

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Thursday, September 10, 2009

9:00 a.m. - 1:00 p.m.

B & C Conference Room

Public Service Building

125 E 8th Ave

Eugene, OR 97401-2926

**AGENDA**

1. **Action Item:** Approval of the Minutes of PDSC's August 6, 2009 Meeting (*Attachment 1*) Barnes Ellis
2. Presentations on Public Defense Delivery In Criminal Cases in Lane County (*Attachment 2*) Invited Guests and Audience Members
3. Update on Service Delivery in Umatilla and Morrow Counties (*Attachment 3*) Paul Levy
4. OPDS Monthly Report OPDS Staff

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

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

***Next meeting: The next meeting of the commission is scheduled for October 23, 2009 from 12:30 pm to 4 p.m. at Mt. Bachelor Village, Bend, Oregon.***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, August 6, 2009  
9:00 a.m. - 1:00 p.m.  
Circuit Court 1  
Polk County Courthouse  
850 Main Street  
Dallas, Oregon 97338

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Peter Ozanne  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch  
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Becky Duncan  
Paul Levy  
Billy Strehlow  
Shelley Winn

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(Meeting was called to order at 9:15 a.m.)

**Agenda Item No. 1 Approval of the Minutes of PDSC's June 18, 2009 Meeting**

**MOTION:** Shaun McCrea moved to correct the minutes; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**MOTION:** Shaun McCrea moved to approve the corrected minutes; Commissioner Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

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

Chair Ellis welcomed representatives of the Polk County legal community to the meeting and noted that PDSC is not seeking to impose a single model of public defense delivery in every county but tries to be responsive to the needs of each community.

Chief Justice De Muniz discussed the 2009-2011 Judicial Department budget and said that even with revenue from HB 2287 and the expected veto of the Judicial Department disappropriation in HB 5054 the department will have to manage its resources very prudently. In a meeting with other chief justices at the National Conference of Chief Justices recently, he

learned that many of them are experiencing similar fiscal challenges. As part of the planning and implementation of budget reductions in Oregon, Chief Justice De Muniz formed two committees, a Budget Reduction Advisory Committee (“BRAC”) to identify core functions of the courts, and the Budget Reduction Implementation Committee (“BRIC”) to implement the reductions. During the legislative session he met regularly with the Chairs of the Joint Ways & Means Committee but has yet to identify a legislator who will be a champion for the courts. His main goal in the legislative session was to maintain an open and accessible court system. Trial court judges will have a lot of flexibility in meeting this goal at the local level. A new approach to the funding of the courts is needed in order to avoid a continued cycle of feast or famine. Dedicated funding may not be the best approach. The Chief Justice also discussed a number of national developments, including a resolution by the Conference of Chief Justices that federal agencies administering drug court funds and the like, deal with the appropriate representative of the judicial branch rather than with individual judges, in recognition of the court’s status as a separate branch of government. He reported that United States Attorney General Eric Holder is meeting regularly with the chief justices to address indigent defense and other important issues. He also described some of the practices being implemented by the Judicial Department to operate more efficiently.

Chair Ellis said that the group that was responsible for creating the unified court system in Oregon believes that Chief Justice De Muniz is fulfilling the role that they envisioned for that position.

Judge William Horner, the Presiding Judge in Polk County, welcomed the Commission to the county and noted some corrections to the draft report. With respect to the representation of parents in juvenile dependency cases after the establishment of jurisdiction he said that the practice of discontinuing the appointment of counsel was established years ago but that if the Commission preferred that representation continue, that could occur. With respect to the appointment of counsel for children in dependency cases, he does not see the value in appointing counsel for infants. With respect to the number of cases in which attorneys find conflicts of interest, in some weeks there seem to be a lot of them. In the future he will inquire of the attorneys what the basis for the conflict is in cases in which he is not the trial judge. When there is a conflict the court generally must appoint an attorney from another county since there is only one criminal attorney besides the attorneys with the Lillegard firm in Polk County who will accept court appointed cases. He believes there are approximately 300 conflict cases a year in the county. For administrative purposes it would be easier for the court to assign cases to a consortium than to find individual attorneys for each case. Judge Horner said that all three of the Polk County judges had experience as defense attorneys as well as prosecutors before they became judges.

Polk County District Attorney Stan Butterfield said that he believes the criminal justice system in Polk county is working well from both the prosecution side and the defense side. He had practiced as a defense attorney prior to becoming the district attorney. He has a staff of 23 people, including six deputies. His office generates discovery in most cases within 72 hours so that conflicts can be identified early. His office has a good working relationship with the defense attorneys. Attorneys are generally free to come into the office and go directly to a particular deputy’s office. The district attorney’s office also works cooperatively with the attorneys who come regularly from Marion County. There has been a collegial culture between prosecutors and defense attorneys in Polk County for many years, even preceding the budget crisis in 2003. Mr. Butterfield described the county’s drug court program. Since becoming the district attorney he has accelerated the process of approving defendants for drug court participation since research indicates that getting people involved in the program as early as possible is beneficial to their prospects for success. The court’s caseload is above average in Polk County and the county is probably in need of another judge but cases are getting the attention they need and a lot of things are handled informally in the county. He said that there had been a recent incident with a private defense investigator who had not followed his ethical duties. This matter had been discussed with OPDS staff.

Judge Charles Luukinen said that the court, the prosecution and the defense had enjoyed a collegial relationship within the criminal justice community in Polk County for thirty years. The court's workload is relatively heavy and they may request an additional judge in the next legislative session. The system works efficiently, however, with experienced lawyers on both sides who understand the cases and the range of possible resolutions. He chairs the Local Public Safety Coordinating Council but before that council was formed there was a "Let's Build a Jail" committee including the defense, the prosecution, law enforcement and members of the public who decided to seek voter approval of a bond measure to construct a new jail and an operating levy. Both were approved and a new jail built. It would be beneficial to the judges in Polk County if they had a known group of attorneys available to handle conflict cases in the county rather than to have a group like the Marion County Association of Defenders send over those of its member attorneys who were in need of additional cases. Judge Luukinen said that all of the judges in the county try to be culturally aware. They are fortunate to have two defense attorneys who are bilingual in English and Spanish. There is a Spanish language interpreter who is available for court appearances three days of the week. For other languages they often depend on the "language line." The defense bar is "graying" but that is in part a function of the contract system. There aren't cases available for the new attorneys.

Chair Ellis noted that the judges in Polk County prefer to see experienced attorneys with whom they are familiar to handle their conflict cases, rather than new, unknown attorneys from Marion County. Judge Luukinen said that they would be open to good, young lawyers starting on misdemeanor cases. Judge Luukinen said that the Court handles cases that arise at the Spirit Mountain Casino. Many of these cases are drug cases and motor vehicle offenses. The evidence in these cases tends to be very sophisticated because of the surveillance technology used by the casino. The Spirit Mountain Community Fund helps to fund law enforcement in the area. A lot of the offenses at the casino are committed by residents of other counties who are generally not appropriate for the drug court.

Commission Ozanne inquired about the trial rate in Polk County. Judge Luukinen said that it had varied over the years depending on who the district attorney was but that he thinks the attorneys in the county try the cases that need to be tried and resolve the ones that can be resolved. Ingrid Swenson said that the Judicial Department statistics indicate a higher than average trial rate in Polk County but that a "trial," includes, for example, a stipulated facts trial. Judge Luukinen said that there are a lot of stipulated facts trials in the county.

Chief Justice De Muniz said that Judge Luukinen is being assigned to cases around the state as part of an effort to leverage experienced judicial resources. He is a role model.

Judge Fred Avera also thanked the Commission for traveling to Polk County. He noted that he and Judge Horner had been active in the defense attorney association that preceded the Oregon Criminal Defense Lawyers Association, along with Chief Justice De Muniz. He was a prosecutor for fourteen years, including twelve years as the elected district attorney of the county. He has been a judge for ten years. Judges Horner and Luukinen have similar backgrounds. The court has been able to handle a large volume of cases because lawyers exercise good judgment. In conflict cases it can sometimes be frustrating to try to find a lawyer on the court appointment list who is available and willing to take the case. It would be good to have a group of the Marion County attorneys who come to Polk County regularly available for appointment rather than having MCAD select the attorneys. He will not appoint an attorney he does not consider qualified to handle the case. With respect to the trial rate in Polk County his impression is that the rate is probably about average or a little lower. Late discovery is not a frequent problem. Late conflicts occur when new witnesses are found or unusual circumstances arise.

Commissioner Ozanne asked whether there might not be a “culture of understanding” that would prevent new attorneys from challenging established practices in a community. Zealous advocacy might suffer in a community where everybody knows everybody. Judge Avera said that the county had a history of bringing in zealous advocates for clients but that sometimes he thinks they get along so well that zealous advocacy suffers. There was an attorney who no longer practices in the area who agreed to a guilty plea for a client who hadn’t committed a crime. Commissioner Ozanne said that the Chief Justice’s plan for moving judges around to other counties was a good one to address this issue.

Chris Lillegard said his office had provided indigent defense services in the county since 1984. Two of the attorneys in his office have worked there for many years, as have two of his staff members. He had to let another attorney go recently but was able to hire a Spanish speaking lawyer to replace him. Ninety percent of the firm’s work is public defense. He described his succession plan for when he decides to retire and described the firm’s system for identifying conflicts. He said that it has been efficient for the court and OPDS to work with his firm as the only public defense contractor in the county. Both have to deal with only one office. Dallas is only a fifteen minute drive from Salem and there has always been a group of attorneys from Marion County who have been available to handle conflict cases there. Mr. Lillegard said that he is not certain that there is any reason to keep dependency files open after jurisdiction but he is willing to continue representation if asked to. His firm still uses the investigator referred to by Mr. Butterfield, who was found to have misrepresented himself in a case, because he is a good investigator. He believes that they do try a lot of cases in Polk County, many of which are court trials. They also file a lot of motions but can often persuade the district attorney to make a better offer if there are grounds for a motion.

Commissioner Welch inquired about the representation of children in dependency cases. Mr. Lillegard said it is rare that children are appointed counsel. Commissioner Welch asked Mr. Lillegard if he felt there was a role to be played by counsel for parents after jurisdiction has been established and he said that his sense is that there is not a lot that an attorney can do for a parent at that stage. Commissioner Potter inquired whether Mr. Lillegard had ever experimented with a client satisfaction survey and he said he had not but that attorneys get a sense of their clients’ satisfaction with their representation from other defendants at the jail.

Sally Avera, the Chief Deputy District Attorney, said that she had previously served as an appellate defender and as a senior assistant attorney general. She said that clients of the Lillegard firm provide feedback on their representation by seeking to have the firm reappointed in future cases. Cases are handled efficiently in the county because of the experience level on the bench and in the bar and because of the level of trust between them. Prosecutors don’t file cases if the admissible evidence is inadequate and defense attorneys don’t file meritless motions. She thinks that the court and the district attorney are able to assert the best interest of children in dependency cases and that attorneys are not needed for children who can’t speak. She said that attorneys who come from other counties to practice in Polk County need to realize that the criminal calendar moves quickly and trial dates are firm.

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

#### **Commission Review of Service Delivery Plan for Clackamas County**

Chair Ellis said that after reviewing the transcript of the June meeting he was encouraged. Although Clackamas County tends to be self-contained, Ron Gray had been more forthcoming. The concern in Clackamas is that Ron Gray has become almost indispensable. Although they have not been responsive to commission concerns in the past they now appear more willing to respond. The board continues to be a provider only board with permanent members which is not a preferred model, but he would prefer that the Commission not force change.

Commission Ozanne said that Clackamas County had been held up as a model and Ron Gray has been a leader on consortium issues. While they do good work they may be Exhibit A for

why the Commission needs to be more prescriptive. The Commission needs to discuss what steps it should take. Clackamas County is still struggling with how to do an evaluation and its board lacks diversity, business expertise and community involvement. At a retreat the Commission should discuss possible prescriptions regarding board makeup and standard evaluations, with accommodations for differences around the state.

Commissioner Stevens asked if there was evidence that board makeup affects a contractor's practice of law, that it affects service delivery.

Chair Ellis said it is intuitive that whoever selects Ron Gray's replacement should be a balanced body rather than a group of providers whose dominant thought is what it will mean for them.

Commissioner Ozanne said that Exhibit B for a more prescriptive model would be Ron Gray's acknowledgment that there was one attorney who shouldn't be practicing criminal law.

Commissioner Stevens said that there is a difference between commission oversight of board makeup and the need for attorney evaluations. It is heavy handed to tell a business how it should be run but it is appropriate to tell them that they need to evaluate attorneys when we are paying the bills for those attorneys.

Chair Ellis asked if there isn't a difference between private enterprise and public service.

Commissioner Stevens said that unless it can be shown that a particular structure isn't working, the Commission shouldn't be involved with the inner workings of a contractor.

Chair Ellis said that even evaluations might not serve their purpose if the board were composed of members who didn't want to push too hard for fear that they might be affected.

Commissioner Welch asked if the situation would be the same if we were talking about a law firm, such as the Lillegard firm, instead of a consortium.

Chair Ellis said that if a law firm were the sole provider in a large county, the concerns would be the same.

Commissioner Welch said that Commissioner Stevens' concerns were more persuasive to her with respect to a law firm since in a consortium there is no real business entity or other management structure beyond a system for managing the public funds they receive.

Commissioner Stevens said that this is probably a conversation for the retreat.

Commissioner Ozanne said that in Clackamas County he observed a troubling level of synchronization with the judiciary. It is a best practice to not have the judiciary run the public defense system and we have generally struck the right balance in Oregon but Clackamas may need to be reminded of this.

Chair Ellis said he would like to schedule an updated presentation on Clackamas County to see that they had followed through on the evaluations.

Commissioner Ozanne said that in Clackamas County they seemed to be concerned that the Commission might move to a public defender model. That is not his intention. Chair Ellis said that he is more open to it.

**Agenda Item No. 4**

**OPDS Monthly Report**

Peter Gartlan reported that the Appellate Division expected to hear by the end of September about its petition for certiorari in the United States Supreme Court.

Kathryn Aylward said that the analysts in her division were reviewing bid proposals. In response to a question from Chair Ellis she said that there would be several alternatives available to cover the conflict cases in Polk County. She noted that many of the conflicts occur in juvenile cases where there are multiple parties and MCAD handles only criminal cases. She also reported that a second building was being considered for a possible future location for OPDS.

Commissioner Potter inquired what materials would be available for commissioners to review in preparation for the September retreat discussion of contract proposals. Ms. Aylward said that she envisioned presenting the Commission with a series of questions the answers to which would allow her to create a statewide plan that accords with the Commission's priorities. No final decisions will be made about any contract proposals at the September meeting.

Paul Levy presented a preliminary report on OPDS's follow up visit to Umatilla County and said that a written report would be presented in September.

**MOTION:** John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting was adjourned at 12:15

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, August 6, 2009  
9:00 a.m. - 1:00 p.m.  
Circuit Court 1  
Polk County Courthouse  
850 Main Street  
Dallas, Oregon 97338

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Peter Ozanne  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch  
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Becky Duncan  
Paul Levy  
Billy Strehlow  
Shelley Winn

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(Meeting was called to order at 9:15 a.m.)

**Agenda Item No. 1 Approval of the Minutes of PDSC's June 18, 2009 Meeting**

0:31 Chair Ellis Good morning. Thank you all for coming and for having us here. We will call to order the meeting of the Public Defense Services Commission. I do want to comment that I think we now have completed 10 years since the study committee was established to review public defense services in the state. That led to the enactment, eight years ago, of the bill that created the Commission. I think that it is fair to say - I just finished reading this book which is called "Justice Denied." It is the report of the National Right to Counsel Committee chaired by former vice president, Walter Mondale who - I knew this before I read it here - had as attorney general in the State of Minnesota submitted an amicus brief in the *Gideon v. Wainwright* case that was signed onto by, I think, about 30 states supporting what became the ruling in that case which I think is kind of a special piece of history. In any event, in this book the committee reviews indigent defense services throughout the country. Oregon looks, frankly, very good when you read this. I think we have certainly got a structure now that seems to be working. We have a funding level that is not what we want but it is a whole lot better than what else you will see described here. I think everybody who has been involved in this 10 year effort can feel a lot of satisfaction reading this. The first item is the minutes from

the June 18 meeting which, I apologize, I was unable to attend. Shaun, do you want to be in charge of that?

2:58 S. McCrea I will defer to you, Barnes.

3:00 Chair Ellis Any additions or corrections? Even though I wasn't there I had two which will demonstrate that I read the minutes. On page five, under Item 6, the first line referring to Paul Levy. I would insert the words "of the" before the words "statutory responsibilities," and on page six, referring to the Supreme Court as the "State Supreme Court" I would add the word "United" before the word "states" on the fourth line from the bottom. Those are two suggestions, but since I wasn't there I don't think I can do that.

**MOTION:** Shaun McCrea moved to correct the minutes; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

3:56 Chair Ellis Is there a motion to approve the minutes as corrected?

**MOTION:** Shaun McCrea moved to approve the corrected minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

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

4:04 Chair Ellis We are very pleased to be here in Polk County and look forward to reviewing, with those of you from the area, how the defense services are going here. Let me just give a couple of comments before we take input from our guests. We have tried to go around the state and meet with not just the provider community but the courts, and the law enforcement people, and citizens to see how we are doing and see how we can do our job better. I have commented at all of those that we are not in the business of imposing a single model. This is a very diverse state. There are a lot of differences from one community to another, so what seems to work in one area may or may not be best in another. We are largely in a listening mode. We think it can be very helpful for us to hear both what the successes are and what the issues are and to improve communications. We are trying very hard to be a state agency that responds to the needs of different communities, but we are also trying to be a state agency that shares with one community things that work in others, and try between us in a dialogue mode to achieve the best level of service we can for each of the areas that we serve. That is the spirit in which we are here. I have a list of people that I believe will be presenters but I don't have a particular order.

6:16 I. Swenson Mr. Chair, I did speak to the folks that are here and indicated that the Chief Justice had an update for us on the Judicial Department's funding situation. They would be pleased to defer to his presentation.

6:33 Chair Ellis Why don't we start with that, Chief, and then we will move to Polk County issues. They are related.

6:39 Chief Justice De Muniz Thank you. We are all related. I think the way to start this is when you are talking about the budget, I just returned from the conference of chief justices in Santa Fe, New Mexico. I think we would describe that collectively as "misery loves company." There are 46 states across the country that have severe budget difficulties. Of course these take different forms. Not every state has a unified court system like we do. In fact, I think there are only 20 or so that are unified. They have a different mix of some state funding and then a lot of local funding for courts. You can imagine what tension that creates in the legislature. When you are feeling sorry for yourself all you have to do is go to something like the conference of chief justices and then you will come away feeling a tad bit better. I would like to talk a little bit about the budget because the delivery of indigent defense services and the overall court

system are linked and it is very important to all of us. I also want to acknowledge Mr. Borden is here from the Legislative Fiscal Office. I wanted to say thank you very much for attending. I really appreciate your willingness to learn everything you can about the courts and about the delivery of indigent defense services. I want to say one thing about Mr. Borden. This was a rough legislative session and he was always courteous, pleasant and hard working. We very much appreciate your being there. Having said that, here is the bad news. The court system was required to submit to Mr. Borden, his staff and the legislative leadership, originally a budget reduction of 30 percent. As you can imagine that would have completely crippled the courts. We would no longer have a full-time court system that would be able to operate. By the time we were finished we had got it down to a 15 percent cut, but we hope with the enactment of House Bill 2287 - did everybody notice the 65/35 split until February? Sixty-five percent will go into the coffers of OJD; 35 percent will go into the coffers of PDSC up to a maximum, I believe, of \$11 million. I think that the maximum that they expect to be received by February would \$10 million. The idea here was that we could operate the court system as if we had a 7.5 percent budget decrease or reduction instead of 15 percent. Now that puts a lot of pressure to make sure that the fees that are part of 2287 are collected at the rates that we anticipated that they would be. I would like everybody here to know that it is not the policy of the leadership of the Judicial Department to fund the courts this way. My view is the courts should be funded by general funds and not this form of dedicated funding, but this is a difficult budget situation that we are in. It turns out that we are not the only court system that had to turn to this. Many of the courts have turned to this. My good friend in Massachusetts, Chief Justice Margie Marshall, had to go to the same thing in a much broader context and it will be interesting to see how this works. They actually have some goals they have to reach, if you can imagine, to free up the funds that they are seeking. I think it is a travesty and way beyond the right thing to do. Nobody went into this wanting to seek this kind of legislation. I don't think it is the right way to go, but it is the only way to go and, in my view, it gives us the opportunity to take some responsibility to manage our court system as an independent branch of government. We are working on that. I am very worried to be honest with everybody. I see a perfect storm coming here. If the tax measures fail that will give us about an \$800,000 million gap when the legislature returns in February. If our revenues under 2287 don't reach the levels that we had projected they would reach and assuming that the revenue forecast is down, we will be facing some catastrophic budget news. I am working very hard to impress upon everyone statewide in OJD how prudently we have to manage the resources that have been given to us. I am exceedingly worried about what will occur in February. As Mr. Borden knows well, we have an understanding that to be able to do this we are going to be overspending our general fund as we move along toward February. That leaves us in a very vulnerable position if any of those things happen along the way. We are working exceedingly hard at collections. Necessity is the mother of invention but having just returned from the conferences of chief justices, I am armed with even more modern, up to date collection materials and information that I am going to be using with our staff. The other thing you should know - many of your have served on judicial department committees - I have suspended all of those committees; either disbanded them or suspended them, because we can no longer staff them. I have eliminated in the State Court Administrator's Office a whole division, the division called Court Programs and Services Division. I am sure many of you are familiar with the lawyers who worked in those divisions and the analysts. The last day of employment with the Oregon Judicial Department will be August 31. Basically what we tried to do in our budget reduction plan is inoculate, as best we could, the trial courts from this severe budget reduction. What we focused on, and I had two committees, the Budget Reduction Advisory Committee, which we called "BRAC," which helped us determine what our core functions were. It was the conceptual document that Mr. Borden's office and the OJD worked with in looking at our budget reductions. That came out of our budget reduction advisory committee. After we knew what our budget was going to look like, and we still don't have all the details, but I put together what we called the "BRIC," the Budget Reduction Implementation Committee. We worked out in that committee what I would give to the local courts for their discretionary use and what belonged completely to the leadership of OJD and how we would do that. I had probably unprecedented access to the chairs of Ways and

Means. I met with them every Tuesday morning for breakfast. They were completely responsive to me. What I would say for all of you is it is one thing to achieve complete access, and it is a failure when you can't achieve a champion. That will relate to something else that I will tell you later on. We don't truly have champions. We have people who are very concerned about keeping the courts open. Both co-chairs were dedicated to that. We operated throughout the legislative session with the goal of being able to maintain an open and accessible court system. By open, I mean 8:00 to 5:00, five days a week. By accessible, I mean all the cases get processed. We don't prioritize these cases. We do the work of the court. We handle the FEDs. We handle the small claims. It is very important to me, not only, of course, that your cases are dealt with but that the civil justice system is maintained. I believe that truly our economic prosperity in this state, one of the underpinnings of that is being able to maintain a really competent and efficient civil justice system. We are working very hard to do that. I have given a great deal of flexibility to the presiding judges in the local courts. We have a set of guidelines and principles that were developed by our BRIC committee. Those require them to maintain an open and accessible court system. Beyond that they can consider the programs, procedures, and that sort of thing. There are things in the local communities that are important to courts in those communities that are not so important to courts in other communities. I have given them that flexibility so long as they maintain an open and accessible court system. In some places that is going to be difficult. In some of those one judge courts we are going to have to make some exceptions. When you are talking about the kinds of budget reductions that we are going through in a court system in one county where there are only five employees that is an enormous difficulty. We will have some exceptions. If one of those three things I mentioned to create the perfect storm occurs, I am going to have a new committee and that will be called "BROKE." Let me finish with my position about this. Many of you may have read the editorial in *The Oregonian* a week ago Friday. That was a result of the Governor's and my discussions regarding a line item veto to get our budget – it is a little out of alignment with the reconciliation bill that occurred at the end of the session. We are trying to make sure that we get that back in alignment and the Governor is working on that. You may have noticed in the editorial that there was a mention of dedicated funding for the courts. My position is this; I believe I could take the speeches of all three of my predecessors, Wallace Carson, Jr., Ed Peterson, Bud Lent, and Arno Denecke. That gets us to four. There have probably been four major crises since I have been a lawyer and a judge. I can pull their speeches out of the archives and in every one of those crises their speeches are just the same and I could have used them this time. They go like this: We are a separate independent branch of government. We provide a core function of government. We are all personnel. Our budget is 89 percent, or whatever it is, people. Even a modest cut to us will affect the delivery of justice services across the state. The response by the legislative leadership, which I could pull out of their speeches, is exactly the same thing. "Yes, we understand that completely. However, we have a severe economic crisis and the budgets of all agencies will need to be cut." Then they proceed to cut our budget and we proceed to go through this feast and famine budgeting process. I am not willing to do that. I have had enough of it the last two times now. I think unless the legislature is going to figure out a way, and I believe they need to retool our tax structure and figure out a way to eliminate this kind of feast or famine budgeting, because it has a deleterious effect on the courts. We get some funding and we start to become a modern court system, and then we have these severe budget cuts and now we are scrambling again just to keep ourselves above water and administer the kind of justice services that people more than have the right to expect and what we need to do in our state and in our country. There will be discussions about dedicated funding for the courts. The form that that will take, whether it is in a formulaic mode, or as the paper described it, three percent of the general fund budget, but there are groups, independent business and other groups, public safety groups, who are very interested and are working on a proposal for dedicated funding. I personally am not in favor of that. Obviously, California has had severe problems because, I think, their dedicated funds reached 67 percent or something like that, of their budget. The legislature has very little discretion to deal with the money. When you start weighing these things you see that if we are going to have to decide which part of the value scale you come down on, I have moved to the part of the value scale

that says that we have to find a way to preserve the court system without this feast or famine budgeting system. I think you will see that coming. I would like to give you just a little bit of national news too. I know you have an outstanding drug court in Polk County as we have in many counties. In addition to serving on the Board of Directors at the Conference of Chief Justices I am also the chair of the Education Committee and the chair of the Problem Solving Courts Committee. Probably about a month ago I gave a speech in Los Angeles at the National Association of Drug Court Professionals meeting. I am here to tell you that the National Association of Drug Court Professionals is seeking a \$250 million dollar federal grant for drug courts throughout the country. Our committee brought a resolution, and this became very important to me, and the Conference of Chief Justices passed it, a resolution asking the federal funders to make sure that in distributing federal funds for drug courts that they deal with the highest judicial entity. We use the word "entity" or "authority" because courts throughout the states are administered differently. They have judicial councils in Utah, California, Arizona, places like that that have a great deal of authority about how the OJD is managed and operated. I have started the judicial council here although it is in a little different mode. My point here is that drug courts and problem solving courts have matured to a point now where we need to have a consistent way of administering them. They told us a story in Utah where there is a rural court in Utah that never went through any entity connected with managing the judicial department and got a grant for a drug court that serves four people. We have to find a better way to use our resources and so we passed a resolution that would seek to have the federal entities deal with the highest judicial authority. Not only is it that you have these other smaller entities who seek these grants, but I believe it is also a separation of powers issue. I'll explain to you what I mean by that. My understanding is the Criminal Justice Commission has funds that are going to be used for a variety of things. In my discussions with the Executive Branch leadership in asking for some of those funds, which didn't come to pass, I learned that they want to use some of those funds for another kind of drug court. No one has ever asked me about that. No one has ever asked, "Do we have the capacity to undertake some other kind of drug court when we are having trouble right now making sure that our drug courts are fully staffed?" There is a separation of powers issue here that we need to think about in terms of good government. That is one of the things that is in our resolution. I also want you to know that Ingrid has sent out some excerpts from Attorney General Eric Holder's comments about indigent defense. It is important for all of you to know that the Conference of Chief Justices, unlike in past administrations, has now set up regular meetings with the attorney general to work on things like indigent defense and other issues that are important. Under Eric Holder's administration, I believe that the Department of Justice will be taking a much broader view of the delivery of justice services and Eric Holder, in particular, is very in tune to the indigent defense issues and how important that is to the delivery of services to our citizens. One final thing – well, I guess there are two things. One is that some of the criticism of state government, I think, is well placed in a sense that when we have plenty of funds we don't necessarily turn our attention to finding out what efficiencies we can recognize. We don't necessarily turn our attention to whether we are doing the best job that we can in the delivery of justice services. A budget crisis like this forces you to do that. I will give you an example as to why technology is exceedingly important. One of the things that we are doing because of our state of the art case management system that serves the Court of Appeals and the Supreme Court is that we are able to take over some of the record functions for the Supreme Court that we could never do if we didn't have this. What I mean by that is they are normally done physically down in the records office. We can use personnel from the third floor, from the Supreme Court, and get some of this work done which frees up people. The Court of Appeals has a much bigger caseload and is in need of this help. We are finding these kinds of efficiencies. In the civil area I am very interested in trying to create this whole regional commercial court idea so that we get away from the boundaries and we use judges where they have the expertise and the things that they can do. I am asking our branch of government to look very hard at ourselves. Through the judicial council we are going to take a very hard look and try to come up with innovative ways for the delivery of justice services, particularly trying to leverage our technology as best we can. I think that is about the best I can give you for right now.

28:51 Chair Ellis Thank you. I might mention that a few weeks ago I had a great privilege of reading a draft of Senior Judge John Beaty's memoir. He is one of the great citizens this state has had. He was, along with - you mentioned Arno Denecke - part of the group that really caused the unified court system to be enacted in 1980. Part of the vision of those involved with that was that we were very hopeful that over time we would see persons occupying the position of Chief Justice who would have the administrative ability, and the political ability, to really be a leader of a court system. I can tell you that Jack is very happy with how things are going. Those of us who were involved in that in 1980 think we have a wonderful Chief Justice today who is really playing that role. Thank you for that. Before we go to Polk County service delivery issues does anyone have questions they want to put to the Chief on any of his comments?

30:22 Chief Justice De Muniz Thank you for sparing me.

30:26 Chair Ellis I have one, procedurally. Assume the Governor exercises the veto? What is the process by which the legislature gets to decide do they want to override that, and when does that happen, and is that part of your perfect storm?

30:43 Chief Justice De Muniz I assume that might happen in February when they return. This would restore about 4.7 million to our budget. Our budget is only 2.7 percent of the general fund. That means a great deal to us. This is how important these is and how close and finely crafted this is. That will make sure that I can honor my commitment that we will maintain an open and accessible court system.

31:19 Chair Ellis I assume part of the problem is judicial salaries can't be reduced?

31:25 Chief Justice De Muniz That is correct.

31:25 Chair Ellis So the whole impact of any reduction goes on the administrative people?

31:30 Chief Justice De Muniz Right. I don't know if all of you know but early on in the session our circuit judges' association established an employee assistance fund because we were not subject to the reduction. The constitution says what it says and I believe in following it. Our circuit judges established an employee assistance fund. It has now paid out over \$50,000. Those contributions have been made by over 75 percent of the circuit judges in the state. It has been paid to employees who have been impacted by the furloughs that they were required to take under the rebalance of the 07-09 biennial budget.

32:27 Chair Ellis Thank you for that. That is a very interesting report. We are here to listen. Is there a volunteer who wants to lead off? Otherwise we will have Ingrid exercise her authority and just point the finger at someone.

32:48 I. Swenson I understand that many of our guests have a little time this morning and aren't in a particular hurry. I know Presiding Judge Horner is here and he has some other matters later.

33:01 Chair Ellis Why don't we start with you, Judge.

33:00 Judge Horner I didn't have anything to say until Chief Justice's De Muniz's speech. First of all I want to thank you all for being here. I don't recall Polk County being graced by a visit of the commission that does this. I think whoever came up with it ought to be patted on the back as a good idea. I hope you continue to go around to the various counties just to see what

happens and to get a little bit of the local flavor. I am just here to listen to where your discussion is going to go and then to offer, if I feel necessary, some insight on it or my take on it. The correction that I saw to Ingrid's report was on, and I am the drug court judge for Polk County, and it is on page 12. It is a minor thing - when we started. It says 2003 and it is really 2005. The more important one is down below in that sentence, paragraph rather, which is under "Procedure in Criminal Cases," second paragraph, and it says "Clients are encouraged to get driver's licenses, become voters, obtain GED's, go to school ..." they are required. They don't graduate unless they have a driver's license. They don't graduate unless they have a GED or a high school diploma. They also have to be in school or employed at the time of graduation. People have said nationwide that that is too strict and it won't work, but we are still doing it and it does work. Other than that, I don't have any factual changes from what was written here. I take it as a criticism that we terminate the employment of the court appointed attorneys after jurisdiction is established in dependency cases. That would be true. If you want to change that that is fine, but the contract says that that is fine. I guess that would assume that the lawyers are - I don't know how the billing goes but they are going to be called upon by the parent for whatever reason. We don't do that and that was just established - I don't even know why. Years ago I talked to the person who does that and she just thinks that when we started doing this, and going under the contract, that we were just trying to figure out procedure and that was our procedure where we stopped it. I have never looked closely at the contract that you have with the indigent defense provider, Mr. Lillegard's firm, and he is here and whether that includes that they are supposed to continue their representation or not. If it is we can do that. I guess I also sort of disagree with the conclusion that we don't appoint attorneys for children when asked. I would say we haven't done that all the time, but on the other hand we have done it. I personally have a problem appointing an attorney when requested by anybody when the child is an infant, one or two, because the representation then by the lawyer, as far as I can tell, is just imposing their own view. We are just getting another view there. We are not getting the child's. If you have a 15 or 16 year old that has a problem where they are going to go then they should have an attorney. I just appointed one last week. His mother wants nothing to do with him. He is 17 years and two months. He doesn't want anything to do with her. The father wants something to do with the child. The father was either convicted of sexually abusing that child or physically abusing him and the boy has made some statements about wanting to go with the father. DHS asked for a lawyer for the child and I appointed one there because the wishes of the child are then going to be heard and represented. Other than that I don't have any changes. I would be happy to listen to your discussions about the report.

37:55 Chair Ellis

I had a question as I read the report. First of all, I want to start by saying it doesn't sound like we have serious problems here. I don't want what I am about to say to be misinterpreted that way, but it did look to me like where you have a single provider, and it is a private firm which makes it subject to the unit rule for conflicts under the State Bar ethics interpretation, that there may be more risk of conflict cases under that model than any other. My question to you is, do you find that there are significant number of conflict problems, and related to that are they identified early enough that we don't end up with mid-case substitution which is a big expense factor from our point of view? Can you talk a little about the conflict issue?

39:02 Judge Horner

Well, I have no comparison; I don't know whether it is more or less. If you have a public defender corporation or group they would be the same as the law firms. I don't know if those would be any different. Consortia would be different.

39:33 Chair Ellis

You are right. Defender organizations are also under that rule.

39:36 Judge Horner

Again, I have asked this agency if they have any statistics on the conflicts that have come here and they are apparently not kept. I wanted to know if we are having - I see them and so when I see four or five of them during a busy day or week then I overreact and say, "We've got a lot of them. What is the problem?" I can't compare. I have run conflicts that are, in my view, found too late but I don't know why. I don't know how they developed or would have

developed or if they could have been realized earlier. I assuming that they are run through and they have a name scan that they can run through on the defendant.

- 40:35 Chair Ellis Sometimes that happens where the discovery provided by the DA is maybe not as early and as fulsome as it might be, so a later identified witness that does present a conflict that can be a cost.
- 40:51 Judge Horner I don't know that. I have not heard any objections that the district attorney's office is not giving reports in a timely fashion. I know we have continuances on pretrials a lot just so the district attorney is actively attempting to get them these reports that develop late.
- 41:16 Chair Ellis It did seem to me reading the report that where conflicts occur we may not have an ideal setup because you almost have to go out of town to get ...
- 41:29 Judge Horner That is probably my conversation with Ingrid when she just told me, "Why don't you just ask them?" They tell me they aren't going to answer me. She said, "Well, they have to do that." I didn't know that and so now I have learned something. As a presiding judge I will just ask them to tell me what the conflict is and I will think about what I am going to do about relieving you and appointing somebody else. Then I won't be the judge that will be hearing that case.
- 41:54 Chair Ellis One issue I think I detected is that when conflicts do arise and we have a single provider. When the single provider is conflicted do you have to go out of county to get ....?
- 42:17 Judge Horner We would have to go out of county for anything. We have one other lawyer that does criminal defense that would accept court appointed. I have another lawyer that works in a firm that does criminal law, but more prosecution for the city. Joe Penna does occasional work but he is out of county. I don't know if he does court appointed. I don't think he favors that. We have nobody in Dallas. We don't have anybody.
- 42:55 Chair Ellis So what do you do?
- 42:52 Judge Horner We go out of county. You have a list. We have one from Oregon City. We haven't appointed him yet but we have a list. Most of the people that are qualified to practice in Polk County don't live or practice in Polk County to be on the appointment list. So, yes, we do. We go out of county and over to Salem. Attorneys who practice criminal law in this county do come from Marion County, Salem.
- 43:41 Chair Ellis Is it an area that we should be doing more to address?
- 43:49 Judge Horner Well, your group has set out a proposal for a contract for the conflict cases. The deadline has already passed and there have been three groups that have applied.
- 44:06 Chair Ellis Can you give me a sense of what volume we are talking about? Is it three cases a year? Is it thirty cases a year?
- 44:14 Judge Horner The number I saw that seems inflated was 300.
- 44:18 Chair Ellis Per year?
- 44:18 Judge Horner Yes.
- 44:23 Chair Ellis That is significant. As things stand right now when you are faced with a conflict issue what is available to you? Do you see a list of names and you may or may not know who they are?
- 44:39 Judge Horner No. You are from Multnomah, huh?

44:46 Chair Ellis How did you know?

44:44 Judge Horner No, all of the lawyers on the list are known to me. You also have to remember that the three judges here have all been in this area over 20 years.

45:10 Chair Ellis And with some defense background?

45:12 Judge Horner Yes. All of us have a defense background. All of us have a prosecution background. Luukinen and Horner both have a minimal amount of prosecution. Four years for me and about four for Judge Luukinen. Judge Avera is a number of decades, centuries, as a district attorney and before that he was doing defense work for quite a bit.

45:47 Chair Ellis From your point of view, are you happy enough with what is available to you when you have these conflicts?

45:49 Judge Horner Yeah. I think a consortium is easier for staff and everybody. We have the phone and computer notice. One of the problems with the computer notice is that the lawyers don't look at their email. We sometimes have problems there. The consortium would be easier, I'm assuming. It would be easier for you for budgeting, I assume.

46:37 Chair Ellis There is a footnote on page 12 and this may or may not be something that you are focused on but it says, "Court staff expressed concern about the Lillegard firm receiving case credits for cases from which they later withdraw after discovering a conflict or, for example, finding out that a defendant who was first thought not eligible for drug court is later found to be eligible, requiring a substitution of counsel." The question I have is, in addition to true conflicts that surface, do you have many instances of substitution where part way through a case either the client is dissatisfied or there are issues of that kind. Are you finding substitution as a frequent problem?

47:30 Judge Horner No. Not frequent. It happens, of course. The client is upset with the lawyer for whatever reason. We listen to the reason and sometimes it is just tough luck and sometimes another attorney is appointed.

47:51 Chair Ellis I think from our point of view we recognize that substitutions will happen. We are very anxious that if they are ever going to happen that they happen early in the case and not later.

48:08 Judge Horner Yes. What you are talking about are two different things. Discovering a conflict should be manageable to find out early, but even there when you get into investigation some witnesses are going to come off the wall and then it turns out that they represented them some time ago and you didn't know that initially. On the other hand if you represented the victim and you are appointed to represent the defendant and you look through, and you just have the name of the victim in the charging instrument, you ought to be able to find that out. How do you tell the defendant to quickly love your lawyer or hate them early. I don't know how you do that. I am just going to guess that it reaches a point where the lawyer recommends that you should go along with a plea agreement and the person doesn't like that or want it. That is it I'm assuming, or they don't get enough hand holding or attention.

49:22 Chair Ellis Other questions for the judge?

49:30 Judge Horner Okay. I'll be around.

49:29 Chair Ellis Thank you very much. Appreciate it. Ingrid, point the finger. They are all shy.

49:41 I. Swenson Let's see. Stan looks like he is ready. Mr. Butterfield, the district attorney. I'll ask him to step forward.

49:55 Chair Ellis Good morning.

49:53 S. Butterfield Good morning. I am glad to be able to be here and again thank you for coming and making this something that is close and convenient for us. I don't have a great deal to say except that I believe that our criminal justice system in Polk County is working well from the prosecution and defense side from what I have been able to observe. A year ago I was a member of the defense bar. Now I am the district attorney for the county.

50:29 Chair Ellis So you went to the dark side?

50:29 S. Butterfield I did. I have a unique perspective in that way in seeing the things that do work and maybe need improvement here.

50:41 Chair Ellis Were you part of the Lillegard firm?

50:42 S. Butterfield No. I was the other conflict attorney here in town. I think that that system works well to address a question that you gave to Judge Horner. I would indicate that I believe that most of the conflicts are noted immediately in court at the time of arraignment. In that situation where they are not, my office is able to generate discovery within 72 hours in most cases of that arraignment. Usually that is spotted pretty quickly. I think that that works pretty well in terms of that. My observation would be that late changes are very much the exception. I agree with Judge Horner. I think 300 would be high, but it could be as high as 200 in making a change like that. I think even so, those changes usually happen very early in the process.

51:55 Chair Ellis How large is your staff?

51:59 S. Butterfield I have a staff of 23 people. That is including victim's assistance and CASA which works out of our office here. I have six deputies.

52:13 Chair Ellis I know you have functions that you do that the defense side doesn't.

52:20 S. Butterfield Correct. We have one attorney, one deputy that is dedicated to child support enforcement. She does not get involved in the prosecution side at all.

52:29 Chair Ellis When you get to those involved directly in prosecution are your numbers about the same as the Lillegard firm or are you probably a little bit more?

52:44 S. Butterfield I am thinking probably a little more.

52:47 Chair Ellis I know this is a sensitive subject but is there a compensation disparity in this county in your mind?

52:59 S. Butterfield hm...

53:01 Chair Ellis I knew it was a sensitive subject.

53:01 S. Butterfield It is and I don't know that I would like to respond if that is okay?

53:07 Chair Ellis If you can't we are probably going to ask your counterpart.

53:10 S. Butterfield That is fine. There probably is some disparity. I don't know exactly what his contract structure is for those folks that work for him.

53:33 Chair Ellis Can you put a percent on it?

53:37 S. Butterfield I can't.

53:37 Chair Ellis Any thoughts you have as to how the criminal justice system can work better in terms of communication on common issues?

53:53 S. Butterfield I think we have a pretty good dialogue with the defense bar. It may seem somewhat informal but all of the defense attorneys are able to come into our office even without being screened ahead of time. They are able to go through the secure door from reception and just go and talk to whomever they need to. I think in that respect there is a pretty collegial relationship, not only with Mr. Lillegard's firm but with all of the conflict attorneys that work regularly. I would say we probably have six attorneys that frequently work with us out of Marion County, and then there are a few others out of Marion County that work on a less frequent basis. Again, we know who those folks are and we have pretty good communication with them. I think for the most part they are pretty responsive in dealing with their clients. I think we are close enough to Salem that it wouldn't be unlike someone practicing in Multnomah County time wise. I just don't think there is that much of an impediment based on distance.

55:17 Chair Ellis I will say in general and this is always a hard thing to generalize about, I think the relationship between the DA community and defense community has improved significantly in the last five, six years. I think there is much more a sense of common interest than conflict of interest. I tend to attribute a lot of that to the experience of the last recession, the 2003 downturn, and that recession where courts were actually cut off a day week and cases were postponed because defense service wasn't available. Peter Ozanne was very instrumental in this in his role as Ingrid's predecessor, but I think the DA community began to realize that we really are in this together. I think that has found its way into more than just funding. I think there has been a pretty healthy improvement in communication.

56:40 S. Butterfield I would agree with that estimation. I think that perhaps the culture of that in Polk County has been present even longer than that. Because of our size we have to work together and I think that has probably been an ongoing kind of thing. It probably did improve as a result of that mutual hardship and necessity.

57:12 Chair Ellis I think it is an attitude. Under the circumstances both sides have worked reasonably hard to make that a more constructive point of contact. Other questions?

57:31 J. Potter Can we talk about the drug court for a moment?

57:32 S. Butterfield Sure.

57:33 J. Potter When you were representing defendants in drug court did you help in the process of setting up the drug court at all?

57:42 S. Butterfield I did. I think that it has been very beneficial to the county in terms of dealing with obviously repeat offenders and people who are affected from a family standpoint here. Our recidivism rate for those that have graduated from drug court has been very minimal. I think we have only had two or three .... one situation now where one of our graduates has reoffended.

58:31 J. Stevens How many people have graduated?

58:32 S. Butterfield I believe that we are at about 40 graduates right now.

58:46 J. Potter The defendant pleads guilty prior to what process?

58:49 S. Butterfield At the time that they actually apply to enter into drug court. They have to stipulate to their guilt and then that is held in abeyance. Then as long as they successfully complete the

program then the judgment is never entered against them. It is very similar to a regular diversion in that sense.

- 59:09 J. Potter            When you changed roles from defense to the prosecution were there any things that you would like to change in the drug court?
- 56:16 S. Butterfield       Well actually there was a change that I made immediately when I became district attorney. When I review the intake in the morning and look at each individual case I immediately consider whether or not that this is a person that would fit the basic criteria of someone that might be eligible for drug court. The evidence based approach to this indicates that the earlier that you can get the defendant into that process the more therapeutic drug treatment is going to be. I believe that I have been able to accelerate how quickly we make a notice of eligibility and try to get these people involved in the program so that they are able to take advantage of that. If it is a situation where the offender is somebody who has not been incarcerated before, the fact that they are incarcerated and that they are shaken up by that experience, I think makes drug court more effective because they are more motivated to not have that happen to them again. That was the biggest change that I saw. Obviously if we could have greater funding, but we have already talked about funding issues this morning. I think that there are probably more people that would benefit from this kind of an approach. I believe that it has been a very effective program, even though a small program.
- 1:00:59 J. Potter            As we have gone around the state over the years, drug court is always one of the things we review. Maybe I missed this in other counties but I have not seen a requirement to become a voter.
- 1:01:11 S. Butterfield       That one is the only thing that is not requirement. That is encouraged. Everything else on there is a requirement.
- 1:01:21 J. Potter            I was going to ask if you were required to vote as well.
- 1:01:28 S. Butterfield       Not yet.
- 1:01:32 J. Potter            That little part was very interesting. I think that is a good idea to encourage them to become voters. To encourage them to engage in common citizen practices.
- 1:01:46 S. Butterfield       I think the court has done a good job in that respect. I know that other drug courts also encourage involvement in parent/teacher conferences and that kind of thing. That is something the judge frequently will talk to parents about. We do have a parenting program requirement as well, even for folks that don't have children. If they are likely parents this is an opportunity to try to make people as whole as possible. I think it works out pretty well for them.
- 1:02:21 J. Potter            And lastly you mentioned funding. If there were more funding, would it expand the drug program? Would you expand it to more people? Would more people be able to partake, or would the funding go to just providing more services for those already qualified?
- 1:02:39 S. Butterfield       I think it would be able to help us expand. We, in most cases, provide the treatment for the individuals who are involved in drug court and the funding for that if we are not able to get it through the providers they are doing it gratis. If we were able to have more money to provide that type of treatment, we would probably be able to have more participants.
- 1:03:08 P. Ozanne            Stan, recognizing the county is small and much can be resolved informally and there are on going relationships, I wonder if you have here any formal body where you assure everybody's participation, Local Public Safety Coordinating Council, Criminal Justice Advisory Committee, one of those.

1:03:26 S. Butterfield We do have a LPSCC and, as a matter of fact, it met this week on Monday. I was suffering from a kidney stone attack so I didn't attend this time. We do and that is a good opportunity to be able to have people coordinate and also let others know about training opportunities and voice common concerns.

1:03:49 P. Ozanne Is a defense bar representative part of it?

1:03:52 S. Butterfield Usually there is a member of the defense bar there, yes. I don't know if there is a designated representative but there is always one present.

1:04:06 Chair Ellis There was a statistic in the report that was pretty striking. It is footnote 5 and it says that the caseload per judge here is 50 percent greater than the statewide average. I am assuming that the judges in the room are not going to dispute that. My question to you is how does the system deal? One could envision with the volume of cases that are processed, some might say efficiently, and some might say without enough time to do them the way that we would like. What is the impact on the system here?

1:05:00 S. Butterfield I don't doubt that there is a higher caseload. I am sure that statistically that is the case. I know that some years ago Judge Luukinen was looking at statistical reports and seeing where we measured up with other counties. It seemed to me like we were probably due to have another judge based on those numbers. I don't think cases are given short shrift regardless of that. Our accessibility to the judges either from a prosecution standpoint, or when I was in the defense, if we need to get in and talk to the court about a particular case I think that we are able to do that in chambers frequently. Again, a lot of that probably does come about in an informal way in this kind of a setting. I know from a defense standpoint, when I was there, I felt like that worked pretty well for my clients at that time. From a prosecution standpoint I don't think I have seen any impairment as a result of that. Workload wise I think it probably causes a bigger load and there may be delay, sometimes, in getting decisions and that sort of thing. I have delays in my office too.

1:06:29 Chair Ellis Any suggestions how we can do our job better?

1:06:40 S. Butterfield This may seem like a small thing but we have had some bad experience with private investigators recently that have not followed either their ethical, and in some situations statutory, requirements as investigators. It seems to me that in approving compensation for folks that are contracting if they aren't following those things that other providers might be approved by PDSC rather than ones that aren't following those kinds of things.

1:07:18 Chair Ellis Have you communicated to our staff on that?

1:07:23 S. Butterfield I have and that may be addressed already. I don't know.

1:07:27 Chair Ellis I just want to make sure that you know how to find us and let us know if you are having issues of that kind.

1:07:35 S. Butterfield That is all that I have.

1:07:35 Chair Ellis Thanks a lot.

1:07:43 I. Swenson Mr. Chair, since we are in Judge Luukinen's courtroom maybe we should give him the opportunity to comment next.

1:07:52 J. Luukinen Good morning.

1:07:52 Chair Ellis Good morning, Judge.

1:07:54 J. Luukinen I got here a little late because I was over doing the jail rotation part that the three of us share on a six week rotation. Crime was down last night so I got done pretty early and got here. I didn't miss very much. The questions that you asked in some ways kind of have a central theme and that is how we have dealt with things in this county in the criminal justice system. I probably beg differ with you about a five-year more collegial atmosphere. Here it is a 30-year experience. As Judge Horner said all of the judges have both prosecuted and defended in criminal cases. We always have a very good working relationship between the bench and the bar. The lawyers that have done the indigent defense outside of the contract have, for the most part, come from Salem. Back when we were the same judicial district with Yamhill County we had more Yamhill County lawyers involved. When the Chief was doing criminal defense, which was a long a time ago, he would come over here on occasion. We kind of saved the special cases for him. He would come over and do indigent defense appointment work for us here as well. It has been a process that has been ongoing. I think you asked about the caseload for judges. I am not going to blow anybody's horn but I think we are pretty efficient.

1:09:38 Chair Ellis It is a very striking statistic.

1:09:40 J. Luukinen I haven't seen it. I am on the new judge committee. Our statistics are at a point where at the next legislative session we would be in a position to ask for another judicial position.

1:10:02 Chair Ellis Pick a year when the economy is up.

1:10:05 J. Luukinen Right. Our numbers will be at the top of the group in terms of eligibility. We are fairly efficient and think part of it is because the defense bar and prosecution bar come to have a level of expectation in dealing with each other that doesn't get out of whack. They have a pretty good feel for kinds of cases and a range of resolutions. They are usually able to achieve those. There is always a little bit of change. Since Stan has been the district attorney there has been a little bit of change, but the bar has adjusted to that and, quite frankly, unless you knew what to look for you wouldn't know there had been a change, but there has been a subtle change. The lawyers have a good working relationship with each other. In fact the entire criminal justice system has a good a working relationship. You asked about the LPSCC Committee. I have been the chairman of the LPSCC Committee since it started, but we were one step ahead of the program. Before there ever was LPSCC we had LBJ - that building across the street. "Let's build a jail."

1:11:36 Chair Ellis Some of us thought you were referring to someone from Texas.

1:11:36 J. Luukinen I won't tell you which of the county commissioners at the time gave it that name. It was aptly named in any event. We got together - the defense bar, prosecution, police agencies, the general population - and we sat down and made our list of the criteria that we needed to address and how to do that. We came up with a program. We were entitled to have a bond to build it and a levy to operate it. Unlike some places in this state that now have beautiful jail buildings but nobody to operate them, we told the citizens of Polk County that we would only use the bond to build the jail if they also passed the operating levy to operate it because we wouldn't have it sitting there empty. That is the kind of relationship that we have had with the citizens. The trust level is there. When we do something we follow through with it as a criminal justice community. It has worked very well for us. The first thing that I wanted to talk about when I come up here and now I am going to close with it. A great deal of that is built on the lawyers who do the indigent work and their individual personalities and their expertise. As judges we tend to try to match the level of expertise to the type of case. If you do a drug bust and you arrest seven people now you have seven conflicts. I don't think 300 is out of whack at all. If you think about it we have now reinstated our drug team in the last year so we have a lot more drug cases that are more extensive. We also have some of those guys that occasionally roll over and remember that they would like to tell somebody about something in order to make their situation a little better. Now we create another layer of

conflict out of that. It would be very beneficial for the judges, I believe, to have definite information on who the conflict lawyers are going to be. I know Judge Lipscomb has a lot of really good young lawyers over there, but I don't want to have to train them for him. I would rather deal with a known quantity rather than just whoever needs to do some criminal work.

- 1:14:19 Chair Ellis Let me ask, whether from your point of view, let's assume MCAD is a candidate. Would you rather retain the ability to pick the lawyer, or would you rather we contract with a Marion County provider? There are two that are likely and they pick the lawyer?
- 1:14:41 J. Luukinen I would like to have some understanding about who will be in the group of lawyers that would be involved in it, perhaps in a priority order for cases and maybe groups of priority so that somebody is not always the first choice. Somebody out of this group of six would be the first choice and then as we go.
- 1:15:09 Chair Ellis We may have a really good marriage to make here because MCAD is experiencing a decline in caseload and that happens. You have, what sounds like either a consistent need for conflict lawyers or a growing need for conflict lawyers, so I think this is an area where there may be a way that we can work something out.
- 1:15:37 J. Luukinen As I said, part of the way our culture has been built is based upon the known ability of the defense bar to work with the prosecution bar. No offense to MCAD but they have had some issues.
- 1:15:58 Chair Ellis They have.
- 1:15:57 J. Luukinen And I don't want to inherit those issues on this side of the river.
- 1:16:04 Chair Ellis But they have made great progress.
- 1:16:05 J. Luukinen Judge Lipscomb is the best thing that happened to them.
- 1:16:07 Chair Ellis A lot of good things are happening.
- 1:16:08 J. Luukinen You have got to remember, and we always tell folks that we may not rehabilitate a whole bunch of people, but we teach a lot of them geography. There is a reason why God put the river there, seriously.
- 1:16:32 Chair Ellis Is there much of a minority population or a Hispanic population in Polk County?
- 1:16:36 J. Luukinen Very high level, particularly in the Monmouth/Independence area, but also the West Salem area. Marion County has felony flats. We invented it before.
- 1:16:50 Chair Ellis How do you handle both the language and cultural issues that that creates.
- 1:16:53 J. Luukinen The judges, and every one else, tries to be very culturally aware. The language problem: Mr. Lilliegard's last two hires in his office have been bilingual, Hispanic bilingual. His newest hire, Mr. Vidreo, was formerly a police officer and is bilingual. That helps tremendously. I found out earlier this week that if we want to get a Vietnamese interpreter for our jury trial that it is going to involve hiring somebody from the State of Washington at a very substantial cost. We are renewing our efforts to resolve the case short of trial. We use the language line for non-Hispanic folks. We have an interpreter Monday, Thursday, and Friday that is basically here all day long and they are a tremendous help in the jail, in juvenile, and Monday, Thursday, and Friday is when we tend to do our first appearance kind of things where we don't know whether we are going to need an interpreter for a specific person. The interpreters that we have are wonderful as far as trying to be in two or three places at the same time

depending on whether we have criminal, juvenile, domestic relations, all those kinds of things.

- 1:18:33 Chair Ellis One issue we encounter in several places in the state is called the graying of the defense bar - that generation of the post-Gideon group. Many of them are wonderful lawyers and very dedicated, but nature catches up to them. Are you finding fresh blood coming into the legal community here, or are you part of the graying problem?
- 1:19:04 J. Luukinen We do have some fresh blood, but it is harder and harder to find good, experienced criminal defense lawyers who are willing to do indigent defense work. There are a group of very dedicated people that are willing to do that who are very, very competent. Quite a few of them come from the Salem area that are part of MCAD, but it is harder and harder to break in as a new lawyer and become knowledgeable, in some ways, I suppose, because of contracts that exclude the brand new guy on the block. He is not part of that contract group and so he doesn't necessarily get the leftover conflict case that used to happen 25 years ago when I started. There is that issue, but I think part of it comes from the process that we have set up to provide indigent defense services. It is more difficult to bring people in and you just about have to make a commitment to be part of that group, part of that consortium, rather than be in the civil side of things.
- 1:20:20 Chair Ellis It is obviously part of what we are trying to deal with. You said it all when you said you don't want just any lawyers sent over from MCAD. You want someone who is experienced, qualified and competent. To get those people they need to have the experience and the specialization and the focus and the CLEs and all the rest of it.
- 1:20:46 J. Luukinen But if Judge Lipscomb were to call and say, "Hey we have a good, young lawyer that is just getting started. We think he is going to do a good job. You know start him up with some misdemeanor cases and then work him and get back to me and tell me what you think." We have had that informal kind of discussion with the Marion County judges before. That is the kind of thing that we would be open to, but we don't want to have a brand new lawyer appointed to a case that the Feds are looking at because there is so much dope involved that maybe they are going to take it federally. That is just asking to come back and do it over again. Some of those guys in those situations know more about the practice of law than a lot of lawyers do. That is what we have tried to avoid. What we have tried to do is to match ability to the type of case, but obviously that doesn't make any sense to overmatch ability to the level of case either. That is a waste of good resources.
- 1:21:51 Chair Ellis Other questions for the Judge?
- 1:21:55 J. Potter Spirit Mountain. A significant number of criminal cases arise out of Spirit Mountain Casino. Could you comment a bit on that and the kind of cases they are and the burden it puts on the system?
- 1:22:14 J. Luukinen Well, we have come a long ways and it may come as a great surprise to some but some of the folks that like to gamble also like to do other kinds of recreational activities that are frowned on by the criminal justice system. I remember the first criminal case that came out of Spirit Mountain was a cheating case. They had the overhead camera and it finally came to their attention because they were moving the dealers around but this group of people would always follow the same dealer so they thought something was going on. The camera was so bad that it was not even in color. You couldn't tell not only what card it was but what suit it was. Now we routinely have the surveillance cameras in the parking lot that can tell you how many people are smoking dope and whether it is a wooden pipe, or a metal pipe, or a glass pipe that they are smoking dope out of. We have a lot of drug and drug related kinds of cases that come from the casino. Not inside the casino but in the parking lot. We have a fair number of vehicle cases, driving under the influence, driving while suspended, those kinds of things, but the sheriff has a relationship and actually the Spirit Mountain Community Fund helps to fund

enforcement out there in that area. They don't put up with any kinds of physical disturbances inside the casino. You are out. We get a few trespass cases where people forget that they are not supposed to come back to the casino or they didn't understand. By and large it is more the drug cases and it happens either in the hotel or motel adjacent to or in the parking lot. The good thing about those cases is the evidence tends to be very sophisticated and good. It is hard to argue with a camera. You can tell them that it was something other than methamphetamine that you were smoking, but probably not. They do an excellent job now with their security people of identifying those things. That is kind of our large city crime center, if you would, that the larger cities put up with in parts of Salem, Portland, and we just happen to have ours sort of isolated away from the rest of our community. But it is the same kinds of activity that you see in certain parts of bigger cities as well. The good thing as I said is that the enforcement level and the evidence gathering level is really excellent. Those cases tend to get resolved very quickly.

- 1:25:32 J. Potter Are they resolved in drug court at a higher rate or a lesser rate than a case outside of Spirit Mountain?
- 1:25:35 J. Luukinen I would say lesser rate. A lot of those people tend to be hard-line drug users. I don't have a lot of experience with drug court.
- 1:25:46 Chair Ellis Are a lot of them out of county residents?
- 1:25:50 J. Luukinen Yes, a large number of out of county residents.
- 1:25:54 Chair Ellis Which would make them less of a candidate for drug court?
- 1:25:55 J. Luukinen Correct. They are a transient group that gets involved in the drugs out there. I just had one this week that was a local person who had been charged out there and ended up going to drug court. You talked about the conflicts and catching them early. Yesterday afternoon I tried to appoint Doug Berg, who is in Mr. Lillegard's office to a case and before I got through saying that we were going to appoint Mr. Lillegard's office, he stood up and said, "Judge, we have a conflict with that and so and so other lawyer is going to have a conflict. I think Mr. Eggert previously represented him and I don't think he has a conflict." Within 30 seconds Mr. Berg had straightened us out about where the conflicts were and we got him a lawyer. It was something that I didn't catch for sure. He just happened to be in the courtroom on another case and hadn't left yet. They do a very good job of catching those things in many, many instances.
- 1:27:11 P. Ozanne Judge, this is probably a question that I should have asked your presiding judge or the district attorney but you have been around doing this for a long time.
- 1:27:20 J. Luukinen I was presiding judge for 18 years.
- 1:27:22 P. Ozanne Right. I was just thinking of current statistics and a fair question. When the statistics bear out a very high caseload, and you said understandably that there are efficiencies in the way that people work together and understand the system well, one of those possibilities is a relatively low trial rate. I wonder if that is something that you either know anecdotally or if statistics show how Polk County compares to other places in terms of trial rates. It is probably something that I should be asking the district attorney.
- 1:27:53 J. Luukinen I think you would probably look at the weighted caseload studies that they use for the new judge committee and the raw data that goes into that. I think it would probably be the most accurate. The State Court Administrator's Office has been keeping that for about eight or 10 years. We now have a very good baseline for making those kinds of comparisons. There is probably not a judge in the State of Oregon that isn't going to tell you, "Geez, we sure try a lot of cases." The best way to get that answer, I would suggest, is to look at that data that goes

into the weighted caseload averages. They adjust those periodically a little bit. That is based on the kinds of cases that go to trial. That is how they assign the weighted average to them.

1:29:02 P. Ozanne

But you don't have a sense over the years whether this has been a high or low trial rate county? You don't have a sense?

1:29:13 J. Luukinen

In some respects it is dependent on who has been the district attorney. I remember one district attorney that said you are either going to plead guilty on everything or go to trial. I stepped right to the front of the trial line and said, "Okay, let's go." We don't have that anymore. That was a small anomaly for four years. Again, a lot of it is because of the good working relationship between the prosecution and the defense bar. I think we do it about right. I don't think that there are cases that get dealt that should go to trial when you factor in Ballot Measure 11, the risks that the defendant faces, those kinds of things. I have sat on a lot of cases all over the state and there are places where they don't deal Measure 11 cases unless it is into another Ballot Measure 11 charge. That is not the case here. I think we do a really good job and for Stan's first year as the district attorney, I think he has done a very good job of picking up those cases that ought to get tried and saying, "Nope." The other thing we do here is we identify pretty early on the cases that are going to get tried as compared to the cases that are likely to get resolved. The ones that are going to get tried everybody just gets ready to try. After a while you can just tell that this one is going to trial and you can gear up after that. The other ones that shouldn't get tried that ought to get resolved you get those resolved early. The ones kind of in the middle you fuss with a little bit and try to get them into one category or another. I think we try things at about the right level. I am sure there are counties in the state that try more cases, and counties in the state that try a lesser percentage of cases. Part of it is the experienced defense bar that we have here. That is probably not an accurate answer.

1:31:27 I. Swenson

Mr. Chair, I would just add that I included in this report, as I do with most of the reports that we do, the Judicial Department's statistics on number of trials, court trials, jury trials, per year that occur here as compared to the state average. On that measure Polk County is higher than the state average, but I realized, really for the first time, looking at it more closely here in Polk County, that I don't know what those numbers mean. Trial rates include stipulated facts trials, for example, so how many of those are there and do you really want to count them as trials?

1:32:09 J. Luukinen

Everybody knows that you do that so you can preserve the issue in appeal. The lawyer does good lawyer work, files a motion to suppress, the court rules against him, now he has preserved the issue and stipulates to the facts on an agreed upon resolution. Now it is available to the appeal. We do a lot of those.

1:32:26 Chair Ellis

Doesn't take a lot of time.

1:32:27 J. Luukinen

No. It doesn't take any longer than a plea of guilty, really.

1:32:36 I. Swenson

We will probably have to look behind those numbers at some point to see what they really mean.

1:32:41 Chair Ellis

Other questions?

1:32:41 Chief Justice  
De Muniz

I just had one comment. You heard Judge Luukinen mention that he sits on cases around the state and I would like to take the opportunity to just comment. One of the things that we are trying to do is leverage our experienced judicial resources around the state and not be bound by these boundaries of artificial venues and this sort of thing. Judge Luukinen has been at the forefront of that and we greatly appreciate the expertise that he has brought to this. He is willing to travel all over the state to deal with very difficult cases. It is actually a role model that we are using for other judges in trying to make sure that we can leverage the judicial

resources that we have, and not be bound and have empty courtrooms and things. I just wanted to tell Judge Luukinen how much I appreciate that.

1:33:32 J. Luukinen Well, thank you. Again, that is a function of having good lawyers who have tried a large number of relatively heavy duty cases over the last 20 plus years. It is because we have good lawyers who identify the cases that need to get tried and then try them. They try them very, very well. Thanks.

1:33:57 Chair Ellis Thank you very much.

1:34:13 Judge Avera Judge Luukinen is occasionally accused of being blunt and I am going to show you that he is not nearly as blunt as I can be. I just have a few things to say. Thank you for being here. This means a lot to us to have you come to Polk County, and I am sure it means a lot to all of the other counties that you travel to that you show this kind of interest in what we do here and helping us make it better. I read Ingrid's draft report. I don't know if the one they have is updated from that, but on the whole I thought it was an excellent report. I am really pleased that she spent as much time with us. I know she spent quite a bit of time watching my court and talking with me. I am very happy with that. There are a few things in the report that I want to comment on and some of the things that have gone on here. It has already been mentioned, and I don't want to beat it to death, but I think our unique history in this county, with the people involved, does have a lot to do with how things are delivered here. I have somewhere, framed, a document certifying our membership in the OPDA, the Oregon Public Defenders Association, and the two of us joined that when it was called that and possibly the Chief was also at that meeting at Sun River where the name was changed to the Oregon Criminal Defense Lawyers Association. That is how far back we go. Judge Horner and I were very active in that and also the Chief. I was at one point approached to be on the board. I was considering that and I learned that Mr. De Muniz was also considering that. I said that he would be much better at that than me and I deferred. One little decision and maybe I would be coming back from the Chief Justices' Committee. Who knows where life's twists and turns will take us. I was not district attorney for decades but I was a deputy for two years and I was the district attorney for 12 years after a very active criminal defense career. I have been a judge now for 10 years or so. Judge Horner has a similar background. When I came Judge Luukinen was a brand new deputy DA. We started here about the same time. I was a law student and he was a newly minted lawyer in the DA's office. He kicked me around the courtroom a lot and – well I didn't kick him around the courtroom a lot but I put up a fight, and we became friends. That is the kind of unique situation we have here. Stan was very active and getting very good at criminal defense. When he became DA he hired two other experienced criminal defense lawyers to be on his staff. What I am getting at is that all of us understand and appreciate the problems that a prosecutor has. We all understand and appreciate the problems that a defense lawyer has. We also understand the dodges and the BS that comes out of prosecutors and defense lawyers at times and we don't tolerate it. I think the reason we are able to handle a large caseload and move things along is we are three guys that do not tolerate that kind of thing. We bring them together and say, "Look, the guy is smoking dope in the Spirit Mountain parking lot and it is on videotape. Are we going to spend a lot of time arguing about this? We know he is going to get a deferred sentence. Let's move on." If there is a motion or something like that lawyers are pretty good at spotting that. If there is not, let's move on. I think if you looked at it we have a very good indictment to resolution time in this county. I think it is very short. Okay. Conflicts. Ingrid was correct to point that out. It is a problem, but just by pointing it out I think the report overstates it. I think the solution to me is pretty obvious. Yes, there is a conflict problem. We have a single firm provider with four lawyers. They are going to have conflicts. I don't know what the number is but I can't imagine it is very high. Somebody said 300. I can't imagine it is that high. Maybe it is. As you know from the report we do a jail rotation. I just finished my six-week sentence in jail here a couple of weeks ago. Judge Luukinen is doing his time there now. That means that I arraigned every criminal in Polk County that was accused of something for a month and a half. I would go several days, sometimes a week at a time

without having a conflict where I would have to appoint a different lawyer. Then, as Judge Luukinen alluded to, the drug team goes out and arrests 14 people in a house, and that is a mess because we have exactly one lawyer in this county who is on your list outside of the Lillegard firm, one lawyer and that is Kathy Streed across the street. She is fairly new, still, so we are not going to appoint her to homicides. It is a problem. However, we have over the years developed five or six very good Marion County lawyers that seem to enjoy coming here, that are willing to come here anytime. We try to make it worth their while. We try not to appoint them on one case that is going to make them drive the 20 minutes here, spend five minutes and drive back. We try to appoint them and schedule them so they are going to come over for three or four cases, both to save them time and to save you money is why we do that. It works pretty well. I got frustrated and probably caused a stir in Ingrid's office because we had a big one and I ran out of lawyers and I couldn't find one. I would appoint one and they would turn me down. I would appoint another and they would turn me down. I would appoint a third one and they had a conflict. So I appointed somebody off the list and I got told I couldn't do that. I think my response was, "Well, Ms. Swenson is a lawyer let's appoint her." Then I started getting phone calls from people. That is one instance. We would have that no matter what solution you come up with. Lillegard's office, I would have to say, handles 95 percent of the cases without a conflict. Most of these are stand alone crimes. It is one person with the dope. It is one person breaking into the house. It is one person trespassing at Spirit Mountain and there is no conflict there. What I would suggest, and this was where Judge Luukinen was a little subtle and I am not, with all respect to Judge Lipscomb, and with all respect to the many quality lawyers at MCAD, when I heard that suggestion I asked Ingrid and she directed me to the list of lawyers. There are several on that list that I think are good, quality lawyers. In fact all of the ones that we regularly appoint for our clients are on that list. Mr. Eggert, Mr. Obert, Martin Habekost is here. They are all on that list and they are good, quality lawyers. There are five or six there I wouldn't want in my courtroom and there are two of them that we ran out of this county because we didn't think there were competent and could get along. If they send that guy back here I am going to send him straight back across the river. Again, with all respect to MCAD and Judge Lipscomb I would be very much opposed to that and would fight you on it. What I think the solution is, and I have also heard this rumored and I think Ingrid mentioned it as a possibility, there is a group of lawyers consisting, pretty much, of the five or six that we generally appoint who was toying with forming some sort of consortium.

1:42:27 Chair Ellis      So they would be members of two consortia which I don't see any reason why it couldn't happen.

1:42:30 J. Avera      I don't know. As Judge Luukinen says, I want some measure of control over who I am appointing. I don't need in every case to say that I am going to appoint Peter Ozanne. I don't need to say that I am going to appoint Barnes Ellis, but I would like to say I am going to appoint the group, whatever you call the group, and know that one of those people is going to come here. I don't want somebody in Salem telling me who is going to come over here. It is just that some of these lawyers aren't what we need over here. Like I say we ran two of them out of town. That is my subtle comment on that score. I would like to say as far as statistics go I have been chatting with Ingrid some and with our trial court administrator. Statistics are great. In the course of looking at them I think we are developing some problems with them. Gene Berg, our TCA, is working on solving those. There are a number of factors that go into that. Ingrid mentioned the stipulated facts trial. Our previous district attorney made heavy use of DA diversions in cases with a jury waiver and stipulation in it. A lot of the people they gave diversions to shouldn't have had them and they failed. They then come back in the system and they are counted as trials which greatly pumps up the stats. I think Gene told me the other day that last year we had 52 stipulated facts trials set. I don't know how many of those actually turned up in the trial stats with 52 set. If you add 52 of what are basically guilty pleas to your trials, it is going to look bad. We are trying to master that ...

1:44:33 Chair Ellis      It might look good.

1:44:34 J. Avera           It might. There is not much incentive to correct errors like that. I will tell you the honest truth. I think we need to know. My impression is we probably have a trial rate about average, maybe a little lower. Our current district attorney, Stan, he came up here and has done a fabulous job in the short time – what, seven or eight months? - he has been here in the office. I tell you how well we get along. He hired my ex-wife, which has worked out fine. Things are getting a lot better from that end. Discovery - that was mentioned. Sure there are times when discovery is late. When I started practicing here in the '70s, John Snyder was DA and the discovery practice was this. When you first went in and introduced yourself a nice lady named Dee took you around and showed you where the file drawer was and presumably you knew the alphabet. You would open the file drawer and pull out your client's case and go over to the copy machine and you take whatever you wanted out of the file. That was discovery. That continued through Judge Horner's term as DA. It continued through my term as DA. Since then I haven't had much occasion to go get discovery out of the DA's office. I think it is a little bit more formal than that now, but usually by arraignment time the deputy has the discovery packet in the file.

1:46:11 Chair Ellis           I think he is saying he makes you put the papers back.

1:46:16 J. Avera           Usually they have the discovery packet in their hand or it is available at their office. Yes, there are times when investigation is ongoing. Sometimes the police agencies don't get a videotape. Sometimes it is hard to get those tapes out of Spirit Mountain in a timely manner and those things happen. For the most part that is not an issue. Where the late conflicts come up are the ones where four, five, six weeks into the case they pop up with a new witness and it is a current client who got burned or something like that and they need to get off. Recently I had to relieve Martin Habekost on one of those. It is a significant case. It is life with no parole, repeat sex offender kind of case so the stakes are high. I really don't think that there was any legitimate basis, but he had filed a bar complaint, a lawsuit, and every other kind of thing against his lawyer. I felt, as Judge Luukinen, I really don't want to try this case again in five years so let's deal with it now. So, yes, I did incur some expense by appointing a different lawyer but under the circumstances I felt I had to. That is one case in two or three years that I have had to do that on. It is not a large problem. On the whole I think things run pretty darn well here. We process cases quickly. We do them well. Increasingly the DA's office and the defense bar recognize the cases that should go to trial and the cases that shouldn't go to trial. They do that pretty quickly and move on. If there is a legal issue we hear motions to suppress. If there is no issue at all we don't hear a motion to suppress. It is as simple as that. Sometimes they miss an issue that I would have filed. I have rattled on. Any questions? Do you want to hear from Chris?

1:48:12 P. Ozanne           I would like to say something. I appreciate your comments and I want you to know that I have only heard good things about the county. I have no direct knowledge, although I worked in Ingrid's position before and appreciate what you say. If I were sitting in your shoes I would probably say something similar, but I want to say for the sake of bluntness that there is a little different perspective here. Having started here in Oregon, working in small counties when you come as a new lawyer and I have had this experience elsewhere, every county has a culture and when you come to a county and you are a young lawyer and everybody went to law school together and was in the same district attorney's office, etc, there is a sense of how things are supposed to work. It is very challenging for that defense attorney to resist what I will call, for a lack of a better term, the "culture of understanding." I think from our perspective, at least mine when I struggle with this, the first thing we want to do is to keep good relations with the court and be sure we are providing the services and quality of attorneys that you have a right to expect. We have also reached out, at least when I was there and I know Ingrid has done that, to reach out to the prosecutors, but ultimately I don't have to tell you, you were on the board or wanted to be.

1:49:33 J. Avera           No. I didn't want to be.

1:49:32 P. Ozanne            So you know this tension. To use the term loosely you, as a judge, are sort of the fiduciary for the administration of justice. At least I view my role as a Commissioner as the fiduciary for the clients who are facing – and need zealous advocates. That is why we have come to this commission model. We have really danced around this but, for the sake of bluntness, the issue is what role does the court have in the selection of counsel? I have heard you speak very well that you want to be sure of the quality. We have a history and there was a history in the county I first worked in and there was history in other counties around the state. We all know, and I am not saying it is going on here, that the judges pretty much had the group of lawyers that were approved in their back pockets. You never quite knew whether that was based on vigorous advocacy or something else. When we come particularly to a place where everybody knows everybody and it is working well, as I am sure it is here, that comes to mind. In a larger county where a lot of people don't know each other, and I have been practicing there too, it is different because you may not see the judge again in two or three years. In two or three years you feel like you maybe have a little more license to push things. From our perspective we worry. I worry.

1:50:58 J. Avera            I understand that completely. Five years ago Stan was that new lawyer that came here not knowing the culture. As soon as he got on the list we started appointing him to see how he did and he responded well. He was a zealous advocate for his clients. He had common sense and he moved things along. He became a great lawyer and was widely supported at running for district attorney. Melanie Mansell, one of his deputies, I don't think she was a brand new lawyer but she was pretty much new to this county and indigent defense. We started appointing her especially to juvenile cases and she was superb at juvenile cases. We just fell in love with her. We have a history of that. We have brought a number of lawyers in and worked with them. Some have stayed and some have gone on. My concern, and I remember spending a lot of time talking to Ingrid, frankly sometimes I think that the collegiality oversteps the line, that we get along so well that maybe zealous advocacy suffers at times. I think every now and then we need to step back and just have an old-fashioned street fight. The lawyers I am talking about and I don't want to name names or get in any trouble, but we had a lawyer here that, frankly, frequently when I was in jail court I rejected guilty pleas because I would have a recitation of what went on and what the guy did wasn't a crime, or it wasn't the crime he was pleading guilty to and the lawyer didn't know it. I have had cases where I have had them reject a guilty plea and made them go to trial and the guy was acquitted at jury trial. That is the kind of lawyer that I don't want representing criminals.

1:52:54 P. Ozanne            Sure and it is great that the three of you have such rich experience on "both sides." I feel pretty comfortable. I am just talking conceptually.

1:52:59 J. Avera            And I understand that.

1:53:00 P. Ozanne            It is an issue.

1:53:03 J. Avera            I completely understand that because I know the kinds of places you are talking about and I have been to some of them.

1:53:06 P. Ozanne            It is powerful - the culture. That is why I think the Chief's idea, and Judge Luukinen is doing this, is to move judges around to other counties. It would be great to have lawyers do that too because one of the things you find is people grow up in the county as lawyers in many places and haven't seen how it is done in other places. I think this is a great program that the Chief is developing. I did want to say that and I knew all that. As a Commission we look at that issue.

1:53:35 J. Avera            I appreciate that.

1:53:39 Chair Ellis Other questions? I think you are done. I just got a long kick in the shin and we are going to take a 15 minute recess and we will be back.

(break)

1:52:20 Chair Ellis I will be a commission of one and assume the others will show. Chris, do you want to come on ahead? With only two of us we can get this done in a hurry. Here we go. Did you have some opening thoughts or would you like to go straight to cross examination? How would you like to do it?

1:56:11 C. Lillegard I would like to thank you all for being here. This has been interesting to see what you all do and visit with Ingrid and hear from our co-workers, so to speak, about how things have gone in this community. Just by way of introduction my office has been the indigent provider in this county since 1984. Judge Williams came to me and wanted to get a contract. I think we were paid by the county at that time.

1:56:55 Chair Ellis It had just shifted.

1:56:48 C. Lillegard They wanted to have some things fixed because they had some people who were ...

1:56:55 Chair Ellis You were dealing with the State Court Administrator's Office.

1:56:57 C. Lillegard One gentlemen, Doug, has been with me since 1984. Monty is sitting back here. He has been here since '96. I have two staff persons, one who works with Shelley our analyst, Tammy and Linda. They have both been with my office for over 20 years. We have stability and that also gives us, as Charlie pointed out, if somebody says a name then Doug stands up and says, "We have represented three generations of that family," or something. We are now up to about the third generation in some families. We have been the guy for 25 years.

1:57:51 Chair Ellis How do you maintain your records on conflicts? Are you electronic?

1:57:56 C. Lillegard We are getting more and more computerized but we have cards for all the files. We have been here long enough that we just know that.

1:58:02 Chair Ellis You have an institutional memory.

1:58:06 C. Lillegard We will get the question from staff, "Didn't we represent the victim?" We typically pick those things out relatively quickly. There are always cases where it will come out later because of witness problems. Most of it is caught at the beginning. I have no idea what the statistics are but when Judge Avera said that we probably do 95 percent of it that sounds right to me. There are always people that retain counsel.

1:58:41 Chair Ellis What percentage of your firm's practice is indigent defense?

1:58:45 C. Lillegard Ninety percent.

1:58:45 Chair Ellis The other 10 is?

1:58:47 C. Lillegard I do some family law, some probate law. I have been here for 32 years so I have written a lot of wills and some of those people are dying. We do a variety of things. We are in a small town so I have done A to Z.

1:59:04 Chair Ellis In the last several years have you been in a recruiting mode?

1:59:15 C. Lillegard I was in a recruiting mode because one fellow that worked with us for a number of years got himself into legal difficulty. We had to let him go. We had a fellow that followed up in his

spot that was very attractive to us because he was Spanish-speaking and he had a couple of year's experience. Both Judge Horner and Judge Avera found him in contempt of court because he couldn't get to court. We had to fire him. We were very lucky to hire this young man who has a police officer background and is also a Spanish-speaking fellow. There are four of us. We really have five counterparts in the DA's office, plus the support deputy, and that works out fine. With Stan in the office we are busier. I think Shelley and my staff are going to finish up the final numbers for the six months...

- 2:00:11 Chair Ellis That is because he prosecutes a lot of people that you don't think should be prosecuted?
- 2:00:15 C. Lillegard I would never say that. He is just more aggressive. I think for the last couple of years the fellow that he succeeded – well his heart wasn't into it or something. We handled a lot of cases pretty informally and I suppose there were a lot of things that weren't filed. I don't know. I can just tell you that in the first six months of this administration our numbers, case credits, or whatever you want to call them are up. I am going to see where we are at the end of this calendar year and we may add on another person. Right now we are fine with the four of us.
- 2:00:59 Chair Ellis And you are the sole equity partner?
- 2:01:02 C. Lillegard Yes.
- 2:01:03 Chair Ellis That probably makes you chair of the training committee, the recruiting committee, the compensation committee, and anything else.
- 2:01:13 C. Lillegard Chair of some of that.
- 2:01:15 Chair Ellis I asked the DA a question that he waffled on and I promised I would ask you the same. Is there a significant differential in compensation?
- 2:01:27 C. Lillegard I have no idea what the DAs are paid. Honestly I don't. When I was sitting there with Judge Avera he suggested that guys that have been with me a long time are probably paid about the same as the assistant district attorneys are here. I honestly don't know that. I have always thought that I was able to pay less than what the seasoned district attorneys get but I don't have any numbers. I suppose I could find that somewhere.
- 2:01:58 Chair Ellis It is actually refreshing that it is not something that you worry about that much.
- 2:02:07 C. Lillegard No. These guys that work for me that have been around. We try to take care of each other. I try to take care of them. When you have staff people who have been with you 20 years you start out knowing that you need to take care of everybody. We have done a good job of that and that consistency and longevity has helped make this work. We are very efficient and we know what to do.
- 2:02:34 Chair Ellis Let me approach this subject and I don't mean to get personal beyond what is appropriate, but from our point of view you are a sole provider in an important county. You have been doing it for a long, long time. I don't know if you'll be doing it forever. What do you see as the succession issue for us when the day comes that you want to move on.
- 2:03:08 C. Lillegard I see myself hiring another young, 20ish, early 30ish person. This new fellow is in his early 30s. One of the attractions to me was that he wanted to raise his two little girls here in Dallas. My kids were raised here. I can see myself getting somebody else and gradually having my firm, or that entity, continuing on with the contract down the road. We do this two years at a time. I just turned 58. I am going to be working.
- 2:03:42 Chair Ellis I think 58 doesn't sound bad at all.

2:03:42 C. Lillegard It isn't.

2:03:46 Chair Ellis I find it interesting because I think the model here of a single, private firm provider may be unique in the state. Out in Hood River there is something close to that. The questions I am asking you now are not with any sense that this isn't working. I think everything we have heard today says it is and that certainly was my belief before we came over, but I wanted to get your thoughts. What would you say are the pros and cons of a single equity partner, private firm, sole provider model versus a consortium? You could organize here as a PD, a consortium. What are the pros and cons? I want to learn from it.

2:04:47 C. Lillegard I think the pros are that they call over to talk to one person in my office or we get something by computer. They deal with us. We tell them which one of us four is assigned to the case. It is efficient. If you have a consortium I suspect you have four or five different offices. They know right away that that is going to be Doug's case or Chris' case.

2:05:21 Chair Ellis Do you assign cases by specialty?

2:05:19 C. Lillegard No.

2:05:25 Chair Ellis By who is available?

2:05:25 C. Lillegard No. The young guy - we don't give him somebody with a bunch of Measure 11 cases. We keep track of what it is and if it is a routine case. We are trying to bring him on gradually. I think our setup, and remember this is the only thing I have done so I don't know what the other systems would be, but I think we are darn efficient at what we do. Here the judges give us a pretrial conference that is sometimes two weeks out so our feet are to the fire so to speak. Stan's office gets us discovery. Typically the defendant checks in. I am a block and a half away. We get an appointment set up. By the time we meet with them we have got police reports and we get to the heart of what we are dealing with fairly quickly. Some of that I think is location and some of it is just personal. We have easy access to the DA's office. We are in and out of their office everyday. I am not sure it would work better to do it any other way.

2:06:41 Chair Ellis A negative, somebody might argue, is the unit rule conflict problem.

2:06:49 C. Lillegard Yeah, I have heard that talked about here this morning. Something else that is kind of unique to this county is that we are 15 minutes from Salem. The bar since I started in 1976 has been the same small size. What are there, three offices here, four? And only one of them does any indigent defense. There are a couple of guys in Monmouth. It has just never been any bigger, but we have always had a group of fellows and ladies from Marion County that have been on the list, so to speak, that have had a good relationship with the judges and the DA, so we have always had that resource. Some of it I think is just the geographic location. It has worked. We have some conflicts but I don't think they are that significant.

2:07:43 Chair Ellis What is your practice in terms of CLE involvement by yourself and the lawyers in your firm.

2:07:49 C. Lillegard We all have to get our hours. A couple of guys go to the OCDLA conference, I think, every year. I was active in OTLA for a while and on that board. If something comes up that looks good then somebody goes to it. I don't have any hard and fast policy. Everybody just has to get their hours in.

2:18:12 Chair Ellis You do the juvenile work as well as the criminal?

2:08:15 C. Lillegard Correct.

2:08:14 Chair Ellis Any issues there? Do you feel comfortable on that?

2:08:17 C. Lillegard Well, we talked about this after meeting with Ingrid about not being continued on a case. I think what we have determined is when disposition is done and we get that court order, a lot of times it says, "Counsel of record is relieved." We put the file away and then two or three months down the road we might get a notice on what we would call "closed file" that we are back on it for some reason. Someone has messed up on their probation or something. I don't know if it makes sense for us to just not be relieved and continue on the file. Frankly, I don't think it matters to us. I think that has just the way it has been.

2:09:12 Chair Ellis One of the witnesses, and you were here, commented about an investigator issue. How do you handle investigation? Is that by contract with an outside investigator or do you have your own in-house?

2:09:26 C. Lillegard We have one now that case by case we get authority for so many hours and he goes out and does whatever we ask him to do in terms of investigating. The fellow that I am using right now is somebody who a while back a complaint was made about, that he misrepresented himself or something. I know there was a hearing and I know he has taken great steps and pains to make sure there aren't any questions about anything at this point. Some of that complaint had to do with the case.

2:10:09 P. Ozanne What happened in this formal hearing?

2:10:22 C. Lillegard I think Judge Horner found that he had supposedly misrepresented himself. The investigator lost a significant client because of it. I think he was working over in Marion County, but we have continued using him because he is a good investigator. We watch what he does but I don't see that we have a problem. In this business you are going to have people complaining about things.

2:10:58 Chair Ellis Relations with our staff going fine with you?

2:10:59 C. Lillegard I was just telling Shelley whenever I see a note to call Shelley I always see if I can get somebody else to do it. No, we work well. She works with Tammy from my office who is the statistics keeper. We have spent a couple of thousand dollars putting together a program, a computer program, where we get appointed on a case we can input everything at the very beginning of the case and it makes it much easier for her to generate her monthly reports. That is still being tweaked. We were doing things by hand and I think it works real well.

2:11:39 Chair Ellis Any suggestions how we can do our job better?

2:11:43 C. Lillegard No. It will be interesting to see what you do with this conflict contract. For budgeting purposes it is probably time to get into something like that. I don't see it impacting us at all. We have a good working relationship with almost everybody who is on the list now that comes over and takes over a case.

2:12:10 P. Ozanne What is your sense of the trial rate, Chris, in your office or in this county with the large caseload?

2:12:20 C. Lillegard I think we try a lot of cases. We have a good relationship and we get to a point where we agree to disagree and we have a trial. We are comfortable trying cases to all of the judges, court trials, and since we know the judges and know we will get a fair shake, we do try a fair number of cases to the court versus bringing in a jury. There are certainly people who need a jury. I think there are three jury trials over here next week. You know you do it on a case by case basis. We try a lot of cases. We file motions when we need to. I told Ingrid that I thought that maybe we didn't have as busy a motion practice because we go in and sit down with the DA's office and talk about it before we have to get to that point of filing a motion.

We don't deal with each other by motions. We deal with each other – we were all taught by Judge Williams. You sit down and you talk about it. You are professional and collegiality is important and that is how we do things. Judge Avera and I are classmates. We have been around since 1976. Judge Luukinen is a little bit older and Judge Horner is a lot older. Is he still back there? We have all been around a long time on these different sides of things. We know how to deal with each other. We are experienced enough to see what we have in front of us in terms of the police reports. The Spirit Mountain thing is very interesting. A lot of times we get the police report and we will sit down with the defendant and they'll say, "I didn't do that." We call the DA because we are going to need the video. We get them over in front of the TV in my office.

- 2:14:23 Chair Ellis His memory gets refreshed.
- 2:14:25 C. Lillegard It is much better. That delays things a bit but it helps us figure out a solution, if you will, pretty quickly.
- 2:14:33 Chair Ellis Any other questions?
- 2:14:37 Hon. Elizabeth Welch I want to ask you about representation of children. Judge Horner is the only person so far that has talked about that aspect of the report that staff put together. I am not concerned about delinquency cases; I am concerned about dependency cases. Do you represent children under the age of 12 in dependency cases?
- 2:15:30 C. Lillegard I am trying to think of some. I am sure we have.
- 2:15:37 Hon. Elizabeth Welch It is rare?
- 2:15:38 C. Lillegard I would say it is rare. Part of my contract is all of the juvenile cases where a court appointed attorney is ordered. Of course we don't make that decision. We certainly represent a lot of people charged with crimes on dependency cases. A lot of times we are the attorney that comes on board for the parent who is accused of the mistreatment or other situation. I don't think those children are afforded counsel but the parents are.
- 2:16:17 Hon. Elizabeth Welch You were talking a few minutes ago about that issue about whether you should stay on the case or not when the matter has been adjudicated, the dependency case. Do you feel there is a role for you to play on a continuing basis with most clients? What is your sense of that?
- 2:16:40 C. Lillegard My sense is that there is not a lot that we can do for them. They go away with their disposition plan to do their parenting class, or drug class, or whatever it. I am not sure what we would do thereafter to assist them through that disposition plan. Frankly, there aren't places where we have been involved. Maybe we should be but I am just telling you what the practice has been in this county.
- 2:17:17 Hon. Elizabeth Welch That is what I wanted to know. Thank you.
- 2:17:18 J. Potter Have you ever experimented with a client satisfaction survey? Some of the counties we have been to have done client satisfaction surveys. It sounds like the system is satisfied, the players in the system, but do we have a sense of what the clients feel?
- 2:17:39 C. Lillegard You get a sense in the jail. There will be one time when we will be the best guys and then sometimes somebody thinks they have gotten short changed on something and, of course, it is

our fault. We can't change the facts. I think generally we have a good level of satisfaction with clients. I don't think that that is a problem.

- 2:18:06 J. Potter But not a formal ...
- 2:18:06 C. Lillegard No. We have never done anything like that. I figure if I do not have to answer to somebody's complaint we are alright, and you certainly get some of those, but not very many.
- 2:18:21 Chair Ellis Any other questions? Thanks a lot.
- 2:18:29 C. Lillegard Thanks for being over here.
- 2:18:36 S. Avera I have a very brief comment for you. I am Sally Avera and I am the Chief Deputy DA in this county and just began this in January. As many of you know I actually was ...
- 2:18:49 Chair Ellis Use to be ...
- 2:18:48 S. Avera Used to be in the appellate public defense realm. I actually worked for the public defender and worked the Department of Justice as a senior assistant AG most recently. I was going to comment that I actually was on the OCDLA board at one time.
- 2:19:09 Chair Ellis But you didn't get invited to the Chief Justices' meeting in Sante Fe.
- 2:19:12 S. Avera I didn't get to go to that meeting this time. What I would say in terms of client satisfaction with Mr. Lillegard's firm there is sort of an informal survey and that is when somebody is picked up on a probation violation or a new charge. They are over in C4 and the judge asks if they would like another attorney. I would say that there is about an 80 percent rate of saying, "Could I please have Mr. Lillegard, or Mr. Campbell, or Mr. Berg appointed?" They are routinely asked for again before they realize that that is who they are going to get anyway. From what I have seen there is a very high satisfaction rate. In some of the early questioning parties were asked how it is so efficient here? Are these efficiencies by culture or what are they? What I could say is that I have practiced in several different jurisdictions in this state. One of the reasons for the efficiencies here is an experienced bench and an experienced bar and the level of trust that has developed between the prosecution and the defense in this county. I began my career here. The DA then was a fellow by the name of John Snyder and the circuit court judge on almost every case was Darrell Williams. Those of us who have practiced here for a number of years, particularly Mr. Lillegard and Mr. Berg, learned early on that this is a hand shake county. You try your case and you are in court for a reason. When the trial is over you shake your opponent's hand and you mean it. It has been that way in this county for 30 years. The cooperation and trust did not start here in 2003, it started here in the '70s if not before. It is has been here forever. We all learned it at this table. It has been a culture in this county for many, many years.
- 2:21:06 Chair Ellis Do you know a way to bottle that?
- 2:21:10 S. Avera I think the way to bottle it is that when someone does something that is distrustful to make it known. To let others in the community know and to read Justice Peterson's list of the Ethical Lawyer Standards and make those requirements and not suggestions. In this county it is not at all unusual for a prosecutor to say, "Oh, geez. I don't have the file. Can I look at the offer letter you got?" "Fine. Here is my file." Or for a defense lawyer to say, "Gee, I left my file back at the office." Prosecutors routinely hand their files back and forth to the defense bar. These are not secret files. There is not a lot of gamesmanship going on in this county. It is straightforward, honest bargaining. "Here are my facts. You can have them all." In terms of motion practice and I would say part of the reason, and I believe this to be the case, part of the reason there is perhaps not as much motion practice here as in other counties is that we do have an experienced prosecution bar. If on intake we see a bad search or we see statements

that would be inadmissible that would preclude conviction, those are not filed or they are sent back until things are done right in this county. In our county the DAs write search warrants. I think they are frankly of a higher quality than many counties because we review all of them. Consequently we take the same approach that the Department of Justice takes. It is not the department of winning cases it is the department of doing justice. There are cases in this county that are not filed if there is a bad search that perhaps would be filed in another county where a young prosecutor would just push forward without evaluation. By the same token, there are perhaps not bogus motions to suppress filed in this county that might be filed by a young defense lawyer or by somebody who wants to see their name in the yellow book filed in this county. We have defense lawyers who are experienced. Those who appear regularly are in court for a reason, not just to waste time and spend four hours on a motion that anybody looking at it would know had no chance. Frankly, both as an appellate defense lawyer and as an appellate prosecutor I have seen a lot of cases where motions to suppress were filed that should never have been filed, and it was apparent on review on appeal. I don't know that you can evaluate the quality of performance of a defense lawyer by the number of motions filed. It is a question of the quality of those motions and the appropriateness of those motions. Unless you are reviewing those files you really can't tell that. I would say that part of what makes the engine in this county run is the level of faith, and confidence, and trust among those who practice here. Yes it is a culture, but it is a good one.

2:24:04 P. Ozanne

What is your view of the obligation of the defense attorney with regard to children under the age of 12 in terms of representation?

2:24:11 S. Avera

Sir, I think there should be representation of the children when the children, in my view, can speak and have something to offer the lawyer appointed. Obviously, if Mr. Lillegard's firm is being appointed for the parents they are not going to be appointed for the child. In terms of continuing representation, from what I am hearing from Mr. Lillegard, it really doesn't make a difference whether you slide that file into the open category or into the closed stacks. If he is available to the client, in any event, and if there is an issue that is coming before the court he is going to be immediately reappointed, I don't know if there is much difference which side of the file cabinet that file resides in and whether we call it open or closed.

2:25:02 P. Ozanne

You have such a wonderful variety and background as does everybody in the county. I just wonder, putting your defense hat on or thinking that way, do you think your office and the courts are pretty much able to come up with what are the best interests of the child?

2:25:19 S. Avera

Yes I do. We have a very well qualified juvenile court deputy who was until January representing both children and parents in juvenile court. Yes I do. The only additional suggestion that I would have is that if you are considering MCAD versus a consortium or whatever for conflict cases, one of the issues that I can tell you that we have seen in the past, at least in the last seven or eight months here, is that frequently those Marion County attorneys who don't practice here regularly don't understand that at first appearance you are going to get a pretrial date and a trial date, and that that trial date, unless it is an extremely complex case, is firm.

2:26:10 Chair Ellis

It is firm.

2:26:10 S. Avera

It is going to happen. Those who practice in Marion County, as I did for some time, assume yeah, yeah, yeah, we are going to have a few Rule 7 hearings or whatever at the annex and then we are going to meet downtown and then we will have a trial date in nine or 10 months from now. That is not going to happen here and they are frequently flabbergasted. They will come in and say, "Well, the trial date doesn't work for me. Can have a date in November?" Our C4 judges, or assigned out judges, are just going to laugh at them. Maybe a week after the assigned trial date. It is a much more rapid process here. The dates that are assigned are meaningful. The courts expect you to be able to get your job done in time. You are not going to put the file back behind you on the credenza and pick it up in three months. That is not

going to happen when you practice in this county and it certainly does happen for those who practice in Marion County and they are quite shocked when they come here. I guess this would mitigate in favor of a consortium because those who might be in a consortium would be coming out here regularly as opposed to those who are on MCAD who might come out here every three or four months. I don't know what degree of frequency but it is going to be a very rude awakening unless they practice here regularly. Frankly, many who practice in Marion County are not used to getting the work out and accomplished that quickly. As far as the single provider some of the other efficiencies in a single firm provider are these: when we have a series of pretrials and things going on in the other courtrooms, the associates in Mr. Lillegard's firm can cover for each other and frequently do. I was in court this morning with cases where one attorney from this firm handled cases for all three. That happens often. If somebody is on vacation for a week and a half or two weeks, somebody else in the firm covers those pretrials. Somebody is there, somebody is covering, it is handled, they know what is going on in each other's cases and can resolve them. There is somebody with authority who can speak. There is someone that can make the court appearances and there is somebody that can juggle if they are in trial. It is very efficient in that respect. We do have the six regular folks who come over from Marion County. We do occasionally have trouble getting the things resolved and scheduled. They are very responsive on the phone and we can get a hold of them, but they have got a whole other trial practice going on in Marion County and they have difficulty juggling around hours. The single provider does present conflicts but it also does present great efficiencies to our system.

2:28:54 Chair Ellis Thank you. Anyone else? I do want to thank all of you from Polk County that shared time with us today. It has been very informative and helpful. Do you want to talk about Clackamas for a bit?

**Agenda Item No. 3 Commission Review of Service Delivery Plan for Clackamas County**

2:29:30 I. Swenson Do you need a summary, Mr. Chair, of where we have been? How would you like to proceed?

2:29:41 Chair Ellis I am a little handicapped because I wasn't at the June meeting. I did read the transcript and felt encouraged about it. To be honest my concern with Clackamas is they tend to be self-contained and not particularly interactive with you and staff or us. I thought Ron seemed much more forthcoming as I read his transcript. I think it is – I will just give my own reaction - it is a county where I think it is probably doing okay right now, but I do predict three or four years from now we are going to have to take a hard look at what we do going forward. That is not a criticism but an observation. Ron himself is not immortal. I know there was a time that he was looking at a judgeship. Who knows what is going to happen? He has become, in some ways, almost too indispensable. I do worry that the succession issue there. I have been concerned that they seem to want us to lob money over a wall and let them handle it. That is not how we wanted to interact with the provider community. Those of you who were at the June meeting tell me, am I misreading it? I felt there was a little bit more responsiveness. The issue that they have not addressed, and I don't want to get heavy handed, but I would like to see them show more willingness to move on this, is their board composition. It still continues to be largely a provider only board. That is not a model that I like. I would much rather have a more community-involved board. I didn't sense that they were going very rapidly in that direction. I also would like to see them not have these permanent seats. I think that is just a bad idea, but I don't want to get in the business of us forcing things. I keep hoping that gentle persuasion will cause them to restructure. Where do you guys come out on that?

2:32:21 P. Ozanne As you have read many times the transcripts don't always reveal the full richness of the meetings. I guess my perspective, while I don't disagree with you, especially if you were to think of county X or W like this one we have just come to, but maybe I am just a victim of my experience with this, but we have held up Clackamas County and I think that maybe it is

unfair to make this statement. They have certainly cooperated, Ron in particular, with being a leader on consortium issues. And the juvenile consortium certainly does good work, but I think it is kind of Exhibit A for the fact that the office and the Commission need to be more prescriptive with regard to these things. We have been voluntary. The signals have been sent in terms of voluntary compliance with best practices both with regard to the board and with attorney evaluations. You could probably add – it is a little foggy about how recruitment happens.

2:33:35 Chair Ellis

It sounded like a different presentation than the one I attended in April.

2:33:41 P. Ozanne

I wouldn't want to do it now but it leads me - and I think we are going to talk more broadly about where we go from here at the retreat – to wonder if Clackamas County is still struggling with how to do an evaluation or how to put their board together in a way that I think is pretty obvious at this point, and that we want a richer diversity on the board, we want community representation, we want assurance that somebody, in my view at least, with some non-legal business expertise could be added to the board and perhaps even community involvement. We are not getting it in Clackamas County.

2:34:32 Chair Ellis

So what do you suggest?

2:34:34 P. Ozanne

I am just saying using Clackamas County only as an example, and I don't think we want to do it now but I think we ought to discuss as a board at the retreat prescriptions around board makeup. It would have to be artfully done. There would have to be some accommodations to the differences across the state. I am having trouble understanding for a board maybe the size varies, but why a board of a consortium couldn't pretty much conform to a set of standards. I don't understand why we couldn't have a standardized evaluation.

2:35:11 J. Stevens

Could I ask a question? Do we have some evidence that a board that is not made up to the way you want it is actually hurting the practice of law for those people or for their clients?

2:35:29 Chair Ellis

I don't know if I would phrase it in terms of evidence. I would phrase it in terms of intuitive logic. In my mind the problems are very much related. The problem of continuity and succession. I think it is a bad recipe. When Ron moves I want the body that is going to pick his successor to be a balanced, broad body that isn't just a clique group of providers. In my mind pushing them on the board now is the first step toward what I think will be a more likely to succeed succession plan than just letting it sit. It is going to be three or four years from now a small group of people whose dominant thought is, "What does this mean to me?" I want them to be thinking more about what does it mean for providing the service for - what is Clackamas, the third or fourth largest county in the state? It is a big county.

2:36:58 J. Stevens

What does this mean just by implication? Yes also how does this affect service in this county? Because if what you are doing is providing that service, if it doesn't mean good for you it doesn't mean good for the service.

2:37:13 Chair Ellis

Well, there is a potential for cannibalism. People that want to dominate.

2:37:17 J. Stevens

Sure, but you have got that anyway.

2:37:20 P. Ozanne

I guess I would answer, Janet, as I recall there was a consensus that there was a person, one attorney who wasn't named, who shouldn't be practicing criminal law. That would be Exhibit B for me - a good example of a system that on its face isn't dealing with attorney performance evaluation adequately. Again, I had always had an expectation that Clackamas was as close to a model as we were getting of experience and best practice. I am disappointed to see that we are facing that kind of a situation in that county.

- 2:38:06 J. Stevens Peter, for me it is very easy to divorce board makeup and attorney evaluation. As the only Republican in the whole meeting ever, it seems to me that as the people who pay the bills it is very easy for us to say that, "We want you to evaluate attorneys and this is how we want you to do it." I have a lot more trouble with saying, "And we want you to run the business the way we say it should be run, not the way that you feel works best for you." I am just institutionally opposed to that kind of – it smacks of heavy handedness to me. I don't want someone coming in and telling me how to run my newspaper because we belong to the Associated Press and they, which is not true obviously because they don't pay our bills, but if they did, as long as we are doing the things that they sent us out for, the way they set them out, I think that is fine. When it comes to management, that is our business. I just kind...
- 2:39:11 Chair Ellis Isn't there a difference? The *Bulletin* is a private enterprise. You guys make your money the old-fashioned way. You develop a product and sell it and it seems to work. We are dealing with public money and a public service. It does trouble me when – it goes back a number of years - we pushed in a gentle way to get Clackamas to restructure to be more of a public service organization. They don't do it and I don't know quite why.
- 2:39:57 J. Stevens I would have to think it through a little bit more, Barnes. I don't know. It seems to me if we are going to tell them exactly how to tie their shoes in the morning then we should just put them on payroll and be done with it. Obviously we are not going to do that because the state isn't going to pay for that and I am not sure that is the best plan anyway. I just have a real reluctance if everything else is going well, and again I do say we have every right to ask for attorney evaluations. We are paying the bills for those attorneys. I have more of a problem with saying and we want your internal business structure to run on the model that we feel is best for you, when they clearly feel some other model is best for them. Unless we can show why it isn't working then I just have a problem with that. We may come to that conclusion but I will still object to it inside. I don't like that kind of interface in the inner workings of a group of people when we tell ourselves we will look at the evidence and we find that basically they are doing what we want them to do. Again, we do have a right to say that the attorneys they hire have to work to our standards. I don't have a problem with that at all. We are not going to go out and hire public health nurses who aren't nurses or who have all sorts of drug problems or whatever. I think we have every right ...
- 2:41:45 Chair Ellis Don't you worry though that if you have a board that is only consortium members that when it comes to evaluations that board isn't maybe going to say that, "I don't want to push too hard in an evaluation because somebody might evaluate me?" All of a sudden you are back in a very insular mindset
- 2:42:17 Hon. Elizabeth Welch I have a question. To the extent that there is a concern about Clackamas County let's just use the local firm here because we just talked about it. This is a law firm that has a contract with the state. Do we have the same concern about the governing body?
- 2:42:43 Chair Ellis If you had a county the size of Clackamas and you had a single provider, private law firm model, I would be making the same comments.
- 2:42:57 Hon. Elizabeth Welch I am just wondering though because it seems to me that Janet's concern would be more persuasive to me if you were talking about a law firm, but when you are talking about a consortium there is no other management of the consortium except that relevant to the spending of the taxpayers' money. There is no real business entity there in the first place. It is like a feudal confederacy rather than a business. The notion that, "Hey you guys we expect you, as part of the use of this particular format, to manage what you are doing," I don't know that the distinction necessarily carries the day all the way across the board. With a consortium I think it is different.

2:43:59 J. Stevens I can see what you are saying and I actually think this is a conversation for the retreat more than here. To me, Judge Welch, we have the right to say what an evaluation is, how it should be conducted, who should do it. I think we can even create the forms, create the plans, write the results and all of that. I wouldn't have a problem with that at all, frankly. I have a little more trouble, as I said; it is an artificial entity in some ways that I would argue is a business separate from their private practices.

2:44:48 P. Ozanne On another subject, Barnes, another thing that came up is kind of like our blunt exchange here. I wouldn't urge the Commission to take a formal stand but I think the observation is worth noting for the record. There seemed to me personally, just as one Commission member, a troubling level of synchronization with the judiciary. How is that for a tortured analysis? There was a lot of references to what Judge X felt. Everybody knows who has worked with me how important it is – in some way the judges are our customers but they don't run the public defense system. I had a sense, again a little bit of disappointment that that wasn't clear. I don't want anybody to hear it as we want to fight with judges or get in arguments, but I didn't sense that there was as much independent judgment about the role of public defense in Clackamas County as I would like to have seen. Again, that is an impression that I got reading between the lines or hearing between the lines. That is a message that we have to continue to convey is that the best practice is not to have the judiciary anywhere running the public defense system. I think we have a good system here and we have generally struck the right balance.

2:46:35 Chair Ellis Here in Polk County?

2:46:36 P. Ozanne In Oregon, as a Commission in general and we have the right aspirational goals. We just have to be constantly alert to that and I thought that Clackamas probably needed to be alerted again.

2:46:68 Chair Ellis I did understand from reading the materials that CIDC is in the process of an evaluation of its providers.

2:47:13 P. Ozanne They certainly were after the meeting.

2:47:12 Chair Ellis The statement appears that Mr. Gray expected that the evaluation process might result in the removal of some members. I guess maybe what I would like to do is calendar Clackamas for October or November and lets see what has happened there. I guess I had a couple of thoughts. One is that Ron has been doing this for 20 years or more, so why is this evaluation happening just now? I think it is possibly pressure from us. If they are not really going to follow through on that then I think we may need to take a little harder line, that we will deal with many of these same providers in Clackamas but we want them to restructure in a way that is a little more of a public service orientation than I think we are getting.

2:48:19 I. Swenson Mr. Chair, I tentatively calendared that for January thinking that if they follow through with the evaluation process there will be a follow up process that deals with whatever the ramifications are and what they learned at those evaluations.

2:48:38 Chair Ellis Why don't we put Ron on our agenda for, let's say, in November with us revisiting Clackamas in January. I want to put some deadlines and pressure here because it is a county that tends to want to be very insular.

2:49:06 I. Swenson Sure.

2:49:12 Chair Ellis Any other thoughts on Clackamas?

2:49:12 J. Stevens I will say this is like the newspaper. We have newspapers in four or five counties around our area. In each county they do things only in that county. We have a paper in Brookings and

one in Curry County. Do they do things the way they do things in Brookings? If we suggest there is a better way we are always told “No. This is the way we do it in Curry County.” I have discovered that here too.

2:49:42 Chair Ellis

The difference is we are stewards of the money.

2:49:47 J. Stevens

I agree.

2:49:53 P. Ozanne

I would add one other thing, Barnes. It was noted, and I mentioned it, the young lawyers in the consortium that Ron had brought in to talk about - which is very interesting and helpful - how they got into the consortium, seemed to be prepared to ward off the prospect of a public defender coming into the county. While I guess I am still the most outspoken on Clackamas County, I want to say for the record that I am very interested in having an effective consortium and I have no desire whatsoever, personally, to move to a public defender in Clackamas County. That is not my intent.

2:50:34 Chair Ellis

I think you were quoted as saying that. My mind is a little more open on it. I would like to see them make me not interested.

2:50:47 I. Swenson

I will schedule IDI for the same process because they are following up on a number of quality assurance matters.

2:50:55 J. Potter

What Peter doesn't know yet is that he is going to be speaking on the issue of boards at the management conference that will be just hours before the meeting of the Commission.

**Agenda Item No. 4**

**OPDS Monthly Report**

2:51:12 Chair Ellis

Are we ready for the management team?

2:51:21 P. Ozanne

Do you have a board?

2:51:38 P. Gartlan

Yes. You wouldn't believe the board that I have to deal with. I apologize in advance. It is going to be brief and boring because I am going to be repetitive. There is not much to report other than...

2:51:52 S. McCrea

You are just going to say it over and over?

2:51:52 J. Potter

The brief part needs no apology.

2:51:53 P. Gartlan

Our petition for cert is up in the U.S. Supreme Court. We should hear by the end of September.

2:52:02 Chair Ellis

Your annual petition for cert?

2:52:11 P. Gartlan

Yes. We are anxious, excited, and pretty happy and optimistic that the court will take it.

2:52:21 Chair Ellis

How many other states have that issue?

2:52:24 P. Gartlan

One other.

2:52:28 Chair Ellis

It is a little like the case that you had last year. It probably doesn't have enormous ramifications nationally. We just seem to have these unique, quirky procedures here.

2:52:40 P. Gartlan

Things are different here.

2:52:41 P. Ozanne I am really surprised that someone hasn't gone the direction of Oregon and Louisiana in the last couple of decades.

2:52:49 Chair Ellis So if they approve it you might see movement.

2:52:55 P. Ozanne I am afraid so.

2:52:55 P. Gartlan It has been approved since 1972 and no other court has done it. That seems to send a message we think.

2:53:06 P. Ozanne You are going to win, anyway.

2:53:14 P. Gartlan Like I said I would be brief.

2:53:14 Chair Ellis Thanks. He failed us on the repetitive part. We will forgive him. Kathryn or Paul? Who is up?

2:53:28 K. Aylward The analysts are working hard going through all the bid proposals and checking to make sure everything is there and they are complete and sending out confirmation letters. They are going through a process of reviewing and marking up all the bids. We are trying to get a sort of mechanical way of summarizing where we are with the bids and what we can and can't do.

2:53:52 Chair Ellis Are you soliciting a bid for the conflict work here?

2:53:53 K. Aylward We didn't specifically solicit any bid for any county, we just said we are accepting bids for all case types in all counties.

2:54:12 Chair Ellis Obviously from today's conversation there could be several alternatives how to approach the conflict piece here. I was wondering where you were on that?

2:54:20 K. Aylward It is unusual and I don't recall ever having received a bid in Polk County and now we have – it is supposed to be confidential but there are several. It will be interesting. We have received feedback from the court. We haven't reached the point yet, as you sort of said, the issue with one of contractors is an insufficiency of caseload or a dropping off of caseload. We haven't gotten far enough to see if we can meet those needs and still keep everybody happy. We will know by September what is possible.

2:55:04 Chair Ellis I am probably venturing out on ice that is too thin. It sounded to me like one possibility was for MCAD as a whole doing this. Another possibility is a smaller group of MCAD lawyers forming a special consortium for this.

2:55:29 K. Aylward I think what may have confused the discussion a little bit today is the term "conflicts." I think a lot of you were thinking in terms of, "I have a case and I have a conflict with this client and I have to give it to someone else," but in general when they are talking about conflicts, and we are getting bids for the conflict caseload, they are looking at situations like juvenile dependencies where there is mom and dad. There is a portion of the caseload that the Lillegard firm can't take. It is still a conflict but that is what we are talking about it. Theoretically their capacity is limited too.

2:56:10 Chair Ellis In any multiple defendant case.

2:56:12 K. Aylward Exactly.

2:56:11 Chair Ellis And any case with a former client witness probably.

2:56:17 K. Aylward But a large component of the cases that aren't going to the Lillegard firm are juvenile cases. MCAD doesn't do juvenile cases. If we are looking for juvenile attorneys to be able to do most of this work then they wouldn't be members of MCAD. We will work something out.

2:56:44 J. Stevens Can I ask an ignorant question. Why is it a conflict about witnesses?

2:56:51 Chair Ellis Because you might have confidential information about the witness that would make it either in fact inappropriate or appear inappropriate for you aggressively cross.

2:57:04 K. Aylward The only other thing that is going on, and I think I told you at the last meeting, there is an empty building across the street from the justice building. In working with DAS facilities they said that, "You really need to go through a process where you see if there is anything else out there that might meet your needs." We did do that search and there actually is another place that would also work for us. It is the building where our office was when I first started to work for indigent defense. We called it the Beirut Hilton. It has since been fixed up and it is very nice now. Now we have two possibilities that are each within a block and half of the courthouse. My hope is that if we can do this we can actually lower the amount that we pay in rent, which will help fill our operating budget hole. It is a lot of effort to move but if we will save money then it is necessary.

2:58:09 Chair Ellis Either of these would be large enough to accommodate all of our activities?

2:58:15 K. Aylward The first building I told you about would be very tight, which is partly why I am thinking the second building would be better. It gives us room to expand if there ever is an expansion. We would be tight in the first building that we were looking at. This one has quite a bit more space.

2:58:36 J. Potter Refresh my memory, Kathryn. At the September meeting are we going to have in our hands the proposals that were submitted, summary of the proposals, recommendations about the proposals?

2:58:56 K. Aylward You can certainly have whatever is useful. I hadn't imagined that the actual giant stack of 130 bids, times seven copies would be something you would want. What I am doing is going through the process of compiling a list of things of I really want to ask the Commission about. All the consortia are complaining, "Why don't we get the same as the PDs?" And the PDs are saying, "We are more expensive to run." A bit of buffering against those arguments. I can see both arguments, and so would like to have a discussion with this group regarding some of those generic or general decisions. Then by September we could say, "Look, here's what was asked for. Here is what we were able to provide. Here are the decisions that we had to make in order to have this whole package fit together." Maybe we'll use the sort of giant spreadsheet approach to say, "He got what he wanted. He can't have this because we want the caseload here," and just talk our way through them.

3:00:04 J. Potter What do you envision the proposal seekers' role in this as being. Are they going to be giving testimony?

3:00:17 K. Aylward I had imagined that because we will be discussing the details of a competitive bidding process that are still confidential, and will be confidential until contracts are awarded, that this would have to happen in executive session. They can't know what the other person bids so they can't be there.

3:00:33 I. Swenson Pardon me. That is why we had two meetings at which we invited contractors to come.

3:00:48 K. Aylward Would you like any specific information provided or a different format?

3:00:57 J. Potter No. I am happy with that. The last question is the Lane County Panel, is a presentation going to be made by those folks at the September meeting?

3:01:09 I. Swenson At the meeting and not the retreat.

3:01:07 J. Potter Right. That is going to relate in part to their submission, is it not?

3:01:19 I. Swenson You don't have to make any final decisions at that point about the award of contracts.

3:01:27 K. Aylward You can't make a final decision in executive session. That would certainly be one of the things that was brought up if we received a bid that would move us away, or partly away, from the panel structure. That is exactly the sort of thing. Left to my own devices I have an opinion, but since the Commission worked so long and hard on the model in Lane, and this is a shift in models, I would bring that back to you. That kind of discussion can certainly happen in executive session. We have a site review and the information from that and the response to that.

3:02:15 I. Swenson We won't use those because they are confidential and that process is very different. I am repeating those interviews in the next couple of weeks so that we have access to information that I can disclose to you.

3:02:32 K. Aylward Since we have started so early in the process we really do have quite a bit of time. If in September I have a recommendation that somebody doesn't like there is plenty of time to go back to the drawing board before the end of December.

3:02:58 Chair Ellis Thank you.

3:03:01 P. Levy Just briefly. Last month Kathryn and I and Tom Sermak and Karen Stenard from Eugene went to Pendleton for three days to follow up on the Commission service delivery review. You were there in November of '07 and then finally approved your report in May of 2008. We were following up. We did over 20 interviews with folks about what is going on now in Umatilla County. We will have a written report for you at the next meeting. I think I can say generally that we heard that across the board folks saw improvement especially in juvenile representation. There was a noted increase in contact between attorneys and their children clients. Overall there was a great deal of satisfaction with the public defender office especially in criminal cases. That was attributed primarily to the stability of the office. There was no turnover in two years and that has made a big difference. There are still a number of significant concerns and that is what the report focused on. We are planning a site visit for October to Klamath and Lake Counties. That is in the works.

3:04:43 S. McCrea Thank you.

3:04:41 Chair Ellis Anything else? Is there a motion?

**MOTION:** John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion;

3:04:50 Judge Horner You kept asking a number of the witnesses is there something else you can do. Two thoughts, actually. One is if there is a way to keep certain statistics that you are interested in from either end, I don't know who is going to keep them, but I think that is going to be helpful more than anecdotally because I think some of the things you hear may not be a problem. There may be problems that we don't know about and we don't see them. Mr. Butterfield had mentioned that he was the drug court lawyer and a defense attorney and he had specific problems. It is really the way you – the billing and being a drug court person that they just don't match being a client. You have to sit for several hours in court. Which client are you assessing or billing and you are out of your office? You have sort of a billable hour or you don't. Is there a generic contract that might fit a lot of the places? I don't know how the big

cities do it. Maybe they have their public defender have a section that does it. We are using now the billing hour type lawyer. There is confusion on how to do it and there is no set program. Thank you for coming.

3:07:18 Chair Ellis

I usually ask if there is anything else anybody wants to contribute because we have some of our good providers here. If not, I would entertain a motion.

**MOTION:** John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting was adjourned at 12:15

# Attachment 2

## MEMO

To: Public Defense Services Commission

From: Ingrid Swenson, OPDS

Re: Update on service delivery in Lane County

Date: September 10, 2009

At the conclusion of a Quality Assurance Task Force evaluation of Lane County criminal defense contractors which began with a three day site visit to Lane County in September, 2008, the site team, chaired by Jim Hennings, recommended that OPDS/PDSC review its decision to contract with the Lane County Public Defense Panel (the Panel) as the conflict provider in Lane County criminal cases.

Set forth below is a brief description of the background and history of the Panel and a summary of comments received from judges, the district attorney's office and others in recent interviews regarding the operation of the Panel.

A number of witnesses plan to testify about the Panel at the September 10, 2009 PDSC meeting.

At the conclusion of this review Commissioners may decide to leave the existing service delivery plan in place or may authorize OPDS to consider contract proposals from other potential contractors as well as from the Panel.

### **History and Description of the Lane Count Public Defense Panel**

The Panel is a product of the Public Defense Services Commission's 2004 service delivery review of public defense in Lane County, a process that involved a preliminary OPDS staff inquiry of local public safety officials concerning the delivery of public defense services, public testimony before the Commission from some of those same officials and public defense providers, and a final public report with recommendations adopted by the Commission. The Lane County report, which accompanied a report on Benton, Linn and Lincoln Counties, was the Commission's first service delivery review.<sup>1</sup>

In its Lane County review,<sup>2</sup> the Commission heard many complaints about the "system" for making "private bar" appointments to financially-eligible defendants

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<sup>1</sup> The report may be found on the OPDS website at <http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

<sup>2</sup> A transcript of the February 12, 2004 PDSC hearing in Lane County can be found on the OPDS website at <http://www.ojd.state.or.us/osca/opds/Agenda/index.html>.

in criminal cases—that is, appointments in those cases that could not be accepted, usually because of conflicts of interest, by Public Defense Services of Lane County (PDS), then the only public defense contractor for Lane County adult criminal cases. The Commission found uncertainty about who was or was not on a list of those lawyers available to be appointed, that more than one list was thought to exist, that anywhere from 30 to 60 lawyers were said to be on the list, and that appointments were thought to be influenced by favoritism. In addition, judges and prosecutors who spoke to the Commission uniformly observed that a substantial number of the private bar attorneys appointed in criminal cases were ineffective and inefficient, and that some were not competent to practice criminal law.

Because of these concerns, the Commission considered alternatives to the existing list system, including the creation of a consortium, which would consist of a limited number of attorneys who specialize in criminal defense but don't rely exclusively upon court-appointments as their only source of income. OPDS staff described a "model consortium" for Lane County with features that included many of the "best practices" now recommended by the Quality Assurance Task Force,<sup>3</sup> including a board of directors, a formal administrator with authority to hold member attorneys accountable for lapses in performance, standards for membership and retention, internal training and mentoring programs, and quality assurance mechanisms such as periodic performance evaluations and a process for removing underperforming members.

During the Commission's deliberations on public defense in Lane County, most of the private bar attorneys who spoke to the Commission opposed the formation of a consortium. They argued that a consortium would unfairly reduce the opportunities for attorneys in the county to practice criminal defense, that the process of establishing a consortium would breed divisiveness and competition within an otherwise collegial and collaborative legal community, that a consortium would curtail opportunities for newer lawyers to enter criminal defense practice in the county, and that the list system could be reformed to address most of the concerns that the Commission had heard.

The Commission was ultimately persuaded to adopt a revised list system. Two of the Commissioners, both residents of Lane County, echoed some of the arguments made by the private bar attorneys and proposed a new list system with quality assurance mechanisms and a strong administrator with "real authority" who would be willing and able to do "the dirty work" of ensuring that only trained and qualified attorneys were appointed by the court. The proposal gained the tentative endorsement of some of the existing list system's strongest critics.<sup>4</sup>

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<sup>3</sup> For the list of best practices, see:

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

<sup>4</sup> For some of the PDSC debate on the formation of the Panel, see the transcript of Commission proceedings for June 17, 2004, at: <http://www.ojd.state.or.us/osca/opds/Agendas/index.html>.

The Commission implemented the new system by directing the establishment of an oversight panel that, in conjunction with OPDS, would develop written policies and procedures for the administration of a private bar list and recruit and select participating attorneys. Meanwhile, OPDS took the lead in recruiting and selecting an administrator for the system, ultimately reaching a contract with Eugene attorney Marc Friedman to perform that role. Finally, the Commission directed that it review the new system two years after it was expected to commence service. The Commission conducted that review at a meeting in June, 2006, at which time it received a written report from Marc Friedman and testimony from him, detailing the smooth operation of the new appointment process. The Executive Director of PDS, Greg Hazarabedian, also stated at the meeting that the Panel was working well with his office in managing the private bar appointment process.<sup>5</sup>

### **Administration and Structure**

The formal policies and procedures, forms, mission statement and other information about the Panel are available online at the Panel's website, <http://lcpdp.org/index.html>. These documents describe a system along the lines envisioned by the Commission's consideration of a "model list." For example, the Panel's "policies and procedures" explain that admission to the Panel and an attorney's qualification level shall be determined by an Oversight Committee, subject to approval by OPDS. The Administrator is directed to "continuously monitor the legal defense work of Panel Attorneys," observe court appearances and trials of Panel Attorneys "from time to time," receive and investigate complaints and concerns about Panel Attorneys, and, at the direction of the Oversight Committee and subject to the approval of OPDS, take corrective or disciplinary action, including reducing the level of case-type qualification, requiring mentorships and other supervision, and suspension or removal from the Panel.

The Administrator, according to the policies and procedures, is required to schedule regular continuing legal education programs for Panel Attorneys and coordinate mentorship opportunities, which experienced Panel attorneys are asked to provide and those in need "encouraged" to accept. Panel attorneys are required to maintain regular email and telephone contact with the Administrator, and to maintain office space suitable for confidential client communications and the secure maintenance of client files. Panel attorneys are also required to abide by Oregon State Bar ethical requirements and other performance expectations. Panel attorneys are required to sign a document agreeing to accept and abide by the Panel's policies and procedures.

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<sup>5</sup> The Commission discussion on the performance of the Panel appears at pages 14 to 21 of the transcript of the June 15, 2006 PDSC meeting which may be found at the OPDS web site referenced in footnote 4 above.

The Panel is described as an “open list” system, meaning that there is no limit on the number of attorneys who can be on the list, and that applications and approval to join the list can occur at any time.

As mentioned above, the Panel Administrator contracts with PDSC to perform his functions. Panel attorneys, however, are paid on an hourly basis, receiving \$45 per hour for all Panel work except Measure 11 cases, in which they receive \$50 per hour. Panel attorneys send their statements electronically to the Administrator, who reviews them, makes any adjustments that he concludes are necessary, and then faxes them to OPDS for processing and payment. When Panel attorneys need non-routine expenses for case preparation and presentation, they request preauthorization directly from the staff at OPDS.

### **Case intake and distribution**

Panel attorneys are scheduled to appear at both the daily morning (out-of-custody) and afternoon (in-custody) arraignments. The attorney who is present for arraignments will usually be assigned to represent the financially-eligible defendants who are not appointed an attorney from PDS, except when that attorney lacks the qualifications to handle a particular case type. Outside of arraignments, Panel attorneys receive appointments when PDS attorneys withdraw from representation, usually because of a conflict of interest discovered after arraignment. Occasionally, these later “hand offs” occur at 35-day call, but often they happen without the necessity of a court hearing if a trial date has not yet been set in the case. In any case, when a Panel attorney is not present in court at the time of the appointment, the panel administrator or his assistant will email the assigned attorney shortly after receiving notice of the appointment from the court or PDS. The Panel expects to receive a confirming email from the assigned attorney no later than 24 hours after the assignment.

### **Case Management and Support**

Other than the requirement that Panel attorneys have a phone, email, and a private and secure place to meet clients and maintain files, the Panel has no other requirements concerning attorney support.

### **Community Involvement**

The panel administrator is a member of “the Lane County Circuit Court procedures committee,” which includes the presiding judge, other court staff, the DA, and PDS. The group meets periodically, when convened by the presiding judge, to discuss changes in procedure for criminal cases.

## **Summary of Comments received from Criminal Justice System Representatives**

During the third and fourth weeks of August, 2009, OPDS Executive Director Ingrid Swenson met with Presiding Lane County Circuit Court Judge Mary Ann Bearden; Debra Vogt, the Chief Criminal Team Judge; Karsten Rasmussen, the previous Chief Criminal Team Judge; Mustafa Kasubhai, one of the newer Lane County judges; Alex Gardner, the Lane County District Attorney, Commissioner Shaun McCrea, the PDSC representative on the Panel's Oversight Committee; Commissioner John Potter and Marc Friedman, the Panel administrator. They reported the following information.

While the judges and the district attorney believe that the panel has been an improvement over the previous list, quality control remains an issue. The Panel recently dismissed some attorneys or reduced the level of cases they were approved to handle, but there remain attorneys on the Panel who are not competent to do the work. Some questioned how attorneys are approved for Panel work and said that, had they been asked, they would have told Mr. Friedman that these attorneys should not be approved. If contacted by the court Mr. Friedman will always respond but he does not seek information from most of the judges, has not asked the district attorney for input, and is rarely seen in court observing the work of Panel attorneys. New attorneys just appear in court without any introduction and some seem to be handling their first appearances and trials without the assistance of a mentor.

Some commentators said that there are still some excellent attorneys who are part of the consortium but that some experienced members have left because they do not receive adequate compensation at the hourly rate.

Two commentators said that Mr. Friedman may not have the right personality for his role. While a gentleman, he is not a "team captain." He seems reluctant to keep poor lawyers out.<sup>6</sup> As a result the judges have to spend an inordinate amount of time monitoring and reporting poor performance. Mr. Friedman does respond when they report problems but is not proactive. He may need more explicit criteria regarding the selection of new lawyers and he needs to monitor them more closely once they are approved. All of the commentators expressed a need for stronger leadership and more direction for the administrator, either from the Oversight Committee or from PDSC. The Panel tends to be a "loose confederacy" where you can do poor work and continue to get cases.

Some said that they would support a consortium if it could exert more control over quality even though consortia tend to become exclusive, not allowing for the entry of new attorneys. Case rates, rather than the hourly rate, should also be considered. One of the judges urged PDSC to be more proactive and, rather

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<sup>6</sup> He received praise, however, for the sensitive manner in which he was able to deal with an attorney who was no longer able to do the work.

than rely on bids in response to its RFP, to directly recruit a respected criminal defense attorney in the county to form a new consortium.

Commissioner McCrea and Judge Bearden both reported that the Oversight Committee has been having regular meetings, more frequently in the last year. The group includes a PDS attorney, Janise Auger; and a private bar attorney, Tony Rosta. A fifth member, Liane Richardson, resigned and has not been replaced. All applicants are initially reviewed by the panel and if accepted are placed on the list for which they are qualified. Some attorneys have been removed from the felony list and placed on the misdemeanor list. If an attorney is having problems, Mr. Friedman notifies the board. Some of the issues that need to be addressed are the need for regular CLE sessions, a means for Panel members to communicate more readily with each other, a better definition of the administrator's role, and review of the membership of the Oversight Committee, which might include adding a public member.<sup>7</sup> Panel members also need to have a plan for covering their caseloads when they are not available, such as when they are in trial or on vacation. Both Judge Bearden and Commissioner McCrea consider the Panel to be a mostly successful experiment.

Marc Friedman said that members of the Panel are approved by the Oversight Committee and must reapply every two years. He said that there is no limit on the number of attorneys who can be included on the Panel. Most of the new attorneys have participated in the public defender clinic so they already have courtroom experience. Panel members are told to expect that no more than 50% of the work they do will be public defense work. Mr. Friedman understood this to be one of the Commission's requirements. The majority of members are sole practitioners. In June PDS and the Panel provided their first co-sponsored CLE and plan to do them on a regular basis. One of the challenges for new defense attorneys is client management and that may be a topic for a future CLE. Panel attorneys are not satisfied with the current hourly rate but still prefer the being paid by the hour to implementation of a case rate system because they believe they "get paid for what they do." Mr. Friedman said the PDSC should either fix the Panel or create a group that is not just a conflict provider but has its own share of the caseload, an equal partner with the public defender.

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<sup>7</sup> As valuable as it is to the Panel to have the Presiding Circuit Court Judge serving as a member of the Oversight Committee, if the administrator were able to meet with her and the other judges more regularly, it might prevent the need for her to actually sit on the Committee and would allow the court instead to designate a non-judicial employee to serve as a member.

# Attachment 3

# Draft

## Public Defense Representation in Umatilla County: An Update to the Public Defense Services Commission's November 2007 Service Delivery Review

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Prepared by Paul Levy  
August 4, 2009

**Introduction.** On November 7, 2007, the Public Defense Services Commission (PDSC) held a public hearing in Pendleton, Oregon to receive testimony regarding the structure of public defense services in the Sixth Judicial District, which is comprised of Umatilla and Morrow Counties. The PDSC's final report on the delivery of public defense services in the Sixth Judicial District, adopted May 8, 2008, identified a number of concerns with public defense representation in both adult criminal and juvenile cases, especially with respect to practice in Umatilla County.<sup>1</sup> The report directed the Office of Public Defense Services (OPDS) to offer to address these concerns with the local public defense providers and their justice system partners, and to report to the Commission on the outcome of those efforts.

In June 2009, the OPDS Executive Director appointed a small team to conduct on-site interviews with the public defense providers and local justice system officials to determine the status of the concerns identified in the service delivery report.<sup>2</sup> In July 2009, a team conducted over two and a half days of interviews in Pendleton and Hermiston. This report provides the findings and recommendations of that team.

**The 2008 Report.** The 2008 service delivery review identified three major areas of concern. First, the report observed that the local public defender office, Intermountain Public Defender (IPD), did not have a formal orientation, training or mentoring program, and concluded that additional attention to training was needed. This conclusion arose in part because of frequent turnover of attorneys at IPD and in part because of noted concerns with the quality of representation, especially in juvenile cases.

The report also noted a number of concerns with representation in both juvenile delinquency and juvenile dependency cases. In the delinquency cases, the Commission received information that attorneys were appointed in only about half of the cases where

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<sup>1</sup> The final report is available on the "Reports and Publications" page at [www.opds.state.or.us](http://www.opds.state.or.us).

<sup>2</sup> The team consisted of Kathryn Aylward, the Director of the Contract and Business Services Division of OPDS; Paul Levy, OPDS General Counsel; Karen Stenard, a juvenile law expert and administrator of Lane Juvenile Lawyers Association, the consortium providing juvenile court representation in Lane County; and, Tom Sermak, the Executive Director of the Public Defender of Marion County. Mr. Sermak had also been chair of the Quality Assurance Task Force peer review team that evaluated the representation provided by the Intermountain Public Defender in 2005.

youth were eligible for appointment, although the final report noted that the number of appointments had increased following the Commission's hearing in Pendleton. But the report also noted considerable skepticism regarding whether attorneys were providing meaningful assistance to clients in those cases where they were appointed. In dependency cases, the report focused on concerns with the representation of children, including whether attorneys were having sufficient contact with clients and whether attorneys were properly representing the expressed wishes of those clients capable of considered judgment. A number of issues regarding professionalism were also noted.

Finally, the report noted concerns regarding the structure of the drug court in Umatilla County, and the advice attorneys were reportedly often giving clients that participation in drug court would not be in their best interest.

Following the Commission's November 2007 meeting, OPDS Executive Director Ingrid Swenson continued her contacts with the local public defense providers and justice system partners. Updated information from those contacts was incorporated into the final service delivery report adopted by the Commission at its May 8, 2008 meeting. Thereafter, Ingrid Swenson continued her contacts with local justice system participants, including a visit to Pendleton. OPDS General Counsel Paul Levy also sought to facilitate participation by IPD attorneys in trial skills training programs offered through the Metropolitan Public Defender, in Portland, and through the Oregon Criminal Defense Lawyers Association (OCDLA).

**The July 2009 Visit.** The team that visited Umatilla County in July 2009 enjoyed the full cooperation of the local justice community, including the two public defense contractors. Over the course of the visit, the team spoke with over twenty persons involved in the criminal and juvenile justice systems in the county.<sup>3</sup> Most of the persons interviewed were familiar with the Commission's 2008 report, and the conversations focused on the concerns identified there.

**IPD Operations.** The team heard widespread satisfaction with the work of IPD attorneys, particularly in criminal cases. Most people attributed the firm's good work to very low turnover during the past two years. The current experienced group of attorneys, according to people interviewed by the team, is able to handle their cases efficiently and effectively, and have achieved greater confidence and good results when

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<sup>3</sup> Among those persons who met with the team are the following: Presiding Judge Garry Reynolds, Judge Ronald Pahl, Judge Christopher Brauer; Trial Court Administrator (TCA) Roy Blaine, and Deputy TCA Patty Maness; Court-Appointed Special Advocates Chris Hull and Mary Bousquet; Juvenile Department Director Charles Logan Belford, and Juvenile Department Court Coordinator Kim Noisey; Department of Human Services, Child Welfare Managers Joyce Turner and Bonnie Hinton; Citizen Review Board Coordinator Toni Lehman; Blue Mountain Defenders (BMD) Administrator Craig Childress, and BMD member attorneys Daniel Stephens, Jonathan Lieuallen, and Kitee Custer; District Attorney Dean Gushwa, and Deputy DA Kate Beckwith; IPD Executive Director Douglas Fischer, and IPD attorney Morgen Daniels; and Umatilla County Community Corrections Program Manager Michael Graber.

taking cases to trial. A number of people had particular praise for the energy and commitment of several newer attorneys at IPD, while also expressing appreciation for the contributions of Douglas Fischer, the Executive Director.

The team learned, however, that IPD continues to have no plans for structured training and supervision of attorneys, including attorneys new to the practice of law. According to Mr. Fischer, an employee manual developed several years ago is no longer provided to new employees, and other orientation and training materials may be “on the computer” somewhere but not in current use. He also confirmed that IPD has no other formal training, mentorship, oversight or evaluation protocols for staff attorneys. On the other hand, he cited the collegial office environment at IPD, the “open-door” policy whereby attorneys assist each other in developing their law practice, and estimated that a new attorney is likely to thoroughly review his or her first twenty or so cases with more experienced colleagues prior to resolving the matters. Mr. Fischer insisted that this relaxed approach to attorney development is best suited to the realities of a small firm practice in a rural community. Mr. Fischer also cited the current general satisfaction with IPD representation as evidence that current management practices at IPD are meeting the firm’s needs.

The team challenged Mr. Fischer on some of his assumptions. While acknowledging that attorneys appear to enjoy working at IPD and appreciate the friendly office environment, the team shared with Mr. Fischer the observation heard in several other conversations that the stability IPD now enjoys is a function, at least in part, of the current depressed economy and the difficulty any attorney may have now in finding a new position. Sooner or later, the team noted, IPD will find itself needing to recruit and train new attorneys. One of the key functions and benefits of a public defender office is the ability to train new lawyers relatively quickly and, with the benefit of other quality assurance mechanisms, have confidence that the firm can handle a significant number of cases with a high level of proficiency. The team also noted that the presence of a well-designed training and supervision protocol could well be a helpful recruiting tool for new lawyers wishing to begin a career with a firm that can provide them the prospect of excellent professional development.

In interviews conducted prior to the conversation with Mr. Fischer, the team heard that he is a reliable participant in planning and policy meetings of justice system stakeholders, and that his input is useful. The team had also heard that on at least one occasion he received and was responsive to concerns regarding the performance of a staff member. The team complimented Mr. Fischer for these efforts.

Additional observations and recommendations by the team concerning IPD will be provided elsewhere in this report.

**Blue Mountain Defenders (BMD) Operations.** The team received information that BMD is also providing satisfactory representation in both Umatilla and Morrow Counties. In fact, there was significant appreciation for the effort of BMD attorneys in assuring the availability of counsel in all the far-flung courts of the Sixth Judicial District, and especially for managing the coverage of cases in Morrow County following the untimely death of Valerie Doherty, a BMD attorney who handled a substantial portion of the caseload in that county. The administrator of BMD, Craig Childress, and one other BMD attorney continue to handle most of the cases appointed to BMD, but the team heard from a number of other BMD attorneys that they are satisfied with the level of appointments received from BMD and are otherwise happy with their relationship with BMD.

Mr. Childress receives most of the appointments to represent children in dependency cases, an arrangement that has evolved, in part, from a belief that conflicts of interest would arise were IPD appointed more often to children due to prior representation by IPD of parents in criminal matters. Another BMD attorney, Daniel Stephens, is usually appointed to represent a parent in most dependency cases. The 2008 report noted some concern that Mr. Childress and Mr. Stephens, who had shared office space until shortly after the Commission's hearing, were often taking similar positions on behalf of their clients. The team received conflicting information regarding the extent to which this appears to still be the case. The more significant issue to several people, however, concerned the manner in which Mr. Childress and others who represent children arrive at the position for which they advocate.

Overall, the team heard that attorneys have increased their contacts with child clients, or at least have somewhat regular contact with foster parents regarding the child in their care. The team learned that the Commission's emphasis on timely contact with child clients, and especially its statement concerning the role of counsel for children and youth, has made a difference in this regard. Nonetheless, a number of persons said that attorneys appear to be continuing to advocate for what they deem to be the best interest of child clients who appear capable of considered judgment. With such clients, according to some, attorneys are either not having sufficient contact or still don't fully appreciate the responsibility they have to advocate for the child's stated wishes.

Umatilla County regularly convenes collaborative Juvenile Court Improvement Project (JCIP) meetings and conducts local JCIP training programs. While representatives from IPD are said to occasionally be present for these meetings, BMD attorneys are not. Mr. Childress is reported to have said, on at least one occasion, that he doesn't get paid to attend JCIP meetings. More generally, training is also a concern for BMD attorneys. The one BMD attorney who represents parents in many dependency cases reported having attended no juvenile law programs in recent years. Another attorney said that the time

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and expense involved made attendance at training programs very difficult. Another attorney makes a point of occasionally attending some juvenile law training.

**Other Juvenile Dependency Issues.** In addition to the matters noted above, the team was told about the following:

- As noted in the 2008 report, attorneys are present for the shelter hearings at which parties make their first appearance in dependency cases. The team heard one opinion that the presence of attorneys at these proceedings has probably not changed the outcome of initial shelter care decisions regarding removal of a child from the home, but it has improved contact between parents and their attorneys. This improved contact can lead to better outcomes for parents.
- The court's mediation program described in the 2008 report, which began with JCIP funding, continues even without a current JCIP grant. Attorneys for parents have usually met with their clients prior to mediation and are generally prepared. There is concern that attorneys for children have not had contact with their clients prior to mediation and are not in a position to determine either the best interests or expressed wishes of their clients.
- Overall, attorneys do a good job representing parents. They do well safeguarding parents' rights and advocating for appropriate services for parents. On the other hand, attorneys for both parents and children are not sufficiently familiar with the Department of Human Services (DHS) Oregon Safety Model. And while attorneys usually have some presence at hearings of the Citizen Review Board, they are not generally attending Family Decision Meetings and other case planning meetings where attorney input could assist a client. Moreover, after jurisdiction is established, attorneys do not appear to maintain regular contact with their parent clients.
- DHS has begun providing discovery and reports as attachments sent to attorneys by email, but it appears in some instances that attorneys have not read the relevant documents prior to court.
- When contested hearings occur, public defense attorneys perform adequately, although they don't appear to be making use of available resources, such as expert assistance. (As was the case when the 2008 report was prepared, OPDS continues to receive very few requests for non-routine expenditures for expert assistance in either juvenile dependency or delinquency cases.)
- Attorneys for children could use some specialized training, particularly because advocating for children, especially very young children, is so different from the

defense of a criminal case, which is the field in which most practitioners are primarily trained.

**Other Juvenile Delinquency Issues.** At the time of the Commission's hearing in Pendleton, it was reported that attorneys were appointed to only about half of the youth eligible for appointed counsel in delinquency cases. By the time the 2008 report was finalized, the percentage of appointments was said to have increased. The team heard conflicting information about the current rate of appointment, with one estimate putting it at under half of all eligible cases. The court will appoint counsel, however, in all sex cases and in all cases where a commitment to the Oregon Youth Authority appears possible.

The team learned that the assessment of attorney performance in delinquency cases has improved significantly since the Commission's visit and the 2008 report. Attorneys are making a better effort to meet with clients and their parents prior to court, and they are doing well when litigating and negotiating on behalf of their clients. The team heard that there are a lot of caring attorneys at IPD. High caseloads and the demands of competing dockets and courthouses continue to cause significant delays in case resolution, however, with cases taking from four to eight months to resolve.

While public defense providers are litigating more cases, including more motions to suppress evidence, they are reported to lack a good understanding of childhood developmental issues and are not sufficiently exploring issues concerning competency of youth to waive *Miranda* rights or to aid and assist in their defense. On the other hand, the team spoke with one attorney who was planning to litigate these very issues in an upcoming case.

Just prior to the team's visit, the County had closed its detention facility. As a result in part of practices developed with the assistance of a Casey Foundation Juvenile Detention Alternative Initiative grant, the County was detaining very few youth prior to the closure. While the County has contracts with facilities in Walla Walla County, in Washington, and with the Northern Oregon Regional Correctional Facility, in The Dalles, where detention necessary, it now relies upon advanced monitoring technology when lesser forms of restraint are necessary.

**Other Criminal Cases Issues.** As indicated above, there is general satisfaction with the public defense representation in criminal cases. While the court continues to hear of problems in contact between attorney and client, the difficulty is often with the client not making scheduled appointments or court appearances, which can be especially challenging in such a large county with no public transportation. Overall, attorneys are prepared for court and, thanks in part to the recent stability at IPD and the attendant gains in experience, they may outmatch the DA's office at trial. Although there had

been concerns about attorneys not identifying issues to litigate in pretrial motions, they are said to do a good job now with motions to suppress.

The 2008 report noted that the courts had recently begun central docketing, instead of assigning cases to the judge who conducts the arraignment. For reasons that the team did not explore, the court has now returned to an individual docketing system. This type of system, which is relatively rare in Oregon courts, can present substantial challenges to attorneys, and even for defendants, who may have conflicting obligations in different courts or courthouses at the same time.

The team also heard a complaint that IPD was providing discovery to clients without redacting contact information of witnesses and complainants, as required by statute. The team learned that IPD has taken steps to assure full compliance.

**Drug Court Issues.** The team explored a number of issues concerning the drug court in Umatilla County, which had been consolidated shortly before the team's visit, for budget reasons, into one court in Pendleton, eliminating a second court in Hermiston. The court accepts "high risk" cases, which means that the case of drug possession, which is the mainstay of drug courts in other counties, are usually deemed not appropriate for participation in the court in favor of more serious offenses, such as burglary, where the defendant's drug problems appear to be a cause of the alleged criminal activity. In 2007, the Commission heard that attorneys had often recommended that clients not participate in the drug court because defendants were then required to plead guilty to all pending charges, with the prospect of receiving a very lengthy sentence upon failing drug court, which could be expected in many cases. The team heard that some plea bargaining may now occur in connection with drug court cases, but drug court remains a less than attractive alternative in many cases. As a result, the number of participants is reported to be very low.

The team also looked into concerns with the role of appointed counsel in drug court. Mr. Fischer, of IPD, is the public defense attorney who provides representation for defendants who have chosen to participate in drug court. He meets periodically with a policy group, involving the court, District Attorney, community corrections and others, which is responsible for establishing the operating procedures for drug court. Prior to the weekly drug court hearings, there is a "staffing" at which the drug court judge, the DA, community corrections, and Mr. Fischer discuss the progress, including sanctions to be imposed for non-compliance, for those defendants on the docket. Mr. Fischer is reported to now be regularly attending these staffings, although in the past he did not do so. He is not usually present, however, when drug court convenes and participants appear before the judge to discuss their progress and, when decided at the staffing, to receive sanctions for noncompliance. Mr. Fischer has viewed his appearance at court

proceedings as an unproductive use of his time and, under the current structure of the court, that is not a completely unreasonable position.

It is only at the morning staffing prior to court that Mr. Fischer and others receive reports about a defendant's status with treatment and other requirements. Mr. Fischer's clients are not present for the staffing and, in fact, are not even expected at the courthouse until after the staffing is concluded. The decisions made at the staffing, thus, are without the benefit of any response or explanation from Mr. Fischer's clients about allegations of noncompliance or lack of expected progress. Yet, these decisions are considered firm. The team confirmed that the court expects that Mr. Fischer will not discuss the decisions with his client prior to court and that there will be no opposition to the decisions during the court hearings. Indeed, the drug court team, defense attorney included, is expected to present a "united front" during the hearings at which sanctions may be imposed.

This drug court structure, which the team considers unacceptable, effectively denies drug court participants their right to counsel. Faced with a report of noncompliance and the possibility of adverse consequence, there is a role for counsel to obtain from the client or others information that may excuse or mitigate the allegation. Yet, under the structure described to the team, counsel has no opportunity to learn about such information or present it to the court. When the team met with the program manager for Community Corrections, he appeared to understand the team's concerns and was willing to explore changes, in terms of when reports are made available to defense counsel, that would allow for actual representation of clients in the decision-making process of drug court.

**Conclusions and Recommendations.** As noted throughout this report, there are important areas in which the work of public defense providers in Umatilla County is commendable. Their work in criminal cases is currently considered to be very good. In dependency cases, parents are generally receiving good representation, and there has been an increase in contact with child clients and their care providers. In delinquency cases, timely contact with clients has improved, as has the level of advocacy, with an increase in trials and motions. Overall, there is less concern than previously with unprofessional conduct, and no apparent concern with impaired or underperforming attorneys. And it is especially noteworthy that most attorneys appear to like their work, despite some of the challenges of living in a rural community, and are willing to energetically juggle multiple courts and counties, sometimes driving thousands of miles every month.

There continue to be significant areas of concern with public defense representation, however, which require the attention of the Commission, OPDS staff, the local public

defense providers and, in some instances, the local courts and other justice system stakeholders. To address these concerns, the team has the following recommendations:

**IPD Structure.** IPD must develop training and quality assurance structures. Except for a collegial and friendly office environment, the firm appears to have few of the structural characteristics expected in a public defender office. The 2008 report included a description of the Commission’s expectation for public defender offices, found in each of its service delivery reviews, that makes clear that in both populous counties and less populated areas “...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...” [emphasis added].

Because the team understands that current IPD attorneys, including Mr. Fischer, already have significant workloads, they recommended to him, during the visit, that he add at least one additional attorney position, which appears feasible from an OPDS review of the firm’s current workload and accompanying payments. A new position would allow for caseload relief for one or more experienced attorney, who could be assigned supervisory duties and training responsibilities. Training of new and experienced staff requires, of course, that the “trainer” devote substantial time to keeping abreast of developments in criminal and juvenile law and practice, and network with attorneys in other public defender offices who fill similar roles. Mr. Fischer should discuss with OPDS contracting staff the details of adding one or more new positions.

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Of course, there is some training that is not feasible for IPD to undertake itself. The team understands that IPD already provides some financial support and encouragement for attorneys to attend educational programs presented by OCDLA. This support should include, specifically, attendance at any trial skills programs (currently planned for February 2010), which are usually aimed at attorneys who already have several years of experience. The firm should also plan on sending new lawyers to the basic trial skills training program provided by the Metropolitan Public Defender (MPD), in Portland, which the team understands will occur more frequently and, thus, be more readily available to attorneys from across Oregon.

Following the recent visit to Pendleton, OPDS General Counsel confirmed with MPD that IPD attorneys would be welcome to attend their trial skills programs. General Counsel will continue to explore training opportunities and options with IPD, but Mr. Fischer is also urged to contact other public defender offices, including MPD and firms in less populous areas, to explore how they fulfill their obligations to provide training and supervision. There are plans for a discussion of training programs at the OCDLA/OPDS Public Defense Management seminar in October, 2009, which Mr. Fischer may wish to also attend.

**Juvenile Representation.** The team appreciates that there have been improvements in juvenile practice in Umatilla County, but has identified a number of specific areas where the providers should undertake further efforts. In general, though, the team concluded that juvenile cases may be viewed by attorneys and the court alike as having lower priority than other types of cases. This was manifested by the relatively little amount of court time provided for juvenile cases (essentially one afternoon each week), and statements by providers that suggested juvenile cases were simple matters that required little training or experience, could be handled without great effort, and didn't require the zealous advocacy that might be needed in an adult criminal case. Indeed, the team was distressed to learn that IPD attorneys are handling very serious felony delinquency cases when the attorneys were not considered qualified to handle the same level of felony for adult clients. Aside from violating the PDSC Qualification Standards, this practice suggests an approach that views juvenile cases as less important than adult criminal cases.

While attitudes and culture of local practice are not the subject of specific recommendations by the team, the team would expect that changes in those areas will occur if attorneys take advantage of currently available opportunities to receive excellent training on a variety of relevant juvenile law topics. Most of the areas where the team has identified concerns with juvenile practice are the subject of recurring trainings presented by OCDLA, the Juvenile Law Section of the Oregon State Bar (OSB), and the Juvenile Law Training Academy, which is a joint effort of OPDS, JCIP, OCDLA, OSB, the Juvenile Rights Project, and the University of Oregon Law School. The team recognizes that attending training programs requires expense and time, but there appears to be a particular need for Umatilla County public defense providers to obtain additional training, particularly as it relates to the obligations of attorneys to child clients in dependency cases, case planning and advocacy for children, and issues of competency and adolescent development in delinquency cases.

The team also recommends that all attorneys handling dependency cases read the OSB Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment and Post-Conviction Relief Cases.<sup>4</sup> The Specific Standards for Representation in Juvenile Dependency Cases are particularly relevant, especially the provisions relating to the role of a lawyer and determining the circumstances in which an attorney must advocate for the expressed wishes of a child client in dependency cases (an attorney must always abide by the client's decisions in delinquency cases). In this regard, it may also be useful for attorneys to review again the PDSC statement on the

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<sup>4</sup> The standards are available at: [http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html).

Role of Counsel.<sup>5</sup> While the team commends the local providers, especially BMD, for its improved contact with placement resources for child clients and recognizes that valuable information may be gained from these sources about the welfare of their clients, these contacts cannot be a substitute for regular client contact, particularly for children who may be capable of considered judgment regarding their cases. As the providers undoubtedly know, placement resources may have their own interests that conflict with those of the client.

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As noted, a significant number of youth continue to be unrepresented in juvenile delinquency cases. This stands in stark contrast to some Oregon counties, such as Multnomah, where virtually all youth are represented and is contrary to national professional standards providing that a youth's right to counsel in delinquency cases cannot be waived and a growing body of state legislation guarding against such waivers.<sup>6</sup> The team recommends that local providers work with the court and juvenile department to ensure that waivers in these proceedings are no longer routinely sought and obtained.

Finally, while the team applauds IPD for its attendance at local JCIP Model Courts meetings, attendance should be expected of representatives from both public defense providers, especially since BMD is involved in most dependency cases. It is a best practice recommended by the OPDS Quality Assurance Task Force, but also common sense, that a public defense provider will participate in collaborative policy and planning meetings with justice system partners that concern an area of law in which they practice.

**Drug Court.** The team was encouraged, that the Program Manager of Community Corrections understood the problems for counsel with the current structure of the drug court and saw that changes were possible that would permit counsel to have a meaningful role on behalf of clients participating in the program. Mr. Fischer, who also participates in policy discussion for drug court, should pursue these changes, if they have not already occurred. To assist in this discussion, the most recent draft of a PDSC statement concerning drug courts is appended to this report. Although the statement has yet to be finalized by the Commission, the statement should provide useful guidance to Mr. Fischer and others.

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<sup>5</sup> This statement is currently available on the CBS Division page at the OPDS website, at [www.opds.state.or.us](http://www.opds.state.or.us). The website will be restructured soon, but the document will continue to be available there, although likely in a new location.

<sup>6</sup> The American Bar Association's Juvenile Justice Standards provide that "[a] juvenile's right to counsel may not be waived." [http://www.njdc.info/pdf/18\\_LAaba.pdf](http://www.njdc.info/pdf/18_LAaba.pdf). A growing number of states offer various safeguards against such a waiver. <http://www.njdc.info/pdf/CPAWaiver.pdf>.