures plainly in place.
- 034 I. Swenson Can I just respond briefly. I know this isn't the reason most people are here today and we can talk about this more at a later time. Maybe we need to expand on the language about process before the court but in every denial. The statute gives you the authority or the right to seek review by the presiding judge in the judicial district. When judges approved or denied these requests before, there was no formal legislation protecting that record. You undertook to protect those records by filing something. I assume you would do the same thing now, if you were appearing before the judge. That process should be exactly what it was before. But if it is helpful, I think we can certainly look at expanding on the statement and the courts might appreciate having some kind of statement about what our policy is.

- 046 J. Hennings Mr. Chair, I would suggest that you pass this. I think it is appropriate that we stay in-state if we have someone who is qualified, but that we come back and work with Ingrid on making sure we have in place the procedures and a statement of those procedures because I do think it is an important area where we need to make the rules clear.
- 051 Chair Ellis I think that is a good suggestion.
- 052 Lisa Greif OCDLA Board of Directors. We have been having ongoing discussions about out-of-state expert witnesses. At our last meeting in April, we came up with some proposed language maybe for the Commission to consider, adding to the end of that underlined statement there. Our proposal was something along the lines “Or unless counsel can demonstrate other extraordinary circumstances or efficiencies that require appointment of an out-of-state expert.” Maybe just give it a little more open-endedness and flexibility.
- 061 Chair Ellis What sort of things were you thinking of other than qualifications and expense?
- 062 L. Greif Well, I know, for example, there are a couple of DNA experts in other states that Oregon attorneys use. I think that their particular expertise in that area would be an extraordinary circumstance that could be brought to the attention of –
- 068 Chair Ellis Doesn’t that come in under the “qualified” word?
- 069 J. Rieke Well it does if that what you mean by “qualifications.” I guess that is the problem. You talk about DNA labs. We have cases coming from 1986 dates forward in which the DNA analysis was whether or not you had an adequate sample or a period of time. If you had done the analysis in stages of maintenance of those samples over a period of time it would be cheaper maybe. I just had this on a 1986 homicide. The other one is the analysis of the questions in the death penalty about the issue in the second question about the propensity to commit violence in the future issue. There are a series of doctors in the nation who have done a lot of those and, if doing a lot of them is “qualification,” then this isn’t the problem.
- 080 Chair Ellis We had quite a debate when we put the word “qualified” in there and we thought it gave flexibility in the types of cases both of you are talking about.
- 083 J. Rieke I was just wondering if that was what that means.
- 084 Chair Ellis There is a subjective element. You have to persuade Ingrid in the first instance.
- 085 C. Hansen Perhaps a better example that will help the language OCDLA is suggesting is geographic location—Columbia County sitting across from Longview. There are some good, qualified psycho-sexual evaluators and providers in the Longview-Kelso area, and if you have clients in Clatskanie and Rainier accessible –
- 091 Chair Ellis We had the same issue over in Ontario and Boise. But what we also thought was that this would be covered by an expense comparison. If you have someone right next door in another state, it is obviously more likely to be less expensive than if you had to stay in-state and get someone from Portland when you’re practicing in Ontario.
- 097 Audience Well, I guess if you are tying it only to the money, then that may or may not work.
- 098 C. Hansen One of the things that concerned the board of OCDLA was that this policy could operate as a constraint, at least as we read it, that might put us at a disadvantage with the district attorney. What I am hearing you folks say is that, for example, if the district attorney wanted to bring in some expert from Chicago on recovered memories and there was someone in Seattle with equivalent skills and stature, then this is something that isn’t automatically precluded by this rule.

- 108 Chair Ellis That would be true. If there happened to be in Eugene someone who was recognized as competent in that field you would have a heavy burden to show that the Seattle expert was so much better qualified that you needed to go there.
- 110 C. Hansen Well, I guess we may have somebody who is qualified at a certain level, but it is an equivalent of an equally qualified person.
- 114 Chair Ellis We put that word in knowing that this is very debatable in any given circumstance. It is a normative word; it is a qualitative word. It was intended to give some judgment to the administrator and I can't preordain what is going to happen. But the legislature really put a lot of pressure on not to have out-of-state experts and this was our way of trying to inch our way back to a little more parity. Any other questions or comments? Any questions or comments from the Commission? Kathryn, I take it you want an approval of the changes?
- 124 K. Aylward Yes, please.
- 125 Chair Ellis **MOTION:** S. McCrea moved for approval of changes to PDSC's payment policies; J. Brown: 2<sup>nd</sup> **VOTE 5-0**, hearing no objection, the motion **CARRIES**
- 132 Chair Ellis Okay, we now go to the Region 4 service delivery plan for Lane County, which has been actually a very interesting experience.
- 133 P. Ozanne We are skipping Agenda Item No. 4?
- 134 Chair Ellis Let's get going on Lane County. Peter, you want to introduce this? And then I know we have two Commissioners with some comments on this.

**Agenda Item No. 5 Region 4 Service Delivery Plans (Lane County)**

- 137 P. Ozanne Yes, the principle issue to address in Lane County involved how to handle the public defense cases that aren't handled by the county's public defender office. There is currently an appointment list that everybody to one degree or another agreed needed to be changed and improved. The Commission has heard testimony in Lane County and deliberated during at least two previous meetings with regard to the options. The last step at the Commission's April meeting was to direct your staff at OPDS to draft an RFP for a consortium that included the elements of a model consortium that OPDS has previously developed for consideration by the Commission. That RFP, or Request for Proposals, is included in Attachment 6 to the agenda. For the convenience of the Commission, we also included my April 6, 2004 memorandum to the Commission that set forth the model consortium. Since the Commission's April meeting and in response to a request by the Chief Justice, John Potter and Shaun McCrea have been working on the draft of an alternative proposal, that has been distributed today as a handout dated 6/12/04 and entitled "A Model List System for Lane County." That draft attempts to address the concerns of some Commissioners with regard to how an appointment list, in comparison to a consortium, might be administered effectively.
- 161 Chair Ellis John or Shaun, do you want to tell us what you have been up to?
- 164 J. Potter I'll start. For the Lane County situation if we replace the word "county" with "commune," we might understand Lane County better. The model list system that Shaun and I and others have worked on and that you have before you is, as Peter says, trying to address some of the concerns about a list system. In developing this proposal for a list system, one of the biggest issues was credibility and assuring quality control. So we designed it after a consortium system and took many of the elements in a consortium and applied it to a list. The main difference between this list proposal and the traditional list system is the provision for a strong administrator who is employed by and paid for under contract with the state to administer the list. We also proposed a five- and three-member oversight committee. The five-member committee initially established by this

proposal would be in existence for one year and would include two members from the bar, one from the Lane PD's office, the Presiding Judge or her designee and the General Counsel at OPDS—Ingrid, in this case. After a one-year period of time, the Presiding Judge in Lane County and OPDS's General Counsel would drop off the committee. It would then be a strictly local advisory and oversight committee.

- 188 Chair Ellis John, what is your plan for the two Lane County bar people, who would select them?
- 190 J. Potter I don't know who is going to select them, but the Commission would be approving that selection. Good question and I'm not sure.
- 194 Audience John, was it anticipated that those members would be outside the court system?
- 196 J. Potter I'll read the language to you. "During the first year of operation, the panel will consist of five members. During the second and subsequent years the panel will consist of three members. The five-member panel will include two private Lane County bar members, subject to the approval of the Commission. One of the bar member panelists will have prior experience as a public defense attorney, but would not currently be engaged in public defense practice. The second bar member panelist need only be an active private lawyer member of the Lane County Bar. The third member will be the Lane County Public Defender or designee at PDSL. The fourth member will be the General Counsel for OPDS. The fifth member will be the Lane County Presiding Judge or designee from the Lane bench." So this panel, in conjunction with the administrator, would in essence start over from the current list. If you wish to be on the new list, you would reapply. The oversight committee would develop a set of new qualification standards, in conjunction with the Commission, and applicants would go through an approval process administered by the committee. A new list would be established as a result. The administrator would administer the appointments of the individual lawyers to particular kinds of cases, based on the experience of attorneys on the list. The administrator, not the judges, would determine who gets a particular kind of case. The training and mentoring would be done under the guidance of the oversight panel and the direct supervision of the administrator. The Lane PD has offered to assist in mentoring and training programs. Individual private lawyers would also be involved in mentoring and training programs. If someone was not qualified for the list, they could go through the mentoring and training program that would be designated by the oversight panel or the administrator for the purposes of getting back on the list or for getting on the list in the first place. Shaun and I met a number of times and talked and then we met with individual private lawyers in Lane County and met collectively with members of the Bar who are interested in court-appointment work. Even though I was joking about the "commune," there is a difference in Lane County in terms of a camaraderie among the members of the Bar that is different than some other counties. Both Shaun and I explained that, under a consortium system, there would be more money for fewer lawyers. Those lawyers who were in the consortium would come out better economically than they will under the court-appointment list by the very virtue of numbers. The model that Peter alludes to for the consortium is proposing that eight to 15 lawyers would be part of the consortium. Under the list system, there will be more than 15 and less than 40, would be my guess. In any event, it is going to be a larger number and, the larger the number, the smaller the pieces of pie for the individual lawyers on the list. The lawyers in Lane County, though not 100 percent unanimous, are amenable to this kind of an arrangement. Their reasons vary, but they do have their reasons. So we present this to the Commission as a way to address some of the concerns that exist in Lane County, maintain a viable group of lawyers to provide the work, take away some of the burden from the judges and address their concerns as well. Shaun forwarded this draft to the Presiding Circuit Court Judge and Judge Rasmussen for their comments and Shaun can report on that.
- 250 S. McCrea I did e-mail this to all of the other Commissioners. Judge Mary Ann Bearden responded as follows: "I have reviewed your proposal although not studied it. It looks like a good start to me and a big potential improvement." She also said she was wrapping up to get ready for vacation and that "Karsten Rasmussen would be presiding for several weeks long so that may be all the input we can manage for awhile. Thanks for your work." Karsten responded and wanted to know if the state

office would pay for a local administrator: “Will the administrator have the power to make assignments of cases. Without that power, I cannot see the position working the way it is envisioned.” When I responded to him, I said, “Yes the proposal is for the state office to pay for the local administrator and, absolutely, the whole idea is for the administrator to assign the cases to take the load off of the judges and out of the office of the trial court administrator in Lane County and to provide the oversight the judges think is needed.” I just want to add a couple of comments to what John said and then it is probably just best to respond to comments and questions. In setting up this model list system for Lane County, we started out with the formal administrator first because we wanted to answer the concern that Judge Bearden expressed at the meeting in Lane County, which was that no one had shown the willingness to step up and do the dirty work. While Lane County has been performing pretty well in terms of the structure of the organization and quality, in going forward, there has to be a formal administrator and it has to be somebody who is willing, as Judge Bearden put it, to do the dirty work. That has been discussed with the Lane County attorneys and everyone understands that. It is something that is going to take some work and some effort, and it is something that I see Lane County practitioners committed to. I can say that John and I, as residents of Lane County, are committed to helping if the Commission decides to proceed with this route. In terms of the panel, I talked to John about whether we should offer ourselves as sort of sacrificial lambs, ala the Chief, and offer to be ex-officio on the panel if the Commission wanted us to do that. I would be willing to, and I’m sure John would as well. But we can represent that we would intend to be involved with, and at least informally advise and assist, the panel and the administrator in any way we can. If we are allowed to, we would also attend as many meetings as possible so we can provide input, guidance and assistance whenever appropriate. One more thing, in terms of the training and mentoring program, the Lane County Public Defender has expressed a sincere willingness to assist in setting up formal mentoring programs, or I guess I should say continuing legal education programs for Lane County practitioners. One of the things that we kicked around was having attorneys, who are in private practice like me, available to take on somebody who is not yet on the panel that wants to be on it. In other words, these attorneys would take on candidates for the list for a minimum of one case a year. So if people come to me, I’m going to work with them on a case, going through every phase of the case with them so they are going to get the experience they need to be able to qualify for the list. It may be that we can get attorneys to commit to more than one case, but for somebody who is really busy, we can say, “Just do one case, but you have to be there with them every step of the way.” I think most Lane County attorneys would be willing to do that.

- 304 Chair Ellis Any comments?
- 305 P. Ozanne Just a question. I appreciate that you volunteered yourself and John as possible participants because I was going to ask about that. I think it would be a good idea and I appreciate the offer. I am also wondering, although Ingrid would be a very valuable participant and I’m sure happy to contribute, whether one of you could actually take her place on the panel or oversight committee because of the many other things we are asking Ingrid to do at OPDS and because one of you could ably perform the functions of conveying the Commission’s legislative intent and concerns and keeping the Commission and OPDS informed of the panel’s actions in implementing your proposal. It sounds like you’re already thinking of participating in a similar manner.
- 317 S. McCrea I think that our participation is very important, whether it is on a formal or an informal basis.
- 319 P. Ozanne The other thing I wondered, in terms of being sure there are mentoring and training programs, whether you have thought about making a condition of participation on the list that lawyers will in consultation with the administrator participate in those programs. So it would actually be expected that panel members would participate and couldn’t say “no” if asked.
- 326 S. McCrea That was something that was discussed, yes. We didn’t try to pin down every detail, but was certainly one that was discussed. Now I would say in terms of the federal CJA panel, that is an issue that has been discussed nationwide—whether there should be a requirement of a certain amount of legal education in order to qualify for the panel. And it has not been a requirement

because there are so many different needs in different districts. But in Lane County, it may very well be appropriate.

- 336 J. Potter One of the mentoring issues is whether lawyers are going to get paid in the process of mentoring. The next step we took is asking whether we could also develop a mentoring list where those lawyers in Lane County who don't do any public defense work, but do criminal law work, might be interested in mentoring one case a year or two cases a year, even though they are not on the list.
- 347 Chair Ellis Other comments?
- 348 J. Stevens I'm curious, beyond the lack of a board of directors and the number of lawyers involved, is there a fundamental difference between the Lane County list proposal and the Lane County consortium proposal that I am missing?
- 351 J. Potter I don't think there is, Janet.
- 352 J. Stevens Then why would you not want a board of directors? Couldn't you simply not take the consortium proposal and expand it to include a billion lawyers, if you felt like it?
- 354 J. Potter It defeats the purpose of the consortium in a sense.
- 355 J. Stevens I understand that.
- 356 J. Potter There isn't much difference. There isn't a board of directors, but there is an oversight committee, and that oversight committee has some of the responsibility the board might have. But truly, Janet, I don't think there is any substantial difference, other than the number of lawyers involved and the fact that this is a more open system, as opposed to a closed system.
- 361 Chair Ellis I think I see at least two significant differences. One is, and I'm not advocating at this point, the list system drives us to an hourly compensation structure to the exclusion of a unit contract. That is a big, big shift from one to the other. And related to that is the cost to us to administer the list. We may end up processing fee applications on every single case, as opposed to once every two-year contract negotiation period. And then there's the cost of the administrator. Those are two significant differences. I do have a bunch of other questions.
- 373 S. McCrea We would be disappointed if you didn't, Barnes.
- 374 Chair Ellis Let me just go through them all, and then you can get back with your comments. I am concerned about the size issue. I will say that I am impressed with the collegiality of Lane County lawyers. They do seem to be concerned about each other, which is not always the case. But I am looking at a proposal that I think is likely to lead to 30 plus or minus lawyers versus a consortium proposal which would be a lot more concentrated. The consortium we have been talking about would be 12 to 15. From the standpoint of the Commission and what we are trying to accomplish, I do worry about this. Because I think if you really did spread this 20 percent of the county's caseload over 30 lawyers, you will end up with none of them having the expertise level intended, the incentive for CLE participation, the street smarts, and all of the other things we have talked about. I think that this is a loss of quality on our side. On the other side, I think the Lane County practitioners have to realize that, if we don't concentrate this caseload in a fewer number, then no one of them is going to have enough of a caseload to really build a practice around. That is one set of issues that I have. The second set of issues I have already indicated is on the compensation arrangement. This list system inevitably forces us into an hourly compensation structure, and I think that has some disadvantages. When we go on a contract basis with units, two things happen. One is I think we are able to build in the providers an incentive and reward for efficiency. We have to watch that the work is not done at the expense of quality, but it does build in an incentive and reward for efficiency. The more efficient lawyer ends up at a higher compensation rate than the inefficient lawyer. Secondly, I think the list system would force us to compensate lawyers at the statutory rate

of \$40, and I think it is a loss to those in Lane County who would be doing defense work. We have experienced under the unit-based consortium model that people are able to achieve a higher income than the statutory rate provides. So I am concerned about this. I don't see any way we can do a list process and have a unit contract. Third is this issue of the cost of the administrator. I am concerned that we not end up with Kathryn's group doing a lot of administrative work on one lawyer at a time. Related to that and the compensation issue, one of the advantages to participants in the consortium is the ability we have when they contract on a unit basis to pay them very consistently. They have an income stream they can count on. I think if we go this route with the list, and if we solve the issue of how to administer it, there will be significantly more delay in receipt of payments relative to time of service. Those things being said, I was attracted to the concept of an administrator who would have real authority, and I have a couple of thoughts on that. One is I think if this is to work, the administrator would need to be on contract directly with PDSC. I think that really means that OPDS has to select the administrator. The way this is written, the informal advisory board would be selecting the administrator and I think, if you are going to keep that as an informal advisory board and not part of the organization with structure and control, then OPDS really needs to be on the other side of the contract with the administrator. For this to work, I think the administrator has to have real authority, not just a role in processing paper, but responsibility for the assignment of cases along with the authority to match cases to attorney competence. That I think is essential. So those were my concerns.

I do really appreciate what has happened by way of the dialogue that has gone on with the Lane County providers. I am very mindful that we want to find a structure that has support from the legal community. I laughed with Peter, who suggested that we have a June 30 date for turning over sovereignty to Lane County. But we do want this to be something that the community and the providers in the community feel good about. So I am certainly willing to work these issues through to see if we can't come out with a program that works.

483 S. Gorham Mr. Chair, may I ask a few questions before you let these people respond?

485 Chair Ellis I am going to give preference to the two Commissioners for a minute, Steve.

487 S. McCrea On the number of lawyers, my recollection of the testimony was that in 2003 there were 7,000 cases, the number the court-appointed list got was 26 percent as opposed to 20 percent, and 410 of the cases were privately retained cases. It is my belief, Barnes, that the number of lawyers who are on the court-appointed list under this model will go down. It is going to be less than the 39 people whose names were on the list that Dave Factor gave us. And there was some concern about whether that was an accurate list. Many of the people on that original list were people who only took misdemeanor cases, so that is going to be different criteria. As somebody said during one of the discussions, just because somebody is on the list does not mean that they are going to get cases, at least all the time. Based on the budget situation in Lane County, at least as reported either yesterday or today in The Register Guard, the Lane County District Attorney is going to discontinue prosecuting a number of misdemeanor cases. So the number of misdemeanors available for appointment through the court-appointed list is going to go down. Now that being said, I agree with you in terms of the question of too many lawyers. There is not going to be enough caseload for people to be able to build expertise, and that is something that has been a concern and has been looked at by federal defenders and by the panel that administers the CJA attorneys. There has to be enough of a caseload. But I think what we do is we have the administrator and the panel set up standards and guidelines. They are going to have everyone apply and they are going to have to make hard decisions about who is going to be on the list and what kind of cases they are going to be doing. In response to the question about this being an informal advisory board, it is my understanding, and John can say if his understanding is different, that this five- to three-member panel is not just an informal advisory board, but has power and authority to set policy and work with the administrator, and will have to determine whether that board would have authority to, for example, apply to PDSC to get rid of the administrator. But they are more like a board of directors than an informal advisory panel in my view. So they are going to have to make determinations about the panel of lawyers, the size of the panel and what kind of cases the

lawyers are going to be qualified to take. In terms of the compensation system, I agree with you, Barnes. I think it requires an hourly system. I understand the argument that the unit pricing offers an incentive and reward for efficiency. But I come back to the point that Lane County is different and that Lane County lawyers have been doing it and doing it well. And they haven't been costing the system a whole lot of money. As for the cost of the administrator, I guess I would propose that the Lane County administrator position be set up very much like the CJ panel administrator in Steve Wax's office in Portland. That is the Lane County court-appointed attorneys, the ones on the list, would send their vouchers to the administrator for initial review before they would go on to Salem. That happens with the federal system. That way errors can be dealt with before they go to Salem, which would presumably save Kathryn and her shop time and money. The payments not being consistent and the potential for delay are things that the Lane County lawyers are aware of and they can speak for themselves. But I think it is something they are willing to do because this is important to them. Okay John, it is up to you now.

- 552 J. Potter I think you have covered the points very well. The number of lawyers is an issue. It is a double-edged sword, once again. It allows the administrator greater flexibility. There are more people from which the administrator can select to do the work. And it actually allows flexibility among the lawyers themselves in that not all of these folks want to be taking a large number of cases. Some of them want a few cases, some of them want more cases, and some of them wish to take a break once in awhile. Having a larger number allows somebody to tell the administrator, "You know, take me off the list for the next three months or next month." So there are some advantages to a greater number as well. Regarding the compensation issues, you are right, it would be an hourly rate. I can't see a way to make it a unit-based system. Marion County has a consortium, they are using an hourly rate and it seems to work. No one has suggested that Lane County is costing the state more money than other counties in the state. In fact, we heard some things that actually suggested it was cheaper than some of the consortiums. Clearly, having the administrator undertake some sort of review process, similar to what Steve Gorham does prior to sending in statements, is a good idea and we are certainly amenable to that. That is a good suggestion and it will help Kathryn I think, if the bills have undergone some sort of local review.
- 582 P. Ozanne John and Shaun, regarding this review, I assume you are implying that this would be somewhat of a gatekeeper function to determine in a particular case whether the total hours were appropriate for the kind of case. Would that be part of the review?
- 587 S. McCrea Yes.
- 588 J. Potter Once again, we modeled what Gorham's outfit has done in that regard. They have a sense of how many dollars a DUI case would be and how many dollars a normal Measure 11 would be. So there are already some parameters. They would have to be adjusted for Lane County because there are going to be different charges and practices and different variables, but we have a starting place already. I think we would draw on Marion County.
- 596 Martha Roberts Regarding the specialization issue, which is I think a good thing to focus on; when we looked at our existing list, we think we have about a third of the attorneys with more than 20 years criminal experience. They are in private practice and they also do federal appointments. They also practice in other areas of the law, but are heavily concentrated in criminal law and have a lot of experience. About a third had over 10 years of experience. The other third were new people coming up through the defense clinic at the University of Oregon. There was a lot of assistance within that group on an informal basis, so that everyone is very open to anyone wanting help. The more experienced people are always helping the less experienced people and it has worked.
- 620 S. Gorham Shaun and John answered one of my questions about the responsibility for the costs, which I think is important. My only question is what is going to prevent, or what check or balance do you have to prevent, natural jealousies or infighting when you have an administrator who is really deciding all of these issues, including who gets the cases. One of the problems as I have seen it with lists controlled by judges is just that. You have people accusing the judges, rightfully or wrongfully,

that they are playing favorites—they are giving choice cases to certain attorneys and that kind of thing. Have you thought about that given the role of the administrator?

- 630 J. Potter Off the top of my head, I don't know how you set up the check and balance that you are talking about. All these leadership and administrative roles are personality driven and that is why it is so important to have the right person at the right time. If it turns out that somebody who is selected as administrator is clearly showing favoritism or discriminating in one form or another, then OPDS or the Commission would need to step in.
- 641 Dorothy Morey As a group down there, we have discussed just exactly that, because we were trying to put a group together. I think the way that we had intended to try to deal with, and it still may be something that can go with the proposal you have, is we simply planned to have something that was transparent, maybe on a weekly basis, or a monthly basis, or a daily basis, where we could see how many cases of what type we had gotten—who they had gone to and who hadn't gotten any appointments and how long people had been without appointments not by their choice. There are computer programs that can be set up to do these kinds of things. I think transparency is the word here. People just need to know what is going on and then there is much less of the infighting.
- 657 Tom Crabtree Barnes, I don't think you would be necessarily limited to just an hourly rate system. That is the way certainly that most lists operate. But I think OPDS could establish rates for each type case, using the Lane County Public Defender contract as a basis. Say, for PV's the rate is \$197 bucks each, for Measure 11 it is \$1,800 or whatever the numbers happen to be. If the concern is fixing costs, that would be a way to do it.
- 670 Chair Ellis That doesn't really get us there though because contracting on a unit basis gives us some protection on escalating costs. It averages cases so that the lower cost case is intermixed with the higher cost to come up with an average cost. If you try to do unit pricing on any one case you don't get that. So I'm not sure how that would work.
- 677 T. Crabtree I think it would work from the state's end, but maybe the bigger question is would the attorneys on the list be willing to do it that way. But your cost could be limited. The only issue you would have there would be the caseload. You know what the percentage is. But if you are paying the same case rates that Lane County Public Defender is getting then your costs are fixed to those rates.
- 684 Chair Ellis Lane County Public Defender takes a large enough volume that a case rate will be spread out—the case that settles fairly early and the case that goes quite a bit further.
- 691 T. Crabtree Right. So that would be the issues for the attorneys.
- 692 Chair Ellis But no one attorney under this model would have enough cases that you could do this.
- 694 J. Stevens If you do it that way, then don't you get to the point where everybody is going to take a case that they are going to come in under budget on. And nobody is going to take a case that will go over budget. I don't see any way around that.
- 700 David Hocraffer Sort of tying into that, and certainly Steve Gorham has the model of how to do it with the hourly rate system, you are kind of assuming that everyone wants to have their practice built around the contract cases that come in, whether there is a list or a consortium. At this stage, you don't know who is going to be on the list and who is not, or who is going to be within the consortium and who is not. You don't know among those attorneys whether you have three attorneys who say, "You know, I would like to keep at least half my caseload of this type of case," and another bunch of them saying, "You know, I want to do two or three cases a month and that is it." It may resolve itself just on that model alone. It takes the administrator or somebody being able to figure out within that group of people who at this stage are applying to say how much does everybody want here because it may be that it works out pretty close; or it may be that you won't get everything you want, but within some range that they are able to get not necessarily every type of case but some

type of a spread or mix that they are able to have at least some predictability under either model about how much of what type of case is going to come in over the course of a year's time. It may resolve itself under either model, but that is some of the preliminary work that needs to be figured out among the attorneys there. I'm curious how much is going to be brought down from the PDSC to the attorneys saying, "Here is the format, here is what you are doing, here is how you are going to do it, here is how much you are going to get, that's the way it is." You sort of lose the whole independent contractor status issue, which is, of course, part of your model contract. At what point do you cross that line? There are some concerns about that. Some of the preliminary things have to be resolved by the people who are submitting the RFP. First of all to decide if that is what they want to submit. I'm not clear if you are saying you have one format only and you are asking for RFP's on that; or are you are throwing it open to see whether you will get somebody proposing a consortium, somebody else proposing a list format? Are you able to compare what those two groups of attorneys are that are submitting this? Those are all questions that I am not real clear on, but I see a lot of land mines in the whole process.

748 C. Hansen I just have a lot of confidence in the lawyers in Lane County. They have wrestled with these kinds of distribution of case issues now for at least 10 years. There is a sense of collegiality down there that is remarkable. I wouldn't call it a commune or that sort of thing. And I know John was being tongue-in-cheek. But there is a certain society there and I think, if you pick a strong administrator and put them to work, they are going to do the job and they are going to come in on budget.

760 Chair Ellis Let me ask the Commission to comment on this issue of who selects the members of the oversight board. I think the way the draft is written there are two –

763 J. Potter Actually three. The PD's office would select one member and the other two would be approved by the Commission. When you say that it is sort of implicit that we are selecting because we are approving, but again, your question is: how do we get those names to approve? Do people say we want to be on the panel?

776 Chair Ellis Let me give one example. Thirty-five years ago, Jim Hennings was it when we started MPD. It was formed as a non-profit corporation, but the directors are appointed by outside sources. So originally we had a contract with the City of Portland, and they appointed one member of the board, the Chief Justice has been another appointment source, and we had the State Bar as an appointing source. When we moved to Washington County, we had the County Commissioners appoint a member. So that the model there was to have a board, but it was not a self-perpetuating board. It was not a board that providers had any say in the selection. It was a board where public entities that had an interest in our success appointed board members. I'm not sure that completely fits, but I could see, for example, letting the Lane County Bar Association be an appointing source. They have a structure -

802 M. Roberts We talked about that. (tape ends)

## **TAPE 2; SIDE B**

073 J. Potter You have a Criminal Law Section of the Lane County Bar that could make one of the appointments. It could also be the whole Lane County Bar as an outside appointing authority. They have to have a fairly substantial interest in the outcome. I wouldn't want the Lane County Commissioners to be an appointing authority. They are not going to have the breadth of knowledge.

083 S. McCrea Barnes, I'm not philosophically opposed to that, but I echo John's concern. I hearken back to the concerns that Presiding Judge Bearden and Judge Rasmussen had. The whole point here it seems to me is to have some continuity. While we might not want the panel in terms of being a board to be self-perpetuating, we do want a group that has knowledge, interest and commitment to all of the things that we are trying to achieve. That's why it seems to me that the categories of people that

- have been set out in the proposal are appropriate and helpful to accomplish what we are trying to do. But I am certainly open to what you are saying.
- 091 P. Ozanne What about the three designated members picking the other two, subject to the approval of the Commission, or recommending them subject to the approval of the Commission? You would have the three members who are already defined selecting the other two subject to your approval.
- 097 J. Stevens Can I ask some questions about the administrator? If the Commission appoints the administrator –
- 099 Chair Ellis The Commission would contract with an administrator and I assume what would happen is we would send out applications and people could apply.
- 103 J. Stevens This feels awfully hands on in a way that the consortium would not be for us, frankly. Do we want that? Is that our role?
- 106 Chair Ellis I think you could do this if we revisit it two years into the future. That at least is the only way I would be supportive of this, if I had confidence that we really did have a strong administrator.
- 109 J. Stevens I can understand that.
- 110 Chair Ellis We are going to end up paying the administrator, so it seems logical to me that –
- 110 J. Stevens We are only going to pay somebody we want to pay.
- 110 Chair Ellis Right.
- 111 Chief Justice Carson And that is doing the job.
- 112 Chair Ellis And we want some assurance from the point of view of the expenditure of public money that we are really getting the things we are talking about.
- 114 J. Hennings What if your administrator was recommended by this advisory board and then accepted by the Commission? It seems to me that you want somebody on the scene locally that that person is responsible to. I think the best way still is a corporate structure, but in the absence of that, if the recommendation has to come from that advisory committee, then that person is going to feel responsible to that local entity. I think that would be probably the best thing because ultimately the system –
- 122 Chair Ellis I will be very candid about my concern. I am concerned that the brotherhood principle in Lane County will result in a Rolodex appointment system, and I think that is terrible. So I am looking for a way to break that chain and have someone with authority and responsibility to try match cases to competence levels—to really try to manage this program.
- 131 J. Hennings I agree with that completely. You have that if you have the ultimate authority to say that this person is appropriate. What I would suggest is that the recommendation come from this advisory committee regarding who is the best qualified person to perform that function; that you give to that local group the ability to say that this is the person, subject to you actually approving that person.
- 137 J. Potter So would the applicants under that scheme send their applications to the advisory committee?
- 138 J. Hennings The advisory committee. And the committee would say to this Commission here is the person or persons –
- 139 Chair Ellis What if you reversed it and had the applications coming to OPDS, but before deciding among the applicants OPDS, get input from the advisory committee?

- 142 J. Hennings That may work. I still think –
- 143 Chair Ellis I hear your concept, but you know it is part of the puzzle with a state-funded system to have accountability and still have individualized community responses to service delivery.
- 147 J. Hennings If you are going to have the kind of control, what you want locally is this person to be the Commission’s person, basically your employee. Then hire someone who is your employee. Or is it somebody who is truly representative, rigorously so, but representative of the local county? It seems to me you are better off getting to an administrative director-type situation like Gorham has.
- 152 Chair Ellis If you went the consortium route, you would have a structure to deal with. You would probably have a non-profit corporate entity with a board and someone to deal with who has the responsibility to manage the program. And you could deal with them on a contract unit basis. But the desire of the Lane County Bar to make it an open system has moved us away from any body that we really can deal with. So that is why I personally tend to think, at least in the first couple of years, that administrator has to be someone that we have real confidence in.
- 163 J. Potter I understand your concerns, Barnes. And I would endorse your concept, even though I am troubled by it from a view of looking like we are being heavy-handed. I think people understand what we are doing. And they understand your concern and I think they would be amenable to that. I think there are going to be those that stand up and say, “Well wait a minute, you didn’t pick the Lane County Public Defender, you didn’t pick the Metropolitan Public Defender, what is the deal in Lane County?” I think you just articulated the reason, and I think folks are going to understand that, and that we will review it in two years.
- 170 Chair Ellis I do see this structure as one that is going to unfold over time. There is a lot of flex in what we are doing here. Two years from now we may all look at it and say we need to move it in this direction or that direction.
- 174 J. Rieke I am having a little trouble focusing in on just the quantity of work this person is supposed to be doing. Is this a full-time position or part-time position?
- 176 Chair Ellis My own guess is it is probably fifty percent of a person’s time.
- 177 J. Rieke So, is the problem in part, if you are trying to get outside the province, you have got to have somebody who is coming from elsewhere?
- 180 Chair Ellis The person is going to be a Lane County person.
- 182 J. Rieke Oh, it’s going to be a local person who is not provincial.
- 184 Chair Ellis Yeah, I think that is right.
- 185 J. Brown I have to confess I am reflecting that, several weeks ago when we met in Corvallis, I don’t think this was stated anywhere except in my own mind, but I felt as if what we were telling the people in Benton County was, in effect, the Commission has a duty to provide for legal services for the indigent in Benton County, but we don’t have to provide it to anybody in particular. And we are going to set standards and we are going to set objectives and policies, and then it is up to whoever wants to provide those services to meet those criteria. I’m sort of feeling today as if there is something kind of backwards here. We are working with bailing wire and twine, trying to make something that is kind of equivalent to what we started out to create, and I’m troubled by that. It is too much work in the sense that it takes us out of our role. So, if it was simply just enough to say, “Alright, if you feel you need 20 lawyers in Lane County in a consortium, then maybe that is a local condition.” But trying to reconstruct it to replicate what was fundamentally our original objective just seems like it is a path to trouble.

- 204 Chair Ellis I agree with a lot of what I think you just said, although I don't think I fully understood it.
- 205 J. Brown That happens a lot.
- 206 Chair Ellis But you know, if it were me alone, it is no secret from the last meeting, I was very outspoken that I thought a consortium was a much better structure to go with. But I am mindful of the fact that we have two commissioners who are from Lane County and who have spent a lot of effort talking with the Lane County legal community. And they never come back saying, "Yes, a consortium would be fine." They always come back with a modified list and I think it would not be smart for us to ignore the fact that two of our own who know that community best keep coming back that way.
- 218 Chief Justice Carson I won't repeat my speech from our last meeting in Room 50 of the Capitol, but I have grave misgivings that a modified list will work. That is kind of what I have heard from several meetings in Eugene. I commend our two members from Lane County, who did all this work, started with the list, and took those things that are wrong with the list, from what we heard from the lawyers and judges in Lane County, and from what we see for ourselves, that don't work. I give credit to the two of them for doing it. I would like to meet them halfway. I don't have a vote, so I am not a threat to anybody. I really think we need to agree that, if there is any possibility of having a modified list, we need to eliminate those things that would guarantee failure. One of them would be to have a self-managed list or one managed by the trial court administrator or the presiding judge, because that is where we are now and it is not working. So I think we have to move toward the consortium, but maybe there is a middle ground. I commented at the last meeting with the old saying that you can't stay dry and jump across the river in two jumps. But, on the other hand, maybe we can create a new path. I'm not sure we are there yet. I agree with you and a lot of people that it ought to be someone from Lane County. But I think what we need to do is settle upon the two or three key issues and make sure it is not just going to be a list. I think from the good work that John and Shaun have done, that Mary Ann and Karsten have tentatively said might work, and they were two of the strongest opponents as you recall of what we have now. The judges just don't want to go down that road anymore. I would think that we provide either one way or the other, but maybe the bold thing to do would be to make it a two-year period, not a one-year period, and have at least three that are ex-officio members with a vote, designated by the presiding judge, by the Commission or by the Lane County Public Defender and present it either to us or the advisory board. Then the question is how do we get an administrator. Because remember, if we are going to go with a half-time position, that person has to live in the community, which I think is the preferred model. But that person will have to continue to deal with the lawyers, which is a pull in one direction, and that person will also have to deal with us. And when the Commission pays for it, the taxpayers pay for it, so that provides the answer of who controls the administrator.
- 259 M. Roberts Just two points. One reason we feel strongly about this kind of a model versus a consortium is that it allows new attorneys to receive some training in the community. I received that training and many of my colleagues have and we know how important it is. The other thing is, Lane County is a lot smaller than Portland and actually Salem, as I understand, so we are able to be more collegial. We occupy a much smaller geographic space. We run into each other every day. If you do give us this opportunity to try this, you can bet that we are going to be putting everything into it because we want to prove that it can work. The judges have no incentive to make it work. They don't have the time or the money or the staff. They are happy I think to not have to look at trying to do this because they couldn't and we can with your help. One of the steps that might come out of this, if for some reason this particular form doesn't meet your approval in two years, is to incorporate as a non-profit corporation. We just like being able to bring in students from the defense clinic when they become lawyers and have a way to help them out. We have a lot of grads from the law school who want to stay in Eugene and have been in the defense clinic at PDS. I was at PDS for 11 years. We all mentored a student every year and we are used to doing that. We are very excited about this opportunity because we have never had a role in the management of what we do. I think we have a large incentive to make it work and wanted you to know that is how we feel about it.

- 290 Chair Ellis Thank you. One other topic I wanted to make sure we talked about is the way the present system works, where a judge has to appoint an individual. I know from some of the testimony we heard that they will appoint someone and then learn later that the lawyer can't take the case. Two days go by and someone is in custody waiting for a lawyer to show up. It is a very untidy process. I think I understand that in Lane County, since such a high number of cases go to the public defender, that it might work that the public defender gets all the initial appointments and then they would go to the administrator with the cases that ought to be either conflicts or other cases. And they will have covered the cases in the short term and then the administrator can find the right person for the case and the case would then move forward. Something along those lines.
- 307 S. McCrea Yes, and ideally one of the things that Dave Factor, the Lane County Trial Court Administrator talked about at our Lane County meeting was that there is no mechanism for someone who is arrested on a Friday evening. In an ideal world, best-case scenario, we would like to have a system where the notice gets provided to somebody at the Public Defender's office. Or there is a home number for the administrator so they can get ahold of somebody, so there is a lawyer with that person when he is arraigned.
- 314 Chair Ellis Are you guys alright with the proposal that I think Peter had? If you are going to have a group of five for the first year, that the court appoint one, Lane PD appoint one, that the Bar appoint, and that one of you is also on it, and then those four could select the fifth. Something like that.
- 320 S. McCrea I can live with that. My only concern is that I want to make sure the Bar appoints someone who has, like I said before, the knowledge and commitment. That is my only concern.
- 324 Bob Homan Mr. Chair, we actually made a proposal to Judge Bearden that PDS take all cases. We would get discovery at arraignments as well, do our conflict checks before arrangements, and then portion those cases out to this group, if the Commission goes that route, the same day that they are arraigned. I talked to Jim Hennings about the way they do this in Portland.
- 333 K. Aylward So then why doesn't that make Lane PD the administrator? If they are dispersing the cases, they have a mentoring system, they have an existing contract that could be supplemented to provide for the additional administration.
- 336 B. Homan I think because of the conflict problem.
- 337 K. Aylward But you are taking the cases now. Isn't that what you were just suggesting—have everything come into your office and those that are either conflicts or beyond your quota –
- 339 B. Homan Right, just hand them to their administrator is what our proposal was.
- 340 J. Stevens Is there a conflict? Obviously I'm not a lawyer, but would there be a conflict to have a paid administrator, who may or may not be a lawyer, parceling out cases to Lane PD or to Shaun? If Lane PD were acting as the administrator and then parceling cases out to people on the list, is that a conflict?
- 350 Chair Ellis It could be. Let's say in a case where they represent the co-defendant, should they really be in the business of assigning the other lawyer?
- 353 B. Homan The reason this would work in our county is because we staff arraignments every day. We are there to pick the cases up and we can just bring them back and assign them. I don't think it creates any –
- 354 Chair Ellis But you would be assigning to the administrator.
- 355 B. Homan Correct.

356 Chief Justice Carson And match the skill of the lawyer with the complexity of the case.

357 B. Homan Correct.

358 Chair Ellis So –

358 J. Potter Can I ask for clarification of the Chief’s comments. Did I understand that you would change this three-member panel a one-year term to a five-member panel for two years.

361 Chief Justice Carson Right. In one year, it is hard to clear your throat. For this to really work, we need two years of experience; or we may want to decide one year is all we could stand. One year is just too short to give it a fair try.

369 Chair Ellis I’m thinking like a corporate lawyer now. The contract would be between us and the administrator because we are not talking about any other legal entity, right?

374 S. McCrea Right.

374 Chair Ellis Peter, you and Kathryn need to speak up if there is not enough content in the discussion to put together, not really an RFP, it is more an application and we flesh out what we are doing. Hopefully, this superhuman person is going to step forward. I’m frankly counting on the good Lane County lawyers, many of whom are here today, to help us find a person who can really carry this off.

387 J. Brown Phil Jackson might be available.

388 Chair Ellis I was thinking of Shaquille himself. Are we at a point where someone wants to make a motion?

390 J. Potter **MOTION:** J. Potter - I would like to move that we adopt the model list system as proposed with modifications that the oversight, five-member panel be for a two-year duration. S. McCrea: 2<sup>nd</sup>

392 Chair Ellis The five-member panel –

393 J. Potter I will modify that as well. The panel is to be made up of the two Lane County Bar members, the Circuit Court Presiding Judge or designee, a representative from the Commission, rather than the General Counsel from OPDS.

400 Chair Ellis So it is a group of five, as I heard you say. The Lane County Bar –

401 J. Potter The Lane County Bar, there is two from the Bar, one from Lane County Public Defender, one from the Commission, one from the court. S. McCrea: 2<sup>nd</sup> as amended.

405 P. Ozanne The selection process would be three designated members, who would pick the other two, subject to the Commission’s approval?

407 Chair Ellis I think the way he phrased it you had all five. You have someone from the Commission --

411 P. Ozanne The Lane County Bar would pick two.

412 Chair Ellis And the PD one and the court one.

412 J. Potter That is the way it was stated, but I’m certainly willing to modify it. Peter’s idea was to modify that to say the Lane County Bar doesn’t pick the two from the Bar. Then the three other oversight committee members pick the other two.

- 416 Chair Ellis I'm going to choose Shaun because I think she volunteered. You would have Shaun, the court designee and the Lane PD designee, who would pick two others, who would be Lane County Bar members.
- 422 P. Ozanne I just wanted to clarify.
- 423 J. Potter And the Chief stated it that way too.
- 424 Chair Ellis With that modification, does the second accept the modification?
- 424 S. McCrea 2<sup>nd</sup> as modified.
- 425 Chair Ellis Any other questions or comments?
- 426 J. Stevens I can't stand it, I'm sorry. It just seems to me we are dancing all around a consortium and building something that is a consortium, and I don't know why we are bothering. I don't know why we just don't go to a consortium. We could create a consortium to fit everybody's needs and we are not doing it.
- 432 Chair Ellis You may be right but the culture in Lane County has spoken.
- 433 J. Stevens I do understand it, but I just think it needs to be stated very clearly what we are really doing is creating a consortium without the name.
- 436 Chair Ellis Two years from now, when we visit this again, let's see where we are.  
**VOTE: 5-0**, hearing no objection, the motion **CARRIES**
- 440 Chair Ellis I want to thank the Lane County people who came today and our two Commissioners. Hopefully, this will all work.

**Agenda Item No. 4 Approval of Draft Performance Measures**

- 447 Chair Ellis Back to Agenda Item No. 4, approval of Draft Performance Measures for the Legislative Audit Committee.
- 448 K. Aylward The Public Defense Services Commission pursuant to a budget note is being asked to present to the Joint Legislative Audit Committee (JLAC) draft performance measures. This is an exercise that all state agencies went through last biennium to develop key performance measures for their agency. At this point ours are drafted. It is a standard form Links to Oregon Benchmarks which is Attachment 5 in the packet. I went to the training and watched the slide show and I understand the concept—the difference between outputs and outcomes. For example, if you are an agency that inoculates children, then an output measure is how many did the agency inoculate. An outcome measure would be the reduced incidence of the disease being inoculated against. JLAC really wants agencies to measure outcomes. But in our case we are not charged with producing a certain result. Our mission is to provide quality representation, cost-efficiently, to those who are indigent. So you either get court-appointed counsel or you don't.
- To the extent you could measure the quality and cost-efficiency in terms of outcome, we tried. In our internal discussions, we thought maybe access to equal justice was our high-level outcome. So I put all of this together and submitted it to the analyst at the Oregon Progress Board (which is responsible for the development of state agency benchmarks). She took a look at it and said you don't need that high-level outcome. Your mission statement says it all. You are a "procedural" agency. I said with all our key performance measures, we are just measuring output, not outcomes. She said, since you're a procedural agency, you have presented exactly what it is you are trying to measure.

Each of the key performance measures cost-effective service delivery. If you pay the bills quickly, at least you might have providers that will work effectively because they know they will get paid quickly. So we pulled this together. This is a major project that is tied to every agency's budget and follows the agency through the entire budget process. You will see here that column 6 has targets for June 30, 2007. You are supposed to set a target for yourself and there is an annual report that the Executive Director has to make. As we go through this process and at some point don't meet key performance measures, the question that the legislature will ask is: "Why are you not performing?" Generally the answer is: "You didn't give us enough money to do as good a job as we'd hoped to." I'm not terribly comfortable at this point with setting measures for a new agency like ours. Many of these things have never been measured before. The appellate backlog is the only thing that has been measured, and that's only recently. But as far as the other measures, we will know the number of fee statements that are reduced due to incorrect billing, for example. People haven't worked with our office before and they call up and we say, "No, you have to submit a receipt. No, you can't bill for that." And as we inform them about our procedures, there will be fewer and fewer errors. Now obviously, we can't get down to zero errors. So we have concluded that right around the 3 percent mark, most everyone should understand the system and will be billing appropriately, except for the 3 percent careless or human error. I'm not terribly confident about these numbers. But we are only required to submit a draft at this point, and I am sure they will advise us if they would like us to use something different with our performance measures.

520 P. Ozanne Kathryn, our Management Team and I really struggled with these concepts. We kicked this around a lot in our Management Team meeting. I appreciate Kathryn's efforts, in particular, to try and pull this all together. I really do believe that state agencies should be accountable to the Legislature and the public. This is an effort that I guess started a couple of governors ago to tell the citizens what Oregon state government accomplishes. The Progress Board's analyst may be right when she called us a "procedural" agency. But at the core of the public defense function is its contribution to the quality of justice. Then the question is: how do you measure justice? I would like to continue to refine these measures and try to better articulate in a way that resonates with the public and the Legislature what our key contributions are to the state's justice system and how we might measure them. I think in representing juveniles and families we are making Oregon a safer and healthier place for all of us to live. I hope all of you out there in the audience help us think in our future efforts at developing benchmarks that describe our core functions and provide a credible means to tell ourselves and others how we are doing in performing them. If we come up with benchmarks that tell Oregonians how we fit into their justice system and way of life, I think we will unlock the key to getting more public and legislative support. You know, we talk about the constitution and we talk about justice, and some people listen. But I'm not yet satisfied with our message or this effort to measure our performance. I think we have to keep trying and I think this is a good start. We also have to remember that the Commission has already developed the strategic plan that I think is very effective. So we just need to keep trying and, with help from others, maybe we will be able to articulate our ultimate goals and outcomes better than this in the future.

548 J. Hennings My only suggestion is to remove the negative benchmarks. For instance, the percent of statements reduced due to incorrect billing. What you are getting at is . . . or does everyone know then the percent of incorrect billings could be less than 3%? And take the item, complaints regarding payment of expenses determined to be founded. Maybe what you are talking about there is that those complaints are handled quickly and you put in a backlog number there, instead of assuming . . . in other words, if everything was working smoothly, exactly the way you wanted, you would have to come out to us and say, "Would you make some mistakes so we can get up to the percent level." That doesn't make sense at all. My only suggestion is, don't presume in your benchmarks that there is evilness out there. Use your benchmarks to say what normal error rates are. Whether it helps with the budget or whatever, you are really talking about your normal error rate—that everything is being handled in a timely manner.

570 Chair Ellis Is this something that we have to approve today?

571 K. Aylward I think, as a draft, it might be better if you approve that it be presented as a draft to the JLAC.

574 P. Ozanne We will return with any revisions that we come up with our that JLAC recommends.

575 Chair Ellis You will keep Jim's comments in mind?

575 P. Ozanne Sure. But JLAC will ask if the draft has been approved as a draft by the Commission. So that is why I put it on the agenda as an Action Item. But the draft will subject to change. We are free to come back to you with another draft, and we will.

581 Chair Ellis Any other questions or comments?

585 J. Rieke Goal #3 has to do with contractual agreements signed before expiration of the previous contract, and the goal is 90%. They have the Commission approving the practice of continuing to operate without a contract when you say 90% instead of 100%.

590 K. Aylward We are trying to come up with ways to measure whether we in our office are doing a good job. Well, how do we know that? Did we get new contracts negotiated? Did we chip away at the backlog? Did we pay the bills? What we're really trying to measure is: How good a job are the CBS employees doing? If you have a contract in place, then there is someone there to deliver services and there is less disruption in the court process or the client's life. Attorneys are available because you have the continuity of service provided. In the past, we have reached June 30 and there would be a one-month extension for the purposes of renegotiation, and one more month, and one more month, and we would just allow ourselves to continue to have extensions because we didn't have the staff, because we couldn't get contracts negotiated in a timely manner. I think that is important to do. So that seems to be a valid measure.

608 J. Stevens Kathryn is this an improvement at 90 percent?

609 K. Aylward Absolutely.

610 J. Potter Joe, you want us to be perfect by 2007?

611 J. Rieke The way it is stated, it seems to me, that what you are talking about is reducing the number of extensions. If that is what that means, then that is what that means. 90 percent is something less than perfect, and I know Barnes has rules about that.

616 Chair Ellis Perfect is the enemy of the good.

619 K. Aylward Well if you are negotiating with someone and it is June 29, and they know that the Commission has said, "You will not have an extension," it makes it pretty hard not to cave on something that you don't want. I just wouldn't want to be backed into that type of a corner.

625 J. Rieke Wouldn't want anybody caving.

26 Chair Ellis Motion to approve as a draft.  
**MOTION:** S. McCrea moved to approve as draft; J. Potter: 2nd  
**VOTE 5-0**, hearing no objection, the motion **CARRIES**

628 Chair Ellis Any new business?

629 P. Ozanne Excuse me, Barnes. We have a couple of matters under Agenda Item No. 5 that we still need some direction on.

**Agenda Item No. 5 Region 4 Service Delivery Plans for Linn and Lincoln**

- 633 P. Ozanne With regard to Linn and Lincoln Counties, and this is very brief, it is just a matter of following up on our Region 4 Report, Part II. The Commission deliberated and essentially agreed with our observations in Linn County that conditions were generally good. The consortium there was working pretty effectively. The one area of improvement identified in the Report as a good first step in Linn County was participation by our contractor and OPDS in assisting the court and prosecutor in the development of a more effective Early Disposition Program that satisfied defense standards for such programs. Previously, we understood that there had been no involvement by the defense bar in the development of EDPs in Linn County. We also understand the OCDLA Board of Directors has developed defense standards for EDPs, which we hope to bring to the Commission soon for review and approval. But for now, I am asking the Commission to authorize me to write a letter to the Presiding Judge and District Attorney in Linn County. In my letter, we wouldn't even presume to be recommending an Early Disposition Program. I would just say that, in the event you decide to reconsider and develop an Early Disposition Program in Linn County, the Commission has authorized me to assist, along with our colleagues in the county, in the development of a new EDP, and probably attach our new defense standards or guidelines for EDPs. That is the action I seek from the Commission in Linn County.
- 660 Chair Ellis Sounds right. You got it.
- 661 P. Ozanne In Lincoln County, there are issues we will probably come back to. While by no means unique to Lincoln County, we were concerned about the apparent absence of any plan of succession or methods to recruit and train new public defense lawyers as experienced lawyers retire. What plans can our contractors in that county offer to assure us that we can find new people in the county to provide public defense services? That was the primary question or concern that we raised in our current service delivery review of Lincoln County. It would probably not become a condition in their contract. We are simply saying that we would like our contractors' help in that county to develop a proposal for ensuring a continuing public defense capacity there, which would be presented to the Commission for review and approval. That proposal would probably help us in other parts of the state. I would be inclined to suggest that the contractors in Lincoln County develop their proposal by the end of this year. Just as an aside, the contractors' representative has already indicated to me their interest in responding. I also understand one of our contractors there has recently hired a new lawyer. So I am confident that they will cooperate. But I would like to see a specific proposal from our contractors in Lincoln County and a date certain to complete it, so I need your authority to request that.
- 684 Chair Ellis You have got it. Any new business?
- 687 J. Hennings Barnes, I think you are looking at me. As a member of the House of Delegates of the State Bar, I am going to be presenting a resolution to the House of Delegates to support adequate funding for indigent defense. It is still in draft stage. I have asked that John Connors present it to the board of OCDLA. Peter has a copy of it as well. It basically recites that it is the Legislature that decides there are crimes or actions such as civil commitments and juvenile matters. There is a constitutional requirement that counsel be appointed and paid for in those functions, and the amount of money that is paid for indigent defense is substantially below the market for legal services, raising a serious question about the quality of those services. The resolution urges the Bar to do whatever it can with the Legislature to provide sufficient funding in the next biennium for appropriate, adequate and quality services in indigent services. It is the motion that would have been presented from our former Lane County associate, but now he is back in DC. So it has fallen on me to do this. If anyone has any comments or thoughts I still have this in draft stage and I have got about a month.
- 718 P. Ozanne I don't personally have any objection, and I think you ought to do it. Angel Lopez, the past president of the Bar, and I have spoken and we met together with the Board of Bar Governors. As I understood their response at that meeting, they are willing to actually accompany us in the next

session's budget hearings, along with the past, present and future Bar presidents. This will certainly be helpful.

730 Angel Lopez You know, Jim, I think what might be helpful is, if we could all get together as a group, that being you and the PDSC, to come up with a dollar amount. Because, one thing is to propose a theory; and another is to propose a goal. I think, if we are going to get there and help the legislature get us there, a solid dollar goal is what we need.

740 J. Hennings I just didn't think I could get that from the Bar.

741 A. Lopez Why not? You have my support.

745 Chair Ellis Okay any thing else? Is there a motion to adjourn?  
**MOTION:** S. McCrea moved to adjourn the meeting; J. Potter: 2<sup>nd</sup>  
**VOTE 5-0;** hearing no objection the motion **CARRIES**

[The meeting was adjourned at 3:35 p.m.]

ORS 151.219(1) The public defense services executive director shall:

(d) Negotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. Contracts may be negotiated with any or all of the following: attorneys, law firms, groups of attorneys or law firms organized as consortia. Pursuant to a contract negotiated under this subsection a consortium may be the exclusive provider of legal services at state expense in a particular county, region or jurisdiction. For purposes of this subsection a “consortium” is a group of attorneys or law firms that is formed solely for the purpose of providing contract services to persons qualifying for court-appointed legal representation. No contract so negotiated is binding or enforceable until the contract has been reviewed and approved by the commission as provided in ORS 151.216.

ORS 656.740 exempts from state antitrust law: (6) Any other activity specifically authorized under state law or local ordinance.

Presenter: Kathryn Aylward

## Public Defense Services Commission Meeting Action Item August 12, 2004

**Issue**

PDSC approval of Preliminary Agreements (PAs) for contracts that begin July 1, 2004.

**Discussion**

All PAs have been reviewed in detail and approved by the Director of Contract and Business Services Division. Actual contract documents will be signed pending approval from the PDSC. All agreements below are operating under fully executed 18-month PAs, except #15 which is preliminarily a one-year agreement, and #17 for which there is a contract document with a term through 3/31/06 to be signed pending Commission approval.

**Recommendation**

Approve all preliminary agreements listed below.

**Required Commission Action**

Vote to approve all preliminary agreements listed below.

	Contractor	County	Caseload %-age change	Comments
1	Coos County Indigent Defense Consortium	Coos	0%	
2	Los Abogados	Jackson	41%	Caseload increase reflects actual caseload.
3	Southern Oregon Public Defender	Jackson Josephine	3%	
4	Aaron & Associates	Hood River	0%	
5	Chris L. Lillegard, P.C.	Polk	-2%	
6	Morris, Olson, Smith & Starns, P.C.	Wasco/Hood River/Sherman Gilliam/Wheeler	3%	Caseload increase reflects actual caseload.
7	Wasco-Sherman Indigent Defense Corp.	Wasco	4%	Caseload increase reflects actual caseload.
8	Alexander & Associates, P.C.	Deschutes	1%	
9	Crabtree & Rahmsdorff Defense Services	Deschutes Crook	7%	Decreased Crook, increased Deschutes.
10	DeKalb & Associates	Deschutes	4%	
11	Deschutes Court Defenders	Deschutes	-5%	Misdemeanor cases adjusted as a result of EDP.
12	Intermountain Public Defenders	Umatilla Morrow	10%	Caseload increase reflects actual caseload.
13	Mark Mordini, Attorney at Law	Umatilla	7%	Caseload increase reflects actual caseload.
14	Umatilla Morrow Consortium, LLC	Umatilla Morrow	-16%	Removed PCR. Other cases increased to reflect actual caseload.
15	Robert G. Klahn	Umatilla	New	PCR only - cases previously taken by UMC.
16	Lincoln Defense Consortium	Lincoln	-13%	Caseload decrease reflects actual caseload.
17	OCDLA Death Penalty Library	Statewide		No changes

August 4, 2004

**MEMORANDUM**

TO: Public Defense Services Commission  
FR: Peter Ozanne  
RE: Lane County's New Court Appointment List

I. Introduction

This memorandum outlines the major steps in implementing the Commission's Service Delivery Plan for Lane County, which will establish a new court appointment list for the county. At its June 2004 meeting, the Commission addressed various details concerning critical features of this new court appointment system, as part of the motion establishing the list that passed unanimously. This memorandum includes those details.

The four major steps in implementing the Service Delivery Plan and the new court appointment system for Lane County are:

- (1) establish an Oversight Panel of five members, including PDSC Commissioner Shaun McCrea, the Presiding Circuit Court Judge or her designee, the Director of Lane County Public Defense Services, Inc. or his designee, and two members of the Lane County Bar Association subject to the Commission's approval, one of whom has previous public defense experience but is not currently providing public defense services;
- (2) recruit and select the Administrator of the court appointment list, who will serve under contract with the Commission;
- (3) develop written policies and procedures governing the administration and operation of the court appointment list, including standards to determine the eligibility of attorneys to participate on the list, all of which are subject to the approval of the Commission; and
- (4) recruit and select attorneys for the court appointment list.

At its June 2004 meeting, the Commission agreed to review the operation and effectiveness of this new court appointment system in two years, in order to determine whether it should continue in accordance with the Commission's current Service Delivery Plan for Lane County or be changed to ensure greater accountability to PDSC and to improve the quality and cost-efficiency of the legal services delivered by the new system. Assuming that it is feasible to complete the foregoing four steps by January 2005, the Commission's review of Lane County's new court appointment system would take place in January 2007.

## II. Establishment of an Oversight Panel

The first step in the implementation process is the establishment of an Oversight Panel with five members, three of whom are already identified by virtue of their office (i.e., *ex officio* members). Those three *ex officio* members will meet as soon as possible and, with the assistance of the Office of Public Defense Services, (1) agree upon the content of an announcement to recruit the other two members of the Panel from the Lane County Bar Association and (2) develop a process for nominating them. Preferably by consensus, the *ex officio* members of the Panel will nominate the two new members for the Commission's approval at its October 2004 meeting.

## III. Recruitment and Selection of an Administrator

OPDS will take the lead in recruiting an Administrator for the court appointment list. In addition to contacting potential candidates identified by the Oversight Panel, OPDS will announce its recruitment for the Administrator position to members of the Lane County Bar Association and the Oregon Criminal Defense Lawyers Association through those organizations' publications and related services. OPDS's announcements will include the Commission's intent to contract with an attorney who resides in Lane County and who is familiar county's legal community and public defense delivery system. Those announcements will be distributed no later than September 1, 2004, with the goal of filling the Administrator's position and establishing a contract between PDSC and the Administrator by November 15, 2004.

In consultation with the Oversight Panel, OPDS will interview and select a candidate for the Administrator's position. OPDS will submit the name of that candidate and a Preliminary Agreement for a contract with the candidate to PDSC for its approval at the Commission's November 2004 meeting.

## IV. Development of Written Policies and Procedures

In consultation with OPDS, the Oversight Panel will develop written policies and procedures governing the administration and operation of the new court appointment list for approval by the Commission no later than its December 2004 meeting. To the extent not inconsistent with PDSC's June 17, 2004 motion

establishing the new court appointment list, the Panel's proposed policies and procedures will incorporate the proposals in a June 12, 2004 Draft prepared by John Potter and Shaun McCrea entitled "A Model List System for Lane County" and in an April 6, 2004 memorandum to the Commission from me regarding a model court appointment list for Lane County. Those policies and procedures will also establish the qualification standards for the selection and continuing eligibility of attorneys to participate on the court appointment list.

#### V. Recruitment and Selection of Participating Attorneys

With assistance from OPDS, the Oversight Panel will develop an announcement for the recruitment of attorneys to participate on the court appointment list. That announcement will be distributed to members of (a) the current court appointment list, (b) the Lane County Bar Association and (c) OCDLA.

In consultation with OPDS and the Administrator, the Oversight Panel will develop a formal process for selecting attorneys to participate on the new court appointment list. In accordance with that process and the qualification standards developed by the Oversight Panel, the Panel and the Administrator will make those selections from among the pool of applicants in collaboration with OPDS and subject to its approval.

**PRELIMINARY DRAFT**  
**(08/12/04)**

**OPDS's Report to the Public Defense Services Commission  
on Service Delivery in Multnomah County (Region 1)**

\* \* \* \* \*

***[NOTE re. this Preliminary Draft: Readers of OPDS's previous reports on service delivery systems in Region 4 (Benton, Lane, Lincoln and Linn Counties) will observe that the content of the first eight and a half pages of this Preliminary Draft report are nearly identical in content to the initial pages of those previous reports. As noted on page 9 of this report, subsequent sections of this Preliminary Draft are either (a) intended to outline some of possible issues for consideration by PDSC at its August 12, 2004 meeting and to guide and stimulate written comments from interested parties in Multnomah County between August 12th and the Commission's next meeting on September 9, 2004 or (b) left blank pending further deliberations and directions from the Commission and comments from interested parties in the county.]***

\* \* \* \* \*

Introduction

Since the completion of its Strategic Plan for 2003-05 in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to ensure the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing the risk of legal errors and the resulting delays required to remedy them, the Commission has concentrated on strategies designed to improve the quality of the state's public defense delivery systems and the legal services delivered by those systems.

Foremost among those strategies is what the Commission refers to as a "service delivery planning process"—a process designed to investigate and improve local public defense delivery systems across the state. During the first half of this year, the Commission undertook investigations of the public defense delivery systems in Benton, Lane, Lincoln and Linn Counties. Following those investigations, PDSC developed Service Delivery Plans to improve the operation of those counties' delivery systems and the quality of legal services the Commission provides in those counties.

The current report, which examines the condition of Multnomah County's public defense delivery system, represents one of the first steps of that planning process in Oregon's largest county. Following receipt of written comments from interested parties in response to this preliminary draft and preparation of a final report by the Office of Public Defense

Services (OPDS), PDSC will hold its regular monthly meeting on September 9, 2004 in Portland in order to receive further comment from interested parties in the county and to deliberate on the condition of the county's public defense delivery system and potential strategies to improve it. Those deliberations are expected to continue during the Commission's monthly meetings on October 21, 2004 in Bend and on November 11, 2004 in Portland.

### PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by OPDS and a report such as this, the Commission will review the condition and operation of local public defense delivery systems and services in each region by holding public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the quality and cost-efficiency of the region's public defense services. In either event, the Commission's Service Delivery Plans will (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts. Fourth, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region.

Because critical steps in PDSC's service delivery planning process will not have been completed, any findings and preliminary recommendations in the final version of this report may be reconsidered or revised, depending upon new information presented to the Commission and its deliberations at subsequent meetings, as well as additional research and investigations by OPDS that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops in a particular region will not be the "last word" on the service delivery system in that region, or on the quality and cost-efficiency of the region's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the extent of the first planning process in a region. Indeed, PDSC's planning process is an ongoing one, calling for the Commission to return to each region of the state in order to develop new service delivery plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to address pressing problems in those regions.

## Background and Context to the Service Delivery Planning Process

The 2001 legislation creating PDSC was based upon an approach to public defense management, supported by the state's judges and public defense attorneys, that Oregon's public defense function should be separated from its judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, the Commission not the courts is primarily responsible for the provision of competent public defense attorneys.

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide.

Numerous Oregon State Bar task forces on indigent defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers.

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the performance of public defense contractors and individual attorneys. The Commission is also concerned about the "graying" of the public defense bar in Oregon and a potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in

public defense law practice, and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

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

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

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

Organizations currently operating within the structure of Oregon’s public defense delivery systems. The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for “public” defenders and the advocates for “private” defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the

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

state from among those types of organizations that have already been established and tested over decades in Oregon.

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

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

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

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

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the

state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

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

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

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

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

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

<sup>3</sup> *Id.*

- Consortia. A “consortium” refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC’s RFP for a consortium and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

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

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium’s administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law

firm's portion of the consortium's workload among attorneys in a law firm may not be evident to the consortium's administrator and OPDS or within their ability to track and influence.

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

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

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

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

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

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

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

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***[NOTE: The following sections of this Preliminary Draft are only intended to identify some of the potential issues for consideration by PDSC and to guide and stimulate written comments from interested parties in Multnomah County. These sections will be revised in accordance with the Commission’s deliberations at its August 12, 2004 meeting and in light of written comments received by OPDS between the Commission’s August meeting and its September 9, 2004 meeting.]***

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#### OPDS’s Preliminary Observations on Service Delivery Issues in Multnomah County

The primary objectives of OPDS’s investigations of public defense delivery systems throughout the state are (1) to provide PDSC with an assessment of the strengths and weaknesses of a system in order to assist the Commission in determining the need for changing the service delivery structure of that system and the kinds of changes that might be needed and (2) to identify issues the Commission is likely to confront in the event changes are needed.

These investigations serve two other important functions. First, they inform local public officials, participants and other stakeholders in a county’s criminal and juvenile justice systems of the condition and effectiveness of important aspects of those systems. The Commission has already discovered that the function of “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, create its own momentum for self-reflection and improvement within the local community. Second, the history, past practices and rumor in a local justice system can distort perceptions about current realities. OPDS’s investigations and reports on service delivery may serve to correct some misperceptions.

Over the coming months, as PDSC deliberates on the service delivery issues in Multnomah County, OPDS conducts further investigations and the Commission receives public comment, this Preliminary Draft will develop into OPDS's final report to the Commission on the condition of Multnomah County's public defense delivery system. The blank sections of this draft that follow will eventually contain OPDS's substantive findings and recommendations to the Commission regarding the effectiveness of Multnomah County's delivery system and the need for any change in that system.

At this early stage of the Commission's service delivery planning process, the Preliminary Draft is simply intended to provide a framework within which the Commission can begin its discussions regarding the condition of public defense service delivery in Multnomah County and the range of policy options available to the Commission—from concluding that no changes in the county are needed, to significantly restructuring the county's delivery system. This draft is also intended to offer some guidance to PDSC's contractors, public officials and justice professionals and other stakeholders in Multnomah County's criminal and juvenile justice systems about the kind information and advice that is likely to assist the Commission in maintaining or improving the county's public defense delivery system. In the final analysis, the level of engagement and the quality of the input from all of these stakeholders may be the single most important factor in determining the quality of OPDS's final report to the Commission, and the effectiveness of the Commission's final decisions regarding service delivery in Multnomah County.

Therefore, on behalf of the Commission, OPDS urges all interested parties in Multnomah County to forward written comments regarding this Preliminary Draft, or any matter relating to the delivery of public defense services in the county, to Peter Ozanne, the Executive Director of OPDS at [peter.a.ozanne@opds.state.or.us](mailto:peter.a.ozanne@opds.state.or.us), or at OPDS, 1320 Capitol Street NE, Suite 200 Salem, Oregon 97303. In order to consider those comments in time for the Commission's next meeting on September 9, 2004 and to incorporate them into the next draft of this report, OPDS requests that any written comments be submitted to OPDS no later than August 27, 2004. The readers of this report are also welcome to attend the Commission's September 9, 2004 meeting in Portland, at a time and location to be announced, at which time the Commission will receive further public comment.

In order to provide a framework for the Commission's initial deliberations regarding the service delivery system in Multnomah County and guidance for public comment, OPDS offers the following preliminary observations. They are based upon (a) PDSC's discussions and public comments to the Commission since its preparations in early 2003 to assume responsibility for administering the state's Public Defense Services Account and the public defense contracting system, (b) discussions between public defense contractors in Multnomah County and OPDS staff over the past two years, (c) interviews of the county's public defense contractors by OPDS's Executive Director over the past 18 months, and (d) interviews of the county's contractors, public officials on the Local Public Safety Coordinating Council and the Circuit Court's Criminal Justice Advisory Council,

senior staff of the District Attorney's Office and the Department of Community Justice and ten Circuit Court Judges by the Executive Director over the past two months.<sup>4</sup>

1. The general quality and cost-efficiency of services. In general, Multnomah County's public defense system appears to be delivering quality, cost-efficient legal services at a level at least equal to any other county in the state. A number of stakeholders observed that the quality of public defense practice is among the best in the state, particularly in the areas of juvenile law and the defense of Ballot Measure 11 cases. Judges on the Circuit Court are generally satisfied with, and frequently complementary of, the performance of most public defense contractors in Multnomah County. The senior staff in the District Attorney's Office, while critical of a few individual attorneys and law offices, and concerned about such chronic issues as the expenditure of non-routine expenses, the untimely and apparently unjustified withdrawal of counsel in criminal cases and some appointments of counsel for apparently ineligible defendants, is, in general, favorably impressed with the commitment and the quality of advocacy and legal services provided by the county's public defense contractors. Finally, contractors generally regard each other as skilled and experienced lawyers who are committed to the common goal of providing high quality public defense services.

Although there appear to be many accomplished lawyers providing public defense services in Multnomah County, some of the larger contractors have gained statewide and national reputations. Metropolitan Public Defender Services, Inc (MPD) and the Juvenile Rights Project (JRP) have been cited over many years as national models for the delivery of public defense services. The Portland Defense Consortium (PDC) is regarded throughout the metropolitan area as a group of lawyers with some of the most experienced and ablest advocates in the state's criminal defense bar. Multnomah Defenders, Inc. (MDI) has generated a large corps of distinguished graduates and a reputation for providing quality defense services in juvenile and misdemeanor cases.

Perhaps the greatest long-term challenge for the Commission will be to find ways to maintain the quality and cost-efficiency of public defense services in Multnomah County and to ensure that, over time, the level of quality remains consistent among all the county's contractors.

2. Variations in contract rates. Variations in rates of payment under PDSC's contracts for the same kinds of cases, or to contractors who appear to be similarly situated, seems to be the most persistent complaint among justice system stakeholders in Multnomah County. PDSC is already well aware of this issue as a result of the many complaints voiced by the county's contractors at Commission meetings over the past two years. However, the concern is not limited to contractors in the county. A number of judges and prosecutors have expressed the view that some of the ablest and most experienced public defense attorneys in the county are being unfairly treated and may leave the practice due to the relatively low rates they are paid under PDSC's contracts.

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<sup>4</sup> Interviews with additional criminal and juvenile justice stakeholders in Multnomah County will continue in August, September and October 2004.

Variations in the rates paid for some cases in the county are both real and significant. The causes are many. For example, over decades of arms-length contract negotiations with the state, some contractors have benefited from their rigorous and persistent attention to those negotiations and to the growth and management of their operations, while others have suffered from their inattention or neglect of those matters. Some contractors have developed significant infrastructure, including staffs of in-house paralegals, investigators, interpreters and social workers, which accounts for some of the differentials and, from the state's perspective, represents a cost-efficient methods of providing services that the state would otherwise have to pay for as non-routine expenses. In any event, PDSC has inherited these differentials, and many stakeholders in Multnomah County perceive this problem as the largest threat to continued effectiveness of the county's public defense system.

Unfortunately, solutions are not easy to come by, particularly in an environment in which Oregon's voters, by failing to pass Ballot Measure 30 last November, rejected the Legislature's method of balancing the 2003-05 state budget and, therefore, its budget for the state's public defense system. In addition to the shortfall in the state's public defense budget caused by Ballot Measure 30, the 2003 Legislature specifically directed PDSC not to raise its contract rates during this biennium. The harsh reality of this environment appears to leave the Commission with the unappealing option of taking money from some higher paid contractors, thereby risking the dismantlement of established public defense offices and the disruption in the careers of dedicated lawyers, in order to give more money to other lower paid contractors.

Assuming that PDSC finds no justification for continuing variations in the contract rates in Multnomah County and determines that such variations pose a threat to the stability of the public defense delivery system in the county, OPDS suggests that the Commission consider several interrelated approaches to addressing this issue:

- Recognize that variations in contract rates is a problem that can only be resolved over several contract cycles or biennia;
- At the risk of using painfully familiar metaphors, recognize that the best solutions probably involve a "glide path" approach, as opposed to "running over a cliff," in the sense that comparative contract rates should be adjusted upward or downward on an incremental basis and on a multi-year timeline set by the Commission;
- In accordance with PDSC's normal practices and procedures, changes in contract rates should be part of the normal contract negotiation process, which is administered by OPDS and subject to the review and approval of the Commission;
- Acknowledge that strict uniformity in contracts rates is unrealistic and that differences in rates of payment for similar cases or to contractors that appear to be similarly situated are justifiable, as long as the basis for such differences is rational and capable of articulation; and
- In order to properly structure the administration discretion of OPDS, PDSC should establish criteria or guidelines to justify differences in contract rates and require

OPDS to articulate the bases for any differences in accordance with those guidelines. The following list represents a few examples of criteria that might justify relatively higher contract rates:

- the existence of internal infrastructure, such as paralegals, investigators and interpreters;
- handling unique caseloads or participation in special court programs;
- a strong and effective management structure, including financial management systems for internal business operations, administrative processes to facilitate dealings with OPDS, and personnel management and staff evaluation systems to ensure the quality and cost-efficiency of legal services;
- training programs that are accessible to other public defense attorneys in the county;
- an institutional presence on behalf of the public defense community at policy-making bodies, such as the Local Public Safety Coordinating Council and the Criminal Justice Advisory Council;
- benefits to the rest of the county's public defense contractors.

3. Contractor preferences and caseload priorities. In light of the fiscal calamities experienced by PDSC's contractors in 2003 as a result of budget cuts during special session of the Legislature and the steps the Chief Justice and his Budget Reduction Advisory Committee (BRAC) were forced to take in response, PDSC is also well aware of the desire of some contractors to have "preference clauses" in their contracts. These clauses would presumably establish preferences among contractors and priorities in the allocation of cases, in the event of a precipitous drop in caseloads and in order to ensure that these contractors retained most or all of their original caseload quotas.

Because another budget crisis and a precipitous drop in caseloads is a possibility rather than a probability, OPDS recommends that the Commission avoid the time and effort associated with negotiations between OPDS and contractors over preference clauses before the need is apparent. In the event PDSC faces another budget crisis comparable to 2003, the Commission can then establish a fair and open process to address contractors' caseload shortages that would involve (a) Commission deliberations on the record at its regular public meetings regarding contractor preferences and caseload priorities, (b) an opportunity for full and fair comment by contractors and other stakeholders, and (c) the establishment of explicit rules or guidelines that would also be subject to public comment before their adoption.

The most that OPDS would suggest the Commission consider at this time is a set of general principles that could govern the determination of contractor preferences and caseload priorities in the event of another budget crisis. For example, on numerous occasions over the past two years, PDSC has discussed the possibility of giving non-profit public defender offices preferences and priorities in the allocation of caseloads because of

the dependence of the offices' attorney-employees on a full caseload due to restrictions on their ability to engage in any other type of law practice and because of the special services the offices may offer and the unique caseloads and special programs they may serve. The Commission has also discussed giving particular consortia a higher priority in the allocation of caseloads, but with greater flexibility to adjust their caseloads downward due to the ability of consortium lawyers to engage in other types of law practice. Finally, the Commission has discussed the possibility of giving individual lawyers on court-appointment lists the lowest priority for caseload allocations due to their ability to rely on a private law practices for income. While the process of establishing these principles will still involve substantial time, effort and pain in anticipation of an improbable event, the process could be justified on the grounds that all of PDSC's contractors are entitled to a clearer idea of the business risks they are assuming for the purposes of developing their business plans and recruiting new employees for the future.

4. The process for handling attorneys' conflicts of interest. The state's process for handling (i.e., paying for) cases in which a public defense attorney discovers a conflict of interest and is required by professional ethics to withdraw has, over the years, been a source of ongoing controversy and frustration for justice professionals in Multnomah County. The challenge for the state has been to strike a balance between (a) fairly compensating attorneys who, with due diligence, have discovered a conflict of interest (e.g., a prosecution witness turns out to be a former client of the attorney's law office) and expended substantial amounts of time and energy to prepare a defense in the case and (b) avoiding an incentive for attorneys to hold on to cases until the last minute and lighten their caseloads by raising conflicts of interest, knowing that they will probably receive full credit and full payment for the case. That balance has been allusive. The result has frequently been double payments for the same case: one for the attorney who discovers a conflict of interest late in the case; and one for the attorney who is substituted into the case.

This problem is by no means unique to Multnomah County. But, perhaps because of the large number of cases and large number of defense attorneys in the county make the problem more visible, the process for handling conflict of interest cases in Multnomah County has been a particularly visible object of criticism and complaint. Prosecutors and judges are obviously concerned about last minute withdrawals and substitutions and the delays they cause in court proceedings. Defense attorneys frequently complain about the problem too. Indeed, several PDSC contractors have claimed that a virtual "gray market" in conflicts cases has existed for years in the county, with a few contractors augmenting their caseloads and income with conflict of interest cases that demand little work and, if held long enough, will generate full payment.

Whether or not this claim has any validity, the issue of how conflict cases in Multnomah County are handled may be a good example of past history and practices distorting current perceptions of reality. In 2003, the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office took steps that may have solved, or at least significantly mitigated, this problem. IDSD encouraged a group of individual lawyers and law firms who had previously contracted with state to gather together and form the Portland Defense Consortium (PDC). PDC now handles many, if not most, of the serious criminal cases

involving conflicts of interest in the county, without the kinds of disruptions and double payments that Multnomah County experienced in the past. Because the consortium is not considered a “firm unit” by the Oregon State Bar for the purposes of determining conflicts of interest, attorneys in PDC can transfer cases among themselves without disqualifying the entire consortium or all the attorneys in it from handling such cases. Furthermore, OPDS does not provide double credits or double payments for cases assigned to the consortium that are transferred among PDC’s attorneys.

Yet the problem of how to handle conflict of interest cases cost-efficiently in Multnomah County has probably not disappeared and may still deserve the Commission’s attention. To the extent that the handling of conflict of interest cases remains a significant problem, OPDS recommends to PDSC that the Commission take steps in this service delivery planning process to resolve, or at least further reduce, the problem. Fortunately, the Commission has access to the talents and experience of Ann Christian in addressing this issue. As part of her contract with PDSC to expand the Application/Contribution Program across the state, Ann agreed to study the issue of handling of conflict of interest cases and to develop more cost-efficient strategies and processes for the Commission’s consideration. Ann plans to administer a survey of Multnomah County contractors and develop her proposals over the next few weeks.

5. Withdrawals and substitutions of attorneys. A significant number of prosecutors and defense attorneys have reported instances in Multnomah County in which defense attorneys are allowed to withdraw from cases relatively late in the case without declaring a conflict of interest or providing any other apparent reason justifying withdrawal. These observers consider such instances commonplace, occurring particularly in less serious “run-of-the-mill” cases. OPDS cannot conclude from a relatively few anecdotal reports by observers without direct knowledge of the facts in these cases that a serious problem exists. But further investigation may be warranted.

The Commission will recall that it readopted a Substitution Policy at its June 2004, which was mandated by the 2003 Legislature, calling for the courts to confer with OPDS in certain instances when a motion to withdraw has been granted and the court is about to substitute one lawyer for another. The apparent purpose of this policy is to reduce costs to the Public Defense Services Account caused by the repetitive withdrawals of court appointed attorneys in criminal cases. Under the policy, OPDS and the courts may agree to exempt particular categories of cases from the policy’s “meet and confer” requirement.

To the extent that “run-of-the-mill” cases in Multnomah County may have been exempted from this requirement under PDSC Substitution Policy, a significant number of withdrawals without apparently sufficient reasons may not be coming to the OPDS’s attention. Although PDSC’s Substitution Policy and its enabling legislation does not authorize OPDS to participate in or influence a judge’s decision to grant an attorney’s motion to withdraw, further investigation by OPDS and conversations with the Multnomah County Circuit Court are likely to uncover the nature and extent of this problem, and may offer OPDS an opportunity to inform the court of any implications for PDSC’s budget. Therefore, OPDS proposes to continue investigating this issue.

## A Demographic Snapshot of Multnomah County

With a 2001 population of approximately \_\_\_\_\_, Multnomah County is the largest county in Oregon.<sup>5</sup> As the home of at least five major institutions of higher education, the county's residents are relatively well-educated, with \_\_\_ percent of its adults over 25 years old possessing a Bachelor's Degree, \_\_\_ percent with post-graduate degrees and \_\_\_ percent of its high school graduates enrolling in college. As the leading center for commerce and industry in the state, Multnomah County has had a relatively low unemployment rate over recent years, below the state average in 2000 and the unemployment rates of \_\_\_ other Oregon counties. The county also has a relatively high proportion of professional, scientific and management workers in its workforce (11.4 percent, compared to Washington County with 11.9 percent) and the \_\_\_\_\_h highest per capita income in Oregon (at \$22,606 compared to Washington County at \$25,973 and Lane County at \$19,681).

Multnomah County's population is one of Oregon's most diverse counties, with non-white and Hispanic residents making up \_\_\_\_\_ percent of its population, compared to \_\_\_\_\_ percent for Oregon and \_\_\_\_\_ percent for Multnomah County. The county has a relatively high percentage of individual residents living in poverty (\_\_\_\_\_ percent, compared to \_\_\_\_\_ percent in all of Oregon and \_\_\_\_\_ percent in the United States).

With \_\_\_ percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Multnomah County's "at risk" population, which tends to commit more criminal and juvenile offenses, is relatively large. As a result, the county had the third highest index crime rate in the state in 2000 (with 74.8 index crimes per 1,000 residents, compared to Lane County at 57.9, Marion County at 58.5 and the state at 49.2 per 1,000).<sup>6</sup>

The public defense caseload in Multnomah County is approximately \_\_\_ percent of the statewide total.

## OPDS's Findings in Multnomah County

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## OPDS's Recommendations

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<sup>5</sup> This demographic information was compiled by Southern Oregon University's Southern Oregon Regional Services Institute and appears in its Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

<sup>6</sup> For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

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Attachment 6

Available at Meeting