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 11, 2008
9 a.m. to 1 p.m.
First Floor Conference Room
Aldrich Kilbride & Tatone LLC
1011 Commercial St., NE
Salem, Oregon 97301

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's August 14. 2008 Meeting *(Attachment 1)*	Barnes Ellis
2. **Action Item:** Approval of Minutes of PDSC's August 14, 2008 Retreat *(Handout)*	Barnes Ellis
3. Commission Discussion of Service Delivery Plans for Grant/Harney, Baker and Malheur Counties *(Attachment 2, 3 and 4)*	Barnes Ellis Commissioners OPDS Staff
4. **Action Item:** Commission Discussion of Service Delivery Plans for Jackson and Josephine Counties (*Attachments 5 and 6)*	Barnes Ellis Commissioners OPDS Staff
5. OPDS's Monthly Report	OPDS's Management Team

Please note: Lunch will be provided to Commissioners at 12:00.

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 17, 2008 from 12:30 to 4:00 at the Resort at the Mountain in Welches, Oregon. (This meeting will be held in conjunction with the annual OCDLA/OPDS Management Seminar.)

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, August 14, 2008
9:00 a.m. to 1:00 p.m.
Swan Room
Geyser Grand Hotel
1996 Main St
Baker City, OR 97814

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 Becky Duncan Paul Levy Billy Strehlow Amy Jackson

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[Meeting was called to order at 9:00 a.m.]

Agenda Item No. 1 **Introduction of New Commission Member: Peter Ozanne.**

Chair Ellis welcomed Peter Ozanne to service on the Commission.

Agenda Item No. 2 **Approval of the Minutes of PDSC's June 12, 2008 Meeting.**

MOTION: Shaun McCrea moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0**

Agenda Item No. 3 **Approval of the Minutes of PDSC's July 2, 2008 Meeting.**

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

Agenda Item No. 4 **Presentations on Public Defense Delivery in Baker, Malheur, Grant and Harney Counties**

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial Distrcit 24) provided written testimony (Exhibit A). He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant

and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately $3,000 which would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to make it necessary to open a new office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for

him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. Defense attorneys do better work if they can focus on criminal cases. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges $90 per hour for private cases and is paid $28 per hour on public defense cases. Most investigators charge between $65 and $75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike Gordon Mallon's experience in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time.

In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. If takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUII cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was $1,903. Insurance coverage for her employee would have cost her $700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

Commissioner Ozanne suggested that the Commission contract with a retired or semi-retired public defense administrator to compile data from other jurisdictions relating to provision of services in rural or underserved areas of those states.

Agenda Item No. 7 **Budget Update**

Kathryn Aylward commented briefly on the contract negotiations that had occurred in Baker County prior to the Commission's approval of the current contracts with the Baker County Consortium and with attorney Dan Cronin.

She then reviewed the 2009-11 PDSC budget documents.

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

Exhibit A

Ingrid:

I am sorry that I cannot be present at the meeting in Baker City. I had planned to be there but learned I have been appointed to a case in which another attorney had to withdraw, leaving me to cover a court hearing that had been set for the morning and cannot be changed. The morning hearing, coupled with a full afternoon schedule makes it impossible to attend.

Please feel free to review this email and, if you deem it to be of value, share it with members of the commission.

I would like to say that I have given some thought to what I might have said at the meeting and come to the following brief observations:

1) Most issues relating to indigent representation are probably the same, whether in Malheur County or Multnomah County. I am certain your efforts at reaching out to providers has made you more aware than most of those concerns (primarily fiscal), so I will not repeat what I think you may have heard many times before;

2) Over the past several years I have seen what seems to be an increasingly burdensome march by the courts and DA's to shift the cost of doing business onto defense counsel. This can be things that are seemingly small (yet cumulatively significant in time and cost) such as the court's decision to no longer providing OJIN reports with the notice of appointment and no longer providing hardcopies of judgments; to significantly increasing the numbers and types of cases at which attorneys must appear; to requiring formal filings and/or motions with orders and affidavits with nearly every kind of request from the court (as opposed to a phone call, or even an informal letter); to mandating personal appearance at settlement conferences, and so forth;

3) Dramatically increased cost of contacting witnesses and clients. This does not just include the fact that many clients are telephonically long distance (due to our proximity to the Idaho state line), but also because virtually everything is farther away than in urban areas. For example: It is a near one-hour/40 mile trek (round-trip) to the nearest office supply store (paper, pencils, paper, etc....) and the same distance every time we need something copied. We do not have any form of mass/public-transit in the entire county which further adds to the cost of business.

4) Malheur County has historically had among the very highest percentage of cases that go to trial.

5) While this may not be a matter unique to Malheur County (and I believe the court tries to accommodate our CRB schedule when possible), Citizen Review Board hearings are to be scheduled the same day of the month, all year. Several times a year (2-3) the hearings are either changed at the last minute, or an extra day is added to accommodate additional cases. This means that approval from the court must be obtained in order to set-over those conflicting court hearings (after assessing each case, contacting each client

and filing the appropriate motions) -- followed by again chasing down the clients and anyone else associated with the court matter to seek their input and/or notify them of the potential/ordered change -- or our CRB client must go unrepresented at a hearing that could have devastating impact upon their family. Some changes cannot be avoided, but perhaps a CRB rule change mandating hearing dates be fixed 14-21 days prior to its occurrence could fix the problem.

6) I have concerns that some may not have a clear perception of the increased work that comes from nearly every prison case. First of all, when assigned a prison case one must remember the obvious: the client cannot come to the office to meet with us. This means we must go to him. That trip adds approximately two hours to each visit because of the time it takes to drive to/from the prison and the time it takes to pass through security, get into the visiting section and wait for the inmate to arrive. If the client is in special housing, the time is longer. There is also a burden on the office staff because of the necessary rules that must be followed in making the appointment. It is not unusual to make multiple trips to the prison in the course of representing a client on a single charge (I would say it is rather uncommon to make only a single visit).

Understand also that inmates are serving longer and longer sentences. This gives them little incentive to negotiate or agree to anything that might be perceived as cooperating with the state -- even if in the end it benefits them. As a result, most lawyers will say they end up in trial far more often when representing inmates than they do with other clients.

Another burden with respect to prison inmates comes from their increased agitation and demands upon attorney and staff time. Unlike other clients who often have a job and family to soften their outlook and provide positive distraction from the worries of the case, inmates have nothing but time and built-in mistrust of the system -- which includes their court appointed attorney. For many, even unlimited resources will not measurably improve their belief that we are part of the enemy, which leads to the final issue relating to inmate representation:

While nobody likes to think about bar complaints (and most of us don't have an excessive amount given the circumstances and nature of the work), I do not recall having any that did not come from a DOC inmate. All were dismissed, but only after considerable work. This is in part because most complaints generally come long after the work is completed. When that happens (actually, in every complaint), it is necessary to review every aspect of the case in minute detail. Then, one must write a detailed letter to the bar, hoping nothing of significance will be omitted. Following that painstaking effort, one can look forward to several supplemental letters, appeals and maybe even a PCR or malpractice suit. Thankfully, this is not the norm, but even a few are so time consuming they wreak havoc on one's practice and reduce whatever profit might have been made in many cases.

I suggest some thought be given to treating prison cases as a separate category with its own value, considering the general increased workload (now and later) that comes with representing DOC inmates, the type of crime charged and the distance to the prison.

Finally, I would be remiss if I didn't say that I believe OPDS has taken great strides in improving the quality of service to those we represent and in doing what is possible to help those of us providing services. The positives far outweigh the negatives and the last thing I want is to leave the impression that I am unhappy or that anyone has failed to do their best, given the tools provided. Your staff has ALWAYS been courteous, attentive, responsive, and supportive. I do not know anyone at OPDS that I do not count as a friend. Similarly, the courts are also trying to help in ways they find possible. My observations are simply that: observations. My notes are merely meant to help recognize those differences that I see as significant and that might warrant attention by the commission.

Again, I am sorry that I could not attend your meeting, particularly after so many have made such an effort to visit this side of the state and to listen to our thoughts.

Very best wishes,

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PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, August 14, 2008
9:00 a.m. to 1:00 p.m.
Swan Room
Geyser Grand Hotel
1996 Main St
Baker City, OR 97814

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 Becky Duncan Paul Levy Billy Strehlow Amy Jackson

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[Meeting was called in order at 9:00 a.m.] [tape was not started]

Agenda Item No. 1 **Introduction of New Commission Member: Peter Ozanne.**

Chair Ellis I would like to acknowledge the presence of Peter Ozanne. Welcome back. Peter has recently taken up the position of Deputy Chief Operating Officer for Multnomah County.

P. Ozanne I appreciate the opportunity to serve. It's nice to see familiar faces again. It'll be different for me being on this side of the table.

Agenda Item No. 2 **Approval of the Minutes of PDSC's June 12, 2008 Meeting.**

Chair Ellis Are there any corrections or changes to the minutes of PDSC's June 12, 2008 meeting? **MOTION:** Shaun McCrea moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0**

Agenda Item No. 3 **Approval of the Minutes of PDSC's July 2, 2008 Meeting.**

Chair Ellis Are there any corrections or changes to the minutes of the telephone meeting on July 2, 2008? **MOTION:** Shaun McCrea moved to approve the minutes; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 4 **Presentations on Public Defense Delivery in Baker, Malheur, Grant and Harney Counties**

Chair Ellis We are pleased to be here in Baker City. We like to go where the action is. We're here to listen. Not every community has to be like every other community. This is a large

geographic area so we welcome your comments. We are not here just to hear praise. If you have got constructive suggestions we want to hear that. It is a good opportunity to kind of dialogue a little bit and make sure that what we are doing, in terms of trying to provide the support for defense services here, is working, that communications are working well, the qualities of the service are appropriate and really respond to any concerns that those of you in the system here want to share with us. We do have several – I'll call them "witnesses" or "presenters" - people from the area that have asked to speak and we look forward to that. Part of what we have tried to do in these regional meetings is to get input not just from providers, but from the courts, from the prosecution side, the law enforcement side, from the victim's side, from all of the different components. One thing I think we have learned is it is a system. It has a lot of moving parts and we can't do our job without relating well to others in the system. I think working together has been a whole lot better than the days when there used to be a lot of tension between elements in the system. So with that, Judge Cramer, I believe you are the first prospect. We look forward to hearing from you.

2:13 Hon. Bill Cramer

Well, good morning Chairman Ellis, Chief Justice De Muniz and members of the Committee. I did prepare some written materials and you may have those. I do need to immediately make a correction. The heading on the materials refers to the Circuit Court Judges Association. That is because I have been preparing other materials on behalf of that organization. I am not here on behalf of the circuit court judges and I need to make that clear. I am here as presiding judge for Grant and Harney counties. My name is Bill Cramer as I indicated. I want to sincerely thank each of you for your willingness to serve on this commission and for allowing me to appear before you. I recognize it is a difficult and ongoing task to educate the public and the legislative branch of the constitutional need to provide adequate legal representation for those facing state initiated proceedings, and who are indigent. Since preparing the initial draft of my remarks, I received Ingrid Swenson's draft report to the commission and it ably addresses my concerns. Quite frankly, it is clear to me that you are aware of the unique circumstances that I think we face in Eastern Oregon. I almost hesitate to take too much time to go into those but let me just express real briefly some of my concerns. At present, those who are indigent and needing legal counsel, I think, are receiving adequate counsel and representation in my two counties. There are primarily two contractors. Markku Sario is the primary contractor in Grant County and first conflict provider in Harney County. Mallon and Lamborn provide just the reverse between Harney and Grant, primarily John Lamborn. I do note that Gordon Mallon is actually present today. Additional coverage is provided by attorneys traveling over 100 miles, usually for cases that need additional attorneys. Those generally come up in either multiple co-defendant cases - or the juvenile dependency cases is really where those arise. However, I do want to say that having one primary attorney in each county does create scheduling issues. Attorneys need to take vacations and in these particular law firms the attorneys do take civil cases. That creates jurisdictional conflicts and where it really arises is when there is need for immediate hearings such as shelter care hearings or release revocations, somebody has been taken back into custody, and if somebody is on vacation and there is no backup, and there generally isn't, then it just creates difficulties in trying to schedule around that. I believe our two counties would be better served if we had more local attorneys who would be interested in doing legal defense. I am very concerned that in a five year period Mr. Lamborn and Mr. Sario may decide to retire. Mr. Sario, I think I can say, is about 60. I don't know how much longer he is going to continue to provide services. I don't see anybody coming in behind to backfill or to take on the contract. In John Day, Canyon City, and in Burns, the law firms as a whole have shrunk in size. There are not even the civil law firms that were there. There is just not a pool to draw from. I suggest that working with the current contractors and providing a way for them to hire somebody who can come in and work with them and provide services now, but who would also be there to take over the contract in time is about the only way I see ….

7:17 Chair Ellis

Do you have any thoughts how we could help attract younger lawyers to the area that would be interested in the work?

7:26 Hon. Bill Cramer	Well, obviously compensation is always an issue, adequate compensation, and I think everyone is going to be talking about that and that is certainly a major part of my remarks that I don't think you need me to read to you. I do think it would help the law firms if they could count on a flow of funds that they know is going to be consistent over an extended period of time. Right now I think it is a two-year contract that is normally signed. To really bring somebody in I think they need a more assured funding source. What I am thinking is I realize the same contractors have been able to renew their contracts over the long-term, but it is really based upon the number of cases. In our local jurisdiction, Chairman Ellis, cases can fluctuate 15 percent. If you are always paying on the number of cases one year it is a feast and the next year it is a famine. It is hard to hire somebody and pay them an ongoing wage each year, if one year you have enough money to do so and the next you don't. I just see that at some point locally they are going to need to be able to count on a contract for four or five years to get somebody into the community and to get them established. Hopefully, they will be able to develop a more general practice at the same time.
9:09 Chair Ellis	It is a little hard for us to think of committing on a contractual basis that far out.
9:14 Hon. Bill Cramer	I know. Especially with the legislative issues, I understand.
9:22 Chair Ellis	I don't think we have a history of arbitrarily terminating people.
9:29 Hon. Bill Cramer	Here is what I am thinking and I am going back to when, Chairman Ellis, when I was a contractor. We just did it on the number of cases and it went up and down. To hire somebody and if you are going to pay them $40,000 or whatever.....
9:49 Chair Ellis	You take the fixed risk and the fluctuation is in there.
9:51 Hon. Bill Cramer	Right. You need to know the money is going to be there to pay that salary. The way it was done in the past was if the caseload went down, you are still paying your associate and it is you who take the financial hit so to speak. I am not sure with the level of compensation and the amount of work involved that people in Mr. Sario's position or Mr. Mallon's position would be able to stand that financial hit.
10:32 J. Stevens	In terms of hiring new attorneys, young attorneys, is it just money that keeps them from doing that? Or is it a reluctance to live in Burns or Canyon City of someplace?
10:49 Hon. Bill Cramer	I am sure there are those who would be reluctant to live in a rural area. I am astounded by the number of people who really want to get to a rural area if they can afford to make it work. I think there are plenty of candidates out there or attorneys who would come. We have certainly seen it with doctors. You would think that it would be difficult to attract those types of professionals to the smaller areas, but there are those that want to come just for the recreation and rural aspect. I think there are attorneys out there that would do that. District attorney offices have always been able to hire people and generally paying a lower salary than they would get in a more urban area.
11:34 Chair Ellis	Why does that work for them and not for the defense?
11:40 Hon. Bill Cramer	I think it is the compensation. I think they are paying more than what the indigent defense providers were paying. I really think, and I don't want to speak – Mr. Mallon is here and he can speak for himself, but I don't think the contract amount really allows for hiring an associate and paying for them to do the work.
12:14 Chair Ellis	So I think I am hearing you say that if we could maybe shift some of the risk of the fluctuation away from the provider and more to the agency, that might make this system work better.

12:29 Hon. Bill Cramer — I think so. I do want to be up front with you, Chairman Ellis and members of the committee. I really haven't talked with Mr. Mallon about this and I really haven't talked with Mr. Sario. I just see they don't have associates ….

12:45 Chair Ellis — So we are here planning Gordon's retirement?

12:47 Hon. Bill Cramer — That is right. I don't see who is going to come in behind them at this point. I think there is a five-year window and suddenly I don't know who is going to be doing the indigent defense. Again, I don't think it is cost effective to have people travel. One of our main providers in dependency cases in Harney County is Jim Spindor who travels from Klamath Falls. That is 180 miles or so from Burns.

13:27 J. Stevens — Can't you find someone in Bend?

13:29 Hon. Bill Cramer — Well, we had an individual who was willing to come from Bend, but without naming names, that particular individual hasn't proved to be satisfactory so we are moving away from him. We have tried to draw people from Prineville and there was a time when individuals from Prineville were coming over a regular basis. They are busy enough where they are and because of the travel, I think they feel they do better by not coming over. Any assistance that we can get from indigent defense we are always willing to take as far as who is willing to come over and who is qualified. We are scrambling sometimes and I do want to commend the defense bar. When they know we are really struggling they don't necessarily want to come to Burns, but they will come to Burns or John Day because they know we need an attorney on the case. That is pretty piecemeal and I don't think it always results in as timely representation, I guess is how I would say it, for those that need representation.

14:43 Chair Ellis — In the draft report at page 16 there are listed about five thoughts as to how to address this problem. It is in the next to the last paragraph. One you mentioned is offering longer contracts. I can see a variation on that of offering some kind of subsidy to existing contractors who are willing to bring in a presumably younger provider who would get the benefit of the training while the older providers are active and be available later. Another is to supplement the caseloads. Here it is suggested with appellate work which can be done from remote locations. You have to have the right person to do this but that would be one possibility. The other is a focus on law school recruitment and specialized apprentice training for lawyers that might be willing to locate in a low population area. Then the last was maybe some special assistance on capital needs. Any reaction to any of those suggestions?

16:15 Hon. Bill Cramer — I think they are all great ideas. I don't know which one would work the best. I think possibly the one where there is some subsidy for those firms that are willing to bring somebody in with the goal that that person would become invested in the community. That would be the understanding. I think that might help attract attorneys into eastern Oregon.

16:47 Chair Ellis — We have seen this in other areas of the state. Coos/Curry is an example that comes to mind. They have some of the same problems. It is a lower population area. It is out of the big city mode. It is a problem that we recognize and we are looking for ways to help because we do see this coming.

17:18 Hon. Bill Cramer — Again, I do think you are aware of the issue, and once I got Ms. Swenson's report it was clear that you have been dealing with the issue. One of the concerns in my area is just, as I have said, law firms in general have shrunk. It seems the legal work is going to be a more regional type of practice. Most of the law firms are sole practitioners now. When I was practicing just 15 years ago we had three or four attorneys in our firm. That is Mallon and Lamborn now. They are the successor and they are down to two, but everything is sole practitioners just about in our area. That just makes it very difficult to do that but I think some sort of subsidy would be ideal. That might encourage Mr. Mallon and Mr. Sario to hire people. They have tried in the past.

18:17 Chair Ellis — We had a meeting in Hood River about a year and a half ago, maybe two years ago, and we ended up kind of negotiating with Jack Morris, who his successor would be. It is an issue that is out there and it is not self-evident how to respond to that.

18:39 Hon. Bill Cramer — I want to thank the Commission. I know this is hard work. My opening statement was I realize it is difficult to educate the public, and the legislature, and just deal with all these issues. I think the Commission is working hard and I appreciate it.

19:00 Chair Ellis — I don't want to get into names or specifics but I do note there was dissatisfaction from some source about an out-of-district attorney that has been taking overload. I am sure staff is aware of whoever is concerned there.

19:20 Hon. Bill Cramer — I do believe I am aware of that particular attorney. Originally, he was one who was pretty well thought of by the group that he was serving, but there have been some personal issues, I think, that have occurred in his life and his work has been unsatisfactory. We are no longer assigning cases to him. I will say that he is finishing up a couple of cases in which he had been representing the parent in a dependency case over the long-term.

19:56 Chair Ellis — Do you feel comfortable that you know how to reach the right people at OPDS and express concerns like that?

20:05 Hon. Bill Cramer — Yes.

20:12 Chair Ellis — Any questions or comments?

20:17 Hon. Elizabeth Welch — I am curious, Judge Cramer, are there members of the Commission or staff who are keeping their eye on technology concepts that might make it a little bit less harrowing for lawyers practicing in these circumstances. Is there attention being given, do you know, to what is done in Kentucky or somewhere else maybe that would provide us an example. I am not a good technology person but are there ideas that would make it easier for people to participate and not be present at hearings? Do you feel like there might be more things possible if there were more equipment, or more technology, or different technology?

21:15 Hon. Bill Cramer — Well, Commissioner Welch, I do know that in our area right now if an attorney only has a single appearance or a couple of appearances, they can either appear by phone. In our particular district, because we have video in both courtrooms and because of the limited number of attorneys, we can only have court going in one courtroom at one time, I have had attorneys go to the courtroom, for example, in Harney County, and call in by video to appear for a hearing in Grant County. We do try to take advantage of those types of technology that we have. Part of my problem …

22:16 G. Kiyuna — I might be able to give a little input on that issue, Commissioner Welch. I had a conversation with Judge Baxter with regard to the possibility of having video link appearances. The price isn't that bad. We could get set up, have a video link terminal in our office, and appear virtually in any court in the state. For about $3,000 you would have a screen about this [indicating] big with a little camera on it. We could appear, for example, in Judge Cramer's court or in the Baker Circuit Court, potentially even in one of the prisons.

23:23 Hon. Bill Cramer — The ultimate difficulty to me is that the attorney still needs to be able to consult with the client and needs to meet with the client. For certain types of hearings the video or the phone appearance works just as long as the attorney and the client have been able to meet with one another and talk.

23:44 Hon. Elizabeth

Welch	I was thinking actually, to some degree, in those terms, not so much in the courtroom but in preparation. Because I have worked in your community recently and have talked to lawyers about their challenges, this idea that the lawyer's in Bend, the client is in Burns, how do you develop a good communication with your client when you can't really get together? Are there techniques that might be possible to help with that?
24:23 Hon. Bill Cramer	Promptly returning phone calls helps.
24:33 G. Kiyuna	What Judge Cramer was addressing is that you can appear by video – I should say your client or the defendant can appear by video but they have to have access to you as counsel. That can be difficult. Of course, the individual lawyer would really have to make a decision on that because in many instances even though, let's say there is a video appearance and you can have your client access you by phone. You have a connected call and it is literally there at his side, it is not the same as you being there with him. I entered a negotiated plea on the record. My client is an inmate at OSP. He is in administrative segregation. He is in a very bad situation. If he goes into general population he will probably be killed. You know, you just have to be there with your client under those circumstances. We went down to Salem, OSP, and appeared by video in Baker Circuit Court. In other less trying circumstances I can see where it would work, the video part.
26:13 Chair Ellis	To make our record maybe you could introduce yourself and give us a little background.
26:16 G. Kiyuna	I'm Gary Kiyuna. I live in Nyssa, Oregon and I am part of the Baker Consortium. I have been there since 1983. I have been doing defense work and juvenile work probably since 1983, actually.
26:42 Chair Ellis	How many in the Baker Consortium group?
26:47 G. Kiyuna	Myself, Ken Bardizian, Robert Whitnah, Krishelle Hampton.
26:53 Chair Ellis	Are you all largely full-time in defense work?
27:00 G. Kiyuna	No. It is a big portion. For example for me it is a big portion of what I do. Certainly by time it is the biggest part of my practice. By income it is less than – let's say it is about three-fourths of my time in my practice.
27:27 Chair Ellis	Each of the four of you are solo practitioners but you are members of the consortium?
27:32 G. Kiyuna	Yes.
27:29 Chair Ellis	Do you have one of you that is the administrator?
27:36 G. Kiyuna	That is me. My office. Part of the difficulty that Judge Cramer was addressing, and I know the Commission has had a lot of discussions about this type of thing, the new lawyers coming out of law school have this debt which is increasingly large over the years. When I came out of law school I had a debt of about $20,000. I graduated in 1981. Now if you are on the low end, your law school debt is probably about $65,000 or so.
28:28 Chair Ellis	There is a little help coming at the federal level on that and Ingrid can give more detail. The bill has finally been passed that gives some credit for full-time defenders as well as other public service lawyers. It hasn't been funded at a very high level and it won't reach persons like you in a consortium relationship. It only reaches the full-time employee defense budget. Some help is coming. That is the sort of thin edge of the wedge that we are going to see grow.

29:16 G. Kiyuna — That certainly would be a help. My experience has been that for those of us that do this kind of work it is an issue. The work itself is just important to us. It is very personal. You have one-on-one contact with the individuals that need help and you hear their stories and you become a part of their cause. Any help financially, tax credit or anything else, is welcome.

30:00 Hon. Bill Cramer — Gary, can you help me understand a little bit more why you thought having a video link in your office would be a great benefit?

30:12 G. Kiyuna — Well, the distance. I live in Nyssa and I can see the Snake River from where I'm at. When I go to Costco it is in Boise and that is about 45 miles away. It takes me an hour and a half from my front door to get here. In the winter it can be a pretty exciting experience. Fortunately I have only had one wreck.

30:44 Hon. Bill Cramer — So you are talking about arraigning someone, for example, and then you would be able to do it from your office? This idea you have, I assume you can think of other practitioners who have the same issues that you do in terms of travel and would benefit from that?

31:10 G. Kiyuna — In this current contract period we picked up some post conviction cases, three post conviction and one habeas a month, and it might be possible, and I don't know all of the mechanics of it, but it might be possible for the lawyer in our office who does that to actually have video conferences with his clients. You know at Snake River he can go in person but if the client is in another place and oftentimes witnesses are in other institutions. That is another potential benefit. If it is a more involved hearing the lawyer would really have to be there.

32:03 Hon. Bill Cramer — There are certain things where you just have to be present.

32:12 G. Kiyuna — Thank you.

32:13 J. Potter — Judge, can we go back to the potential solutions here that you highlighted and the Chair read to you and these were 2003 ideas. The last one was assisting with access to office space at the initial capital investment stage. When that idea was first presented there was some reaction from those in eastern Oregon saying, "We don't need to have a separate set-up for you," and they weren't supportive. What I understand you to say is you are really talking about incentives to existing offices to get people to come into an already existing office. Even though that might cost us more money per person it would be a wise investment rather than a separate new office, is that right?

33:10 Hon. Bill Cramer — Yes. That is what I was thinking. I was anticipating it would be more cost effective in the long run than trying to set up a new office and paying entirely for the funding of a new attorney. So, yes, incentives to the existing offices, yes.

33:34 J. Potter — I assume we are going to hear from Gordon but maybe you have a thought about what that would cost. Something needs to be presented at some point to the Commission to say, "This is what it is going to cost. It is going to cost an extra $100,000, or whatever it will, and the reason we need to do this is because the circumstances out here are different than anyplace in the state," or whatever the argument might be. At least you have an idea. It is a question that Gordon and other members out there might wish to explore.

34:07 Hon. Bill Cramer — I certainly haven't done that kind of an analysis. At least to a certain extent I was here just from the court perspective. At times, our docket is such that through the Willis Committee, they have given additional pro tem time to our district with the theory that I could be sitting in Grant County, for example, and bring in a judge to sit in Harney County. I have not been able to take advantage of these funds because of attorney availability. It is the same attorneys that follow me from county to county. They are working very hard. I guess I want to say that. I think if there is really a complaint against those who are actually doing the work right now it is because they are overworked. That would be the source if there is any complaint against

them. They are all competent attorneys that work very, very hard but they are stretched pretty thin. From a court docket standpoint, there have been times where we certainly needed to take advantage of that pro tem availability and really haven't been able to do it. In the rare occasion when we have a long civil case we have been able to do that.

35:35 J. Potter — Is there any advantage to having a separate new law office set up for conflict cases?

35:41 Hon. Bill Cramer — Well, yes. There would be because there are certainly times where, because of prior representation, the local law firm is conflicted out and if there was another local firm that would certainly be cost effective to the system overall and provide quicker representation. That is part of the issue. Every time you have to go 130, or 150, or 200 miles away to get an attorney, the reality is the contact with the parent in a dependency case, or in a shelter care hearing case, or in a criminal defense case is delayed. Sometimes that can be pretty critical. I don't know what happens in other courts in other states; excuse me, in other counties, jurisdictions. We actually try to get attorneys appointed for shelter care hearings if we can. Sometimes that prolongs the hearings but I think in the long run it actually speeds the hearings up. When you take all the shelter care hearings together my experience is, and we do a better job of this in Harney County, quite frankly, than in Grant County, but I think it doesn't really take any more court time and I think there is better representation right from the beginning with parents on behalf of children. All of that would be improved if there were more local attorneys.

37:25 Chair Ellis — The draft report indicated that as much as 50 percent of the individuals that enter the system are Hispanic, many of whom are not bilingual. First of all, is that accurate, or does it seem to be from your perspective? I am interested in how the defense community is handling that?

38:00 Hon. Bill Cramer — Malheur County, Nyssa, for example, I would say is probably about 60 percent or so Hispanic in terms of background. In Malheur County the DA said, well I don't know if this statistic is true or not, but he said we have as many criminal cases as Lane County. We have a great need for Spanish speaking investigators and interpreters. I just got through with a four-day Measure 11 trial about a month ago. One or two of our interpreters came from the Willamette Valley. When we go to the prisoners that is a whole separate category. I would like to let you know something about those when we get to it. That is a whole different type of area, the prison criminal cases. There is definitely a need. In dependency cases you can have virtually every adult and child that doesn't speak any English at all. In my Measure 11 case nobody in the family was really very conversant in English. There is definitely a need.

39:59 Chair Ellis — Other questions?

40:00 J. Stevens — If we were to look at something that said rather than directly give salary money to get new people over here we would need to look at something that compensated or provided incentives in other ways like partial loan relief, would that be effective? Like rural doctors get.

40:25 Hon. Bill Cramer — I guess from my perspective it would depend on how significant it is. That would be most attractive. I guess it would work. I am thinking as I speak. I guess it would work even for existing firms because theoretically they could pay a little bit less but the attorney would still want to come there because of the incentives that were there. So, yes, I think that would be effective. Chairman Ellis, Chief Justice De Muniz, thank you.

41:26 Chair Ellis — Is Dave Carlson here? He indicated that he wanted to speak at 9:45. If he is here this would be a good time. If not, is District Attorney Shirtcliff here? Gordon you came, did you want to share some time with us.

41:59 G. Mallon — Sure.

41:59 Chair Ellis We appreciate your coming.

41:59 G. Mallon I mostly came for the fine dining. My name is Gordon Mallon. I have been practicing for 20 years in Harney County in Burns. For that entire time I have been involved with indigent defense. Now I am doing predominantly capital defense under a contract with PDSC. I want to echo what Judge Cramer said, although we didn't talk about it ahead of time. I think he hit it right on the head. I can give you a concrete example of exactly the situation we are dealing with. A few years ago we hired an associate. Mr. Lamborn was doing an extensive civil practice. I wanted to move into more capital defense than I had been doing, and in order to cover our obligation under the contract, we decided we needed to hire an associate. Mr. Sario had just laid off his associate. We had seen his work and decided that we wanted him. The only reason that Mr. Sario laid him off was for financial reasons. He didn't have the additional work to cover the expense. After our associate was there for a couple of years he was making more money than Mr. Lamborn and myself were making because we had to pay him, not anything like an adequate wage, but at least a wage that would keep him there. After two years we made him a shareholder so that we could cut his pay. We told him exactly what the situation was and what would happen and I'm not sure that he believed us. It did in fact happen and we lost him to The Dalles, to Jack Morris' office. That is the situation we are faced with. Mr. Lamborn has cut back his civil practice so that he can devote more time to the indigent defense contract. That is how we have dealt with that by doing the less lucrative but more fun work in some ways, and more rewarding work of indigent defense. As far as sort of long term planning, planning for my retirement, Mr. Lamborn and I have discussed that we are probably both going to retire in six or seven years. That is going to leave, at this point, no one in Harney or Grant County to take up that slack. What I would propose, looking at the various options, is that opening up a new office, with a new lawyer, to take conflicts and to take some of the load would be difficult and probably not very cost effective because of the fact that there is only a limited number of cases available. That includes a limited number of civil cases, a limited number of non-indigent defense criminal cases. In our jurisdiction there are very, very few non-indigent defense criminal cases and then the limited number of indigent defense cases. Either you would have to take a significant number of cases away from existing contractors which would then make it difficult for them - in our office we would find something else to do with our time rather than maintain our indigent defense practice for a limited number of cases - or the new person wouldn't have enough cases. The conflict system as it works now leaves few cases that aren't covered by one of the two offices, at least in Grant and Harney County. I believe the situation is similar in other jurisdictions. The other solution would be to compensate the existing offices well enough to hire an additional person or persons. Part of that compensation package would be a more stable approach as Judge Cramer mentioned not necessarily stable as far as a longer period of time but stable as far as the case count is concerned. In my last response to the state's request for proposals for the contract I am in now …

47:33 Chair Ellis The death penalty contract?

47:36 G. Mallon No, our regular office indigent defense contract. I proposed, rather than a per-case value system the way it has been for many years, I proposed that we just get a flat amount for the contract period. The reason for that was that it is necessary for something like that to occur if we have the case counts we are talking about. I believe we have about 12 or 13 cases a month and so with a swing of five cases a month, which often happens, we have had months with no cases assigned and we have had months with 30 cases assigned. Our sample, as it were, is too small to make a statistically valid sample. You go to Metro in Washington County or Multnomah County and they are contracting for a gazillion cases a year and they are going to get a gazillion cases a year because the cases are just there. The county is big enough that it basically comes through, but if we only do 50 cases instead of a 100 cases we can't sell half our books and lay off half our staff and then hire them back when we get the extra 50 in the next contract period. Our costs for providing these services are fixed so we asked for a fixed cost. That cost is doubly true with an associate. If you have someone on

the payroll that you have managed to be able to hire and then you can't pay them, "Well, we are in a slow down and we don't have enough money from caseload to pay you so we are going to lay you off for three months. We hope that you hang around and work in your garden and then we will bring you back three months later."

49:40 Chair Ellis — If we were able to structure a contract that subsidized you for the training that would be required for a younger lawyer to come into the community and get a start, would you be able to attract one?

50:50 G. Mallon — Yes. It has always been a compensation situation as far as attracting new lawyers. There are some people that don't want to come and practice in a small community. We don't want to hire those people. We have interviewed people that come from small communities that understand what they are getting into.

50:19 Chair Ellis — Are you actively looking now?

50:23 G. Mallon — We are not right now. The compensation just isn't there to hire somebody now. We did look after we lost our last associate. We looked for about eight months, maybe a year, and couldn't get close to hiring someone at the compensation level that we were able to offer.

50:46 Chair Ellis — We have to watch that we don't end up spending money on the subsidy for training and then the lawyer doesn't work in defense. Do you see any way to solve that?

51:03 G. Mallon — Well, in the small jurisdictions I don't really think it is a risk because that is a necessary component of the practice to keep the practice going. There is not enough civil work in most of the smaller jurisdictions that I am aware of, to keep a practice going just based on that. In some of the relatively larger jurisdictions such as Malheur County, here in Baker County, Umatilla, Union, there are civil firms that already get the vast majority of that work. There is always a situation where somebody leaves and does something else. I don't know how you deal with that. One of my small jobs is hospital attorney for our local health district. There are financial incentives for nurses and doctors to come to the community in different positions, radiology, technicians, and the like. We try to somehow tie it in with loans that are forgiven. It doesn't always work and I don't think it can always work. Last year when I was on the Board of Directors for the Oregon Criminal Defense Lawyer's Association and president, I called around to almost all the indigent defense providers in my district, which is District 1, which is basically the entire area of Oregon east of the Cascades. Those providers from Deschutes County, which is the largest jurisdiction in that area, to the smallest ones all agree that it was stability of funding that was causing the problems, different problems for different areas, but the funding based on case count just doesn't work for the smaller jurisdictions. At least that is what everyone I spoke with thought and I agree from personal experience.

53:28 Chair Ellis — If we were to consider a contract that would shift that fluctuating caseload risk to the agency, but conditioned on your firm having a younger lawyer brought in who was getting the benefit of you and your partner's experience, would that mix work?

53:53 G. Mallon — Depending again on the level of compensation. That would be something that I think would be appropriate. I wanted to comment on one of the proposals as far as supplementing with appellate work, that sort of thing. What would be necessary there, I think in most of the jurisdictions that I am familiar with in eastern Oregon, is some sort of training component. I have handled one appellate case in my 20 years and I was on the path to winning when the Supreme Court overruled the case I was relying on in the Court of Appeals the day before my argument.

54:38 Chair Ellis — Another outrage.

54:38 G. Mallon	This was well prior to the time that Justice De Muniz was on the Supreme Court. That happened the day before oral argument and that is my experience with appellate work.
54:55 S. McCrea	Are you saying you don't want to do any more?
54:55 G. Mallon	I just wouldn't be in a position to mentor someone.
55:04 Chair Ellis	You are the guy with the black thumb.
55:04 G. Mallon	Training could be available through the Legal Services Division or something like that. That would certainly be feasible. I believe most of the offices are the same way.
55:19 Chair Ellis	What about your own contract you have on capital cases? Is there work there you could benefit from having a younger lawyer do with you?
55:27 G. Mallon	Yes. Typically we try to hire what, in effect, are law clerks, or sometimes we draft attorneys to work on particular motions. That seems to work, and also on second-chair situations. That seems to work even though a person isn't in my office to do that work we still attempt to bring people into the fold. A person in my office that could start learning some of that stuff would be somewhat beneficial.
56:20 Chair Ellis	Reference was made to the debt load that a lot of younger lawyers carry. Is that something you are experiencing as a barrier to attracting?
56:22 G. Mallon	As part of their compensation they have to make enough money , (1) to live, and (2) to pay off their debt. We can't attract someone unless we offer enough money to do both of those things.
56:40 Chair Ellis	The other thing we have heard about in the lesser populated areas is it is hard enough to attract the lawyer but is there work for the spouse of the lawyer in a community?
56:58 G. Mallon	Just depends. Often that is the only way you attract an attorney. I know that the head of nursing at our hospital is a former prosecutor from the State of Indiana. We have discussed with him whether or not he wants to take the bar and come to work. At this time he doesn't. That sort of situation arises often. At the rates that are paid, it is a spouse who has a good job in the community and then the other spouse happens to be a lawyer and would like to work. That is how we got Mr. Lamborn. His wife managed the local credit union.
57:46 Chair Ellis	Questions for Gordon?
57:52 Hon. Elizabeth Welch	You were talking about your submission for your current contract and that you had tried to put together a proposal that might be workable. What happened?
58:04 G. Mallon	The Office of Public Defense Services just said that the Commission hadn't indicated a willingness to move away from the case based compensation, and if fact you hadn't, so they were appropriate in that regard, but I think that is a direction we may need to move in in some of the smaller counties.
58:27 Chair Ellis	It is a like a thinly traded stock, very volatile. What they call the beta factor is very high in those. I can see exactly the same parallel. In the less populated areas the caseload choice is going to be far more extreme than in the more populated areas. Okay. Any other comments? Thank you, Gordon.
59:01 G. Mallon	Thank you.

59:04 Chair Ellis Is Dave Carlson here now or District Attorney Shirtcliff?

59:08 D. Cronin Excuse me, Chairman Ellis. Neither one of those gentlemen is here. My name is Dan Cronin and I would like to say a few things.

59:29 Chair Ellis Why don't you introduce yourself and give us a little background information.

59:32 D. Cronin My name is Dan Cronin and I am an attorney and I practice in John Day, Oregon. I have practiced law for about 27 years. I think I am probably the only attorney in eastern Oregon that is left of the group of individuals that started this when the state took over. When I first started practicing law in John Day …

1:00:00 Chair Ellis So that dates you to about 1981?

1:00:03 D. Cronin No. It was after that. It was '83 or thereabout, maybe '82. When I first practiced law, the county had the responsibility of funding indigent defense. There was a cry throughout the state from the counties that we can't afford these. We can't afford indigent defense. One murder case would break the budget. At some point, the legislators were convinced and the state took over the job.

1:00:04 Chair Ellis That was the '81 session, but I think your dates are still fine because there was a transition period.

1:00:45 D. Cronin Elizabeth Belshaw was the first …

1:00:51 Chair Ellis She was the first State Court Administrator.

1:00:56 D. Cronin It was very simple at that time. She talked with a few people out in eastern Oregon about who would do this work. I think what all of you need is two six packs of Killian's Red and you could solve the problem that you have right now. I don't know if you know Mr. Smith, Ralph Smith, he practices capital murder cases. At that time, he was public defender here in Baker County. I was working with him on a murder case in John Day and we were sitting in the bar talking about this issue.

1:01:47 Chair Ellis With the Killian's Red?

1:01:52 D. Cronin With the Killian's Red. Two apiece.

1:01:52 S. McCrea Well, you didn't have enough. That's why.

1:01:58 D. Cronin I think we did fairly well.

1:02:00 Chair Ellis How did your client do?

1:02:10 D. Cronin Very well. One of the issues was how much compensation should we ask for? The county defenders at that time - and I think I can say this because they are dead - were suffering from alcoholism. Several different counties were in that condition. They did not want to do that. They did not want to become part of the state system. They had their own offices, by and large, and I had the experience of watching one attorney so drunk he could hardly stand up in court in early 1981. These county offices, some of them, were staffed by people that had just drifted down to the point where they were getting $18,000 a year, or there abouts, from the county to handle public defense. What Mr. Smith and I thought about was well, how much is it going to take to keep the state from coming into eastern Oregon and setting up a public defender system in eastern Oregon? How are we going to do that? We got together, we sat down and we calculated out what it would cost for the state to open offices here in eastern Oregon. We decided we would bid probably about three-quarters of that amount. At that

time there were five different firms throughout eastern Oregon that did indigent defense. The idea was that each firm would cover the conflicts of the other attorneys. With five attorneys you would have enough to cover conflicts in Malheur, Baker, Grant, Harney, Union and Wallowa. We proposed those figures to Ms. Belshaw – well first of all we got together and talked with everybody else that we thought was going to be involved, which might have some antitrust implications now. At that time we thought it was a great idea and so did everybody else. We submitted our bid and surprisingly everybody's bid was same. We would do it for this amount of money. There wasn't a case count at that time, it was a letter response. We will pay you this amount of money, you do the cases, and you go out to these counties and cover the conflicts. That is the way it started out. Since that time, since the very beginning – well let me just back up. I think because of the way that was set up and because of what we thought would be needed for us to provide the services and prevent the state from coming in and setting up this system, I think we were probably the highest paid group of indigent defense providers in the State of Oregon.

1:05:19 Chair Ellis Collusion worked.

1:05:25 D. Cronin It does. That didn't last very long. That effort to try to maintain financial stability in eastern Oregon didn't last. Since that time I have seen a steady erosion of the ability to provide quality representation in eastern Oregon. I am not talking about attorneys. I am not talking about attorney representation. I am talking about providing services to individuals. You have already heard how difficult it is to get an attorney into eastern Oregon. Well, an office isn't just comprised of attorneys; you also have your support staff. As all of you know who have practiced law you almost need to have a basic unit of a legal secretary and an attorney. I think that is the unit that still exists in large law firms in Portland and it exists out here. When I first started practicing law I was able to hire a secretary without too much trouble.

1:06:53 Chair Ellis Of course you are dating yourself. An awful lot of the lawyers now don't have a secretary. They do all their composition on the computer.

1:07:06 D. Cronin They are doing it themselves. That is correct, but they also have access to paralegals.

1:07:10 Chair Ellis So don't call the person a secretary, just call them an assistant.

1:07:18 D. Cronin An assistant. Alright. I had the experience of losing my secretary after 19 years and was put into a position where I needed to hire somebody. I didn't know whether I was going to be able to do that. Over the last couple of weeks I was looking at what is a competitive wage out here for secretaries. I realized very rapidly that I could not compete with the district attorney's office and offer them the same wage and benefit package that the county and the district attorneys are offering their secretaries. You can't compete with the federal government, can't compete with the hospital district. By a stroke of luck I was able to find somebody that would be willing to take a lesser wage than what the other secretaries are getting. I am just talking about support staff. One individual.

1:08:33 Chair Ellis You are a defense contractor?

1:08:31 D. Cronin I am a defense contractor. I used to be the primary contractor in Grant County with secondary conflicts out of Harney County until my brother-in-law was elected as circuit court judge, Bill Cramer, who you just heard from. Now the indigent defense work that I do is done primarily out of Baker County. That is where my court appearances are and I do a smattering of cases, murder cases and that sort, as they come up and I'm asked to do them.

1:09:06 Chair Ellis You are a one lawyer office?

1:09:06 D. Cronin At this point I am a one lawyer office. I have given up trying to compete with the district attorney's offices here in eastern Oregon to get an attorney. The qualified attorneys in eastern

Oregon are somebody that has practiced here for about five years in a district attorney's office, so we can take them out of the district attorney's office and put them right to work on a Measure 11 case. You can't hire somebody out of law school and put them to work on a Measure 11 case. It is impossible. About 10 years ago, 12 years ago, I was able to lure somebody away from the district attorney's office and she worked here. I paid her a salary without benefits but she was willing to do that. I can't do that anymore. Hiring another attorney is just an impossibility if you are going to continue to do indigent defense. I can't do indigent defense the way that I did 27 years ago. I am gradually moving away from indigent defense to doing more civil work. The bulk of my practice now is civil work in John Day.

1:10:30 Chair Ellis — So other than increasing our consumption of Killian's Red, do you have some suggestions how we can help?

1:10:38 D. Cronin — I do have some suggestions. You are going to have to pay more money. You are going to have to figure out how much it is going to take to hire staff and to hire an attorney to come in here to do the work. There is one attorney here that is in the back of the room, Mr. Whitnah, that I tried to, well I did, get to work with indigent defense here in Baker County doing primarily Measure 11 cases. With the current system, what you are looking at right now, you have people that can't do that anymore, don't want to do that. This is a type of thing that I have heard. Not too long ago there was an attorney that came down from another county on a dependency case. He was getting like $200 for the review, something like that. He said, "I can't continue to come down here. It takes me six hours, a full day, to come down to Baker County which is 45 miles away to handle a case that only pays $200. I can't do it. After many years, he is no longer providing. He can't pay his support staff let alone himself given that kind of compensation. I have heard the same sort of thing from - I will let the younger attorneys speak, but civil cases right now are a necessity here in order to be able to pay your support staff. You can't do it.

1:12:30 Chair Ellis — It is always a tension because a lot of what we have encouraged is specialization in criminal defense because it is not an easy area to practice in and it takes a lot of concentration, but what you are saying is the price for the system we have is maybe a lower percentage of time in indigent defense and a higher percentage of time in civil. There is tradeoff there because we lose some of the benefit of the specialization.

1:13:07 D. Cronin — That is exactly correct. Before Mr. Whitnah came on board I was the primary contractor here in Baker County and I wanted to try to do that. To specialize in indigent defense, and try to get back on some of the other cases and I did. There is a tradeoff. You can only do so much work. If you do more indigent defense you do less civil work. From my perspective, I can no longer do that. When I get to a point where I am concerned about being able to hire a secretary, I have got to shift my practice. I still have a deep commitment to indigent defense, but I will be taking less and less of that as time goes on. I will be taking private, retained work where I can charge what I want to. There is another attorney here in Baker County that backed away from it who is no longer doing indigent defense and is just an excellent attorney.

1:14:24 Chair Ellis — Any questions for Mr. Cronin. Didn't mean to cut you off.

1:14:34 D. Cronin — No. What I am saying right now is pretty much a repetition of what other people have said. You have got to pay more money. To reiterate, it is not really rocket sciene. All you have to do is figure out how much it is going to take to pay for an attorney to bring them in and you pay them that with the support staff. With the district attorney's office, you are probably going to have to pay probably around $60,000 plus their benefits to get an attorney in here that is willing to stay, to lure them away. You need three attorneys that can cover conflicts. Preferably those three attorneys, that system, would be per county. I don't think you can do that. You are going to be in a situation where you are going to have to have people travel just like we did 27 years ago.

1:15:30 Chair Ellis Thank you very much. I understand that District Attorney Shirtcliff is here. Why don't you come on up and we'll cover you and then we'll take a recess after that.

1:15:43 M. Shirtcliff I apologize that I am late. Judge West said he saw you jogging this morning, Chief Justice, and would give me a pass. We had to have quick arraignments so he could leave and get back to Union County. I do apologize.

1:16:07 Chair Ellis Why don't you introduce yourself a little bit and what we are interested in is from your perspective, how do you feel the defense services in the area are going? What could we do better? How can we work together with the prosecution side to make this system work better?

1:16:27 M. Shirtcliff Okay. I am Matt Shirtcliff. I am the district attorney for Baker County. I am beginning to start my third term. I started as district attorney in 2001 and prior to that I was a deputy district attorney for six years, from 1994 to 2000.

1:16:47 Chair Ellis I should tell you that one of your predecessors many years ago was Manley Strayer. He was DA here for a while and then he moved to the big city and he was my mentor when I came into the legal profession.

1:17:00 M. Shirtcliff Mr. Duggan was here for a while. I don't know why these people leave. It is a beautiful place and they ought to stick around. I am glad that they did or I wouldn't have a job. I spoke when Mr. Potter and Ms. Swenson were here and talked to them a little bit about the situation. I guess I would start out by saying - and obviously the public defenders are getting some money because two of them have left my office and are sitting back here - I'm kidding.

1:17:39 Chair Ellis Everybody else tells us that you are the one with all the money.

1:17:41 M. Shirtcliff I'm here to defend that. No, in all seriousness, they do a good job. The attorneys I work with on a regular basis in the courts, my deputies work with, do a good job and they work hard. We have a good relationship here in Baker County, I believe. I think that is an important thing. With Judge Baxter I know that is an important thing. We work hard, we work our cases, and we have a good rapport. I think the quality of the work is good. Obviously, some of the attorneys are more experienced than others, but I do know that they are overworked in the sense – well, there are a couple of issues that I know are difficult. I am amazed the extent to which they cover cases well while traveling so far. Several of the attorneys that are in the consortium travel from other counties. In the winter, in Baker, that is not easy. They are there. They are late once in a while but I am late once in a while and I have only got to walk two flights of stairs. I am actually pretty impressed a lot of times. They work hard and they are very dedicated and I don't see a lapse in the quality of work or anything. I do have to say that I think the level of work and the ability to keep folks in these positions is going to be tough if they have to travel so far on what they are paid. We are not here to talk about my office and my deputies. I could give you the same spiel. They leave my office because they can't stay because of the pay. Some of them stay longer than others, but that is a problem that I think both sides of the bar have. We are not here to talk about my side of the bar so I'll talk about theirs. I think that while they do a good job, and they work really hard, I wasn't here to listen to them but I am guessing that they have told you, or will tell you that, if they could, some of them probably want to do some civil work and criminal work, but the ones that would prefer to just do criminal work could do a better job if they could focus on that criminal work. Because of the inability to pay bills, and make ends meet, they have got to do multiple things. I think that is too bad because you might be able to attract more attorneys in the consortium that are geographically more local which would makes things easier for them, probably easier on the court in some regard.

120:31 Chair Ellis Where do you do your recruiting? Where are you finding new lawyers?

12:37 M. Shirtcliff Typically, I have two deputy district attorneys and one of them, after a few years, will move up into a more experienced role that handles felonies and things in circuit court. So generally what I am hiring, like I am right now, is a deputy DA to handle misdemeanors and juvenile cases. For the most part they are new attorneys right out of law school who have just passed the bar. I think Mr. Whitnah worked for me right out of law school and so did Mr. Zuercher. They did a good job, but then they wanted to do other things. Some of the lawyers that work for me want to stay in the DA's office. They want to transfer to other DA offices or they want to go into private practice. I look at it as I need certain coverage in the courts. I need certain things from this person but I can also give them a lot of trial experience and a good, hopefully a good, experience and help them kind of do what they want to do and go wherever they want to go in their career. I would prefer to be able to keep people longer, but because of the financial end of it I kind of see my, I hate to say it, but my office, and a think a lot of the other DAs in the state would tell you the same, that what we tell a lot of our applicants is that this is like another post-graduate course if that is what you want it to be. We can get you a lot of trial experience. You will get a lot of trial experience if you want it and it will help you in the course of your career where you want to go. Some folks stay longer and that is great. We are not able to pay at the higher level that somebody would want to stay. I would not be the district attorney in Baker County right now if Judge Baxter hadn't run for judge. I couldn't afford to continue on as a deputy DA. Part of that is the smallness, the size of the office. It is the fact that we don't have enough criminal activity, thank goodness, to justify maybe another position, chief deputy position, that handles Measure 11 cases while I just administer the office and act as an administrator, like in Deschutes County or a bigger county. I think the cutoff you are going to see there is around four or five deputies before the DA begins to have to just run an office. I handle all the Measure 11 cases in my office and many murder cases, a good portion of juvenile cases, and I administer my office and the juvenile department, so I am pretty busy. Getting back to where we were, the ones that chose to could just do indigent defense work and make it work for them. I am sure that there are some that would do that because they enjoy it and they are good at it. I think it is probably a problem around the state. The prosecutors talk about it for their deputies, talk about it for ourselves, and I know the public defenders talk about it. They are right. They are not getting paid enough. The net effect I think you see in the rural area is you see a consortium that is spread out, traveling long distances and lawyers who have to do other kinds of work that probably could spend more time on a big Measure 11 case if they could just focus on those cases. That being said, I can't tell you that the work that is being presented in the courtroom here in Baker County by the defense bar is bad. They are dedicated and work hard. Cases are worked through the system in a competent way. I think Judge Baxter would agree with that. I think that he said that in his report. Obviously, some of the lawyers have more experience than others. Some of them are better at certain kinds of cases, you see that, but they work hard and represent their clients well. I am not sure if there are other things that I can answer.

1:24:30 Chair Ellis There used to be, I think, an impression that lawyers in the lower population areas were isolated from the mainstream, big city, lawyers. I had assumed, and tell me if I am wrong, that with all the communication devices we have, the internet and all of the rest of it, that it is different now and people are much more connected.

1:24:58 M. Shirtcliff Yeah, I agree. I kind of get a little miffed sometimes because sometimes it equates to the quality of the lawyer out in eastern Oregon, especially if you are talking to a certain lawyer from Portland sometime. They might not come right out and say it. My office has a strong relationship with the AG's office. We can get help on research issues. We can get help on certain types of cases. That budget is getting cut some too so the ability to get a lawyer to come out and sit as second chair on a case isn't quite what it use to be. There is good communication. We have Westlaw on our computers and I am in contact with the AG's office and the Appellate Division looking at the issue. From my office's perspective I can't complain about that. I don't know how that works for the public defenders and how their relationship with appellate public defense lawyers for the state is, but, yeah, that helps.

1:25:55 Chair Ellis In this community how do you handle criminal justice system-wide issues. Do you have a structure? Do the courts, and the DAs, and the defenders, and the victims, and law enforcement meet? Is it less formal?

1:26:15 M. Shirtcliff In terms of how we handle things procedurally?

1:26:21 Chair Ellis Usually it relates to procedural issues but this is a system with a lot of moving parts and we like to encourage each of those moving parts to be talking to each other. How is that handled here?

1:26:37 M. Shirtcliff Well, a couple of days ago, Judge Baxter, myself, and several of the criminal defense lawyers in the room met at the Chinese restaurant across the street to discuss how the flow of cases are going and how we can better set pretrials or entries of pleas and procedure. The judge - probably in a lot of jurisdictions that is the case - kind of oversees that. I think it is incumbent upon me to oversee the law enforcement side of things. Our major crime team, our drug enforcement teams meet in my office on a monthly basis. I think I have an obligation to be listening to the defense bar about things they see and issues that they see coming up. We interact together and we began a drug court and other things. A lot of it falls on the judge and that's not unusual. The judge is sort of the gatekeeper of the system. I think we do a fairly adequate job of that and can communicate with each other pretty well. I don't know how much on the topic this is. In Baker County, from what I can tell in other counties, I believe we get along really well. The defense bar, the prosecution, the courts, and it has been that way for a while. I don't know what to attribute it to other than that Judge Pope and Judge Baxter really worked at that. I think my office and the defense bar really work at that. That helps because we are under strained resources. At different times we have had to kind of bend a little, to be facilitators of each other's positions and issues. That is not just in cases but in financial issues and other things. We have to work together. That is not to say that we don't go into court and mix it up pretty good, but come out and we are friends and we work hard.

1:28:23 Chair Ellis I will say statewide over the last six or seven years, we have felt that the relationship between the defense bar and the DAs has really improved.

1:28:37 M. Shirtcliff Statewide?

1:28:37 Chair Ellis Statewide and the last two legislative sessions some of the strongest advocates for defense funding have been DAs. We really appreciate that.

1:28:57 M. Shirtcliff We don't benefit from them not being able to do their jobs well. I have said that over and over again. It doesn't do me any good to go in and prosecute a Measure 11 case and have the record be a mess and get to do it again. And by the same token, these are people that I work with on a daily basis. Some of them are good friends and have been in my office before they went out into private practice. I want to see them make a living and do well and represent their clients.

1:29:26 Chair Ellis And then kick their butt the next time they are in court.

1:29:29 M. Shirtcliff Hopefully, yeah. The same problem that we have tried to work with the best we can, that I know they deal with, is the funding and pay. I think they do really good with what they have. I'm sure many of them would like not to have to travel so much and be able to focus on criminal cases, the ones that want to just do criminal cases, and maybe some of them would rather do a mix. My view is if you can specialize, and you want to specialize, it sure would be nice to be able to do that. Generally, in law, that aids in the quality of the product. I don't know that anybody can disagree with that. That would benefit us greatly if they could do that. I think it would benefit them, and the client, and the system. That being said, they work hard and do a pretty darn good job anyway. We always want to do better.

1:30:31 Chair Ellis Any other questions for Matt?

1:30:31 P. Ozanne Matt, I was wondering if you would fill a gap in my knowledge. I notice from the counties that we have been looking at during this visit there are some variations in the use of justice courts and filing of misdemeanors. I wonder if you could tell us from your perspective what the considerations are.

1:30:48 M. Shirtcliff We have a good justice court in Baker County. It is not a court of record, of course, but we file most of our misdemeanors in justice court here in Baker County because we just have, other than that, the circuit court. I have tinkered with that a little. We moved domestic violence assaults into circuit court. They are a difficult case for both the prosecution and the defense. They are just fraught with issues and victims and we all know how that goes, trying to work with victims. And I just felt like it was a better position for the community. They are important cases. I look back at the murder cases in Baker County over the last 15 or 20 years, most all of them are the result of domestic violence situations gone wrong. They are very, very serious cases for my office to try to prosecute and they are not easy. I moved them into circuit court several years ago. We did move DUI's. We had a couple of manslaughter cases in one year and I began to get concerns about my office's proficiency in being able to move those cases through. So I have kind of moved those back. I try to utilize the courts in the most efficient way that I can. What we are doing now is I have put diversion eligible cases and non-chronic offenders in early disposition type programs in justice court. We still do repeat offenders in circuit court. That seems to be working better. Other than that most of the misdemeanors - and there are hundreds of cases that go into justice court - most of them aren't appealed. There is an automatic right to appeal and the court seems to be working pretty well. With my office having one less deputy right now we have gotten a little backlogged, but that is not the first time that has happened. We will get it tightened up. It works pretty well. Preferably, it would be nice have two courts of record in the perfect world, but we don't. That is what we work with and I try to tinker with the case flow and the docket to try to put the kind of cases into the docket that fit best and create outcomes or the right circumstances. The early disposition programs I think are important. We have a deferred prosecution program for domestic assaults. Obviously, the DUI programs and drug court programs - I am a firm believer in those and resolving cases quickly. Getting people the help they need as opposed to grinding them through the system if they want to get help. It alleviates some of the backlog so in justice court we can do some of those things. We treat things as violations, but we do file everything. We file bad checks. I understand there are other jurisdictions where they maybe don't do bad checks and some of them are even going to not filing C misdemeanors. We file everything. We are not that backlogged. We do try to work early disposition programs in the justice court. Does that answer that?

1:33:52 P. Ozanne Thank you.

1:33:52 J. Potter I have a compound question.

1:33:58 M. Shirtcliff I object.

1:33:58 J. Potter You may want to remind yourself you are not under oath.

1:34:01 M. Shirtcliff Okay.

1:34:02 J. Potter If you were to fish the Owyhee tomorrow, what would be your number one dry fly; would you fish it above or below?

1:34:12 M. Shirtcliff If it were tomorrow you might even have a guided trip, if one was to hypothetically ask the question. I would fish a sparkle gun on the surface but not in mid-day. I would fish probably a pheasant tail during the middle of day under the surface. Again, I know this is hypothetical

and I am not under oath. You might have to ask Mr. Lovelace other questions. We are getting far a field here. But don't ask Mr. Bardizian because he doesn't catch as many fish as I do and he will tell you that. There are witnesses here to that.

1:34:46 J. Potter Thank you.

1:34:44 S. McCrea That was it?

1:34:46 P. Potter That was it.

1:34:47 Chair Ellis Any other relevant questions? Thank you very much.

1:34:57 M. Shirtcliff Thank you.

1:35:00 I. Swenson I know it is time for a break but Judge Pratt is only available for a very limited period of time. We need to call him now.

1:35:28 Hon. J. Pratt Hello.

1:35:29 I. Swenson Hello Judge Pratt. You are on the speaker phone in front of the Commission.

1:35:32 Hon. J. Pratt Okay. Very good.

1:35:34 Chair Ellis Judge Pratt, this is Barnes Ellis and thank you for joining us.

1:35:40 Hon J. Pratt I appreciate the opportunity to appear by phone.

1:35:45 Chair Ellis Well, there is a room full of people here who are interested in your thoughts about the defense services in this area and any suggestions you have how we could do our job better. Feel free to unload.

1:36:07 Hon. J. Pratt Okay. Do you want me just to proceed?

1:36:06 Chair Ellis Sure. Go right ahead.

1:36:07 Hon. J. Pratt I think first of all I want to tell you that the attorneys who handle indigent defense not just in Malheur County, but in eastern Oregon do a fine job under the circumstances. The distances involved, not only appearing in court, but contacting witnesses and so forth is a real challenge. We have a particular challenge here in Malheur County with the number of criminal charges that arise within the Snake River Correctional Institute. It becomes a real challenge for them to meet with their clients to interview witnesses who are often other inmates. It can present real special challenges.

1:37:24 Chair Ellis Give me a little help on that because the report indicated that that was an area of concern. Those cases seem to be more time consuming than the other cases. Why is that?

1:37:38 Hon. J. Pratt Well, I think for a number of reasons, simply the process of getting in, scheduling time and getting into the institution takes quite a bit of time. If the inmate is – often after a crime is charged because of some incident at the institution - the inmate often is in a disciplinary segregation, so that takes more time, just the process of the attorney getting from his office to the prison and the process of getting in to interview the inmate, and then usually many of the other witnesses are inmates. If you magnify that by the number of people involved it is a fairly time consuming process just to get from the outside into where you are talking to a live person. I know the attorneys here really struggle with that. Sometimes they will set up a schedule for an appointment and then something will happen within the institution, maybe on very short notice, and it makes it impossible for them to meet and then they will have to

reschedule that. It just consumes a lot of time. I think those cases also tend to be more likely to go to trial. I think a higher percentage of cases involving inmates end up going to trial. Quite often, the inmate really doesn't have anything to lose and it is a day out, a diversion day so to speak, coming to court as well as for the inmates that are called as witnesses. It is a tougher case for the attorneys to handle in a lot of respects. The one concern I do have – I think the primary concern I have - is the number of cases that attorneys have to handle, because of the reimbursement rate, the number of cases that the attorney has to handle in order to make it feasible for them to handle indigent cases really puts a squeeze on them in terms of being able to give them full representation. It seems that our attorneys are just constantly scrambling from one case to the next without having time to take a breath or being able to spend the amount of time that I know they would like to on the cases. I don't fault them for that because in order for them to handle indigent defense they have to handle so many cases. It really puts them in a bind in terms of having the time that they need to give to each individual case.

1:41:09 Chair Ellis — This is an issue we have seen, obviously, in a lot of places that for the attorney to increase compensation, which the attorney needs for personal and family reasons, they end up taking a caseload that does push the envelope in terms of their ability to handle them properly. Any suggestions how we should approach that problem?

1:41:41 Hon. J. Pratt — Well, I think the only answer is to increase compensation. If you squeeze the attorneys down too much on how many cases they can handle, then it is not financially feasible for them to do indigent defense. In eastern Oregon generally, we already have too few attorneys available. We are probably fortunate here in Malheur County. We have enough different attorneys handling indigent cases. Even here occasionally, particularly if we get a riot situation out at the prison and there are eight or 10 defendants in a case, we are reaching all over eastern Oregon to find enough attorneys to represent everyone.

1:42:39 Chair Ellis — Do any of the commissioners have questions for Judge Pratt?

1:42:39 Hon. Elizabeth Welch — Hi Judge Pratt. This is Betsy Welch.

1:42:50 Hon. J. Pratt — Hi. How are you?

1:42:50 Hon. Elizabeth Welch — In the report that the staff and the Commission presented today, there is a reference here in dependency cases to the fact – I am just going to read you the sentence. "It was reported that although the court encourages them to seek appointed counsel, many parents waive counsel because of the cost." I am puzzled by that. I don't understand what that means?

1:43:18 Hon. J. Pratt — I'm not certain what that means. If they are able, if they are above a certain threshold, they have to pay a $20 application fee, and if they are above another threshold, they are required to reimburse the state for a portion, or all of the costs, of their court appointed attorney. That is the only cost that I could think that that could be reference to.

1:43:50 Hon. Elizabeth Welch — Is it your impression, or experience, or observation, that there are parents involved in dependency cases proceeding without counsel on a regular basis?

1:44:00 Hon. J. Pratt — I don't see it as happening frequently. I think that is probably infrequent. Most of our folks in dependency cases fall into a low income category and they usually qualify. It is my experience in virtually all dependency cases we have attorneys representing the parents.

1:44:31 Hon. Elizabeth Welch — Thanks.

1:44:31 Chair Ellis Other questions for Judge Pratt? Judge, thank you very much. We appreciate your participation.

1:44:39 Hon. J. Pratt Okay. Thank you.

1:44:40 Chair Ellis We will take a much promised recess. Let's come back about five after 11:00.

1:46:40 Chair Ellis One that wasn't here earlier was David Carlson. I know Dennis Byer asked to share some thoughts with us.

1:47:04 S. McCrea Lawyers always say that.

1:47:04 D. Byer I am not a lawyer. I am a lowly investigator.

1:47:06 S. McCrea Those associated with lawyers always say that.

1:47:09 D. Byer What can I say. My name is Dennis Byer. I work for Coughlin, Leuenberger and Moon as the staff investigator. I have been with them for 10 years now. Prior to that I was in law enforcement. I haven't done a whole lot of indigent work. When I started out with Bob Moon back in 1989, '99, maybe 2000 we did some work where the counties were paying. Until just recently I haven't done very much indigent work. I started doing some of it, so even though I have been investigating for quite awhile I wasn't really conversant, like I should be, with some of the rules and regulations. I am learning them as I go, but the staff that you have at PDSC is incredible. They are helpful. They are polite. They try and steer me in the right direction. They answer my questions in a timely manner. If they have to tell me no, which happens sometimes, it is always a teaching moment. They are very pleasant and they are an absolute credit to your organization. I don't know if anybody has told you that but they are just wonderful.

1:48:09 Chair Ellis You are welcome to continue and stay longer.

1:48:16 D. Byer Seriously, that is it because I am just starting to do some indigent work. I would like to see more money but that is just the way it goes. There is a significant difference between what I charge as an hourly rate on retained cases and what I get paid in the indigent cases.

1:48:33 Chair Ellis Although that has improved this year over last.

1:48:36 D. Byer Three dollars an hour, but nevertheless it is an improvement. The main thing is it is also kind of fun, in some ways, to do indigent work because a lot of the truly indigent clients out there don't have a lot of hope. I know that they might have bad facts and other things, but if you have somebody who is actually working there who cares, the indigent clients that I have dealt with, and that I have seen with other cases that I am not involved in directly, they really, truly appreciate when someone pays them some personal attention. I know that it is not always an easy task, but I also know again if I have any questions I can always call on the staff and they can help me anytime, and they will and they do a great job.

1:49:24 J. Potter Dennis, could you give us a little bit of a overview of what investigators do get paid in retained cases in eastern Oregon?

1:49:31 D. Byer I charge $90 an hour for my time. I get paid $28 an hour on indigent cases. It does beat the time that I was called to be a fact witness in a county, Grant County, where I had witnessed something, called 911 because I was concerned, and I got $5 a day and eight cents a mile to go sit and testify in a criminal case.

1:49:59 S. McCrea That is statutory.

1:50:00 D. Byer Yes it was. I would hope you would be able to change that a little bit. Most investigators I know charge anywhere from $65 to $75 an hour on their retained cases. Some of them are $55. There is a significant difference. There is more of an incentive to work the retained cases than the indigent cases. It is kind of fun and kind of refreshing sometimes to see people that really don't have a whole lot of hope. To go in and see what they have to say and try to help them out.

1:50:34 Chair Ellis Thank you. We appreciate it.

1:50:49 M. Rader Good morning. I am Mark Rader and I am with the firm of Rader, Stoddard and Perez. We are the primary contractor in Malheur County. I have been there since about 1988.

1:51:02 Chair Ellis When you say "primary," do you have a sense what percent of the caseload you have?

1:51:08 M. Rader I don't. I used to. One of my partners has taken over the case counts and I just keep a rough eye on it to see what is going on. Since January we have been averaging about 120 cases a month. It has actually been riding much higher some months, but it is kind of in that range. We have two associates, both women, who we hired right out of law school. One is married and has a couple of children and lives in Fruitland, Idaho. To her, being in Ontario is being in the big city. She came from a very small town in Idaho. The second one has been around the world a lot and has chosen to live in Boise, and commute to work in Oregon, and my partners and I are waiting to hear the dreaded words "I think I am going to take the Idaho state bar." That is kind of the kiss of death for associates. They get attracted to Boise. It is a very nice city. You see it on the covers of magazines now and they just don't want to be in Ontario after a while. She is also unmarried, which also makes a difference. They are both very good and we are going to do whatever we can to keep those two women with us. They are just doing dynamite work.

1:52:34 Chair Ellis The Eastside Café is not enough to hold her?

1:52:38 M. Rader It is not enough. We need more than that. They have opened a new place that is better, but she still prefers Boise. That being said, that is kind of ….

1:52:52 Chair Ellis How long have these two been working with you?

1:52:52 M. Rader The one who is married, her name is Renee Denison by the way, and she has been with us for about four years now. She seems very comfortable and happy. I am thrilled because I would hate to lose her. The second one is Whitney Bindreiff and she has been with us for about a year. She is also doing dynamite work. I am very proud of what she has done. I have helped her on a few cases and sat with her. I have been waiting to do something, but she is always totally prepared and got the arguments ready to go. It has been very easy for me to deal with in terms of training and those kind of things. I would hate to lose her, but she is the one I am worried about mostly. It is a continuing problem of finding the right person, the right fit.

1:53:33 Chair Ellis We heard from some others today that caseloads here fluctuate and it gets hard for someone in your position to have associate lawyers. It doesn't sound like that has been too bad of a problem for you?

1:53:51 M. Rader Ours doesn't fluctuate a great deal. It is more of a long wave. Every once in awhile there will come a period where they will drop off for three or four months, but we still have plenty of backlog to do from the times when the caseload is too high. We always have work for those people and it is not a problem that way. You do begin to worry if the caseload goes down below your predicted average, whether you are going to be able to make the numbers by the end of the year. Frankly, every year I have been in this business but one, I have always made it. It has always come back so I don't worry a lot about it.

1:54:30 Chair Ellis You do both the criminal and juvenile?

1:54:34 M. Rader Pardon?

1:54:34 Chair Ellis Do you do juvenile as well as criminal?

1:54:34 M. Rader Yes. We do the whole spectrum of cases whatever it may be.

1:54:37 Chair Ellis Delinquency and dependency?

1:54:36 M. Rader Yes. Mental hearings, everything.

1:54:45 P. Ozanne Mark, it indicated in our report that at least hourly paid attorneys are drawn into Idaho because their rates are higher. Do you know anything about that? It kind of surprised and disappointed me that Idaho is paying higher rates.

1:54:58 M. Rader I can walk into Idaho now and take a court appointed case and get $50 an hour. It is a capital murder case I can get up to $90 or $100. It is negotiable from county to county, but it is generally a lot higher than they get paid here.

1:55:22 P. Ozanne So it is a county funded system.

1:55:24 M. Rader Right. Well, the county seems to have control over it. I am not quite sure who is funding it. We always have to fight that battle if someone wants to go work on their own. I could go earn $90 an hour or $50 an hour and live in Boise. I don't have to commute. I don't have to deal with an office.

1:55:51 Chair Ellis Wouldn't have to pay Oregon income tax.

1:55:51 M. Rader Right. We have the double taxation problem in you live in Idaho.

1:55:55 Chair Ellis Is your own practice bi-state?

1:55:58 M. Rader I have handled one case in Idaho. I was asked to by one of local providers because of my experience in death penalty cases, and with the technical aspects of murder cases, DNA, blood samplings, splatter, that kind of thing. I did that once. All my other cases are here in Oregon and they always have been.

1:56:24 J. Potter You commute from Boise, one of your associates commutes, how many other people on your staff?

1:56:28 M. Rader One associate.

1:56:30 J. Potter So just two people are living in Idaho from your office?

1:56:34 M. Rader There are four.

1:56:36 J. Potter Four. What is the commute time?

1:56:38 M. Rader For me an hour. For my partner and the associate, Whitney Bindreiff, it is an hour either way. It is time I would like to have in my own pocket, but it is also not a hard commute since we go against traffic and it is freeway and in Idaho the speed limit is close to 75. We cover the ground pretty good. The other associate lives just across the Snake River in Idaho in the community of Fruitland. They have really nice schools, better schools, so that is why she is there.

1:57:13 Chair Ellis Dennis Byer made some very nice remarks. How are you doing in terms of communication with staff and relationships with our agency.

1:57:26 J. Potter The chair is fishing.

1:57:26 M. Rader Fishing. I don't have any lure suggestions. I don't have any issues with communication with staff. We have always seemed to have - you know, call on the phone, somebody answers, we talk, and things get done. It is not a problem for us.

1:57:47 Chair Ellis Do you tie in with the Idaho bar on criminal CLEs? How does that work?

1:57:52 M. Rader We can do that. I have gone to CLEs in Idaho, particularly the ones put on in the federal court. They offer, almost annually, a federal criminal defense CLE, both in regular criminal law and capital murder for $25 for two or three days and it includes lunch. We always go over and go to those. The State of Oregon has always given us credit for that.

1:58:31 Chair Ellis There was a big push, frankly, from the legislature that we hire, or permit, in-state experts and be kind of cautious about out-of-state experts. That is probably a rule that was made by people who live in the Willamette valley and not on the border.

1:58:51 M. Rader It certainly wouldn't work here.

1:58:54 Chair Ellis Has that been an issue for you?

1:58:57 M. Rader No. The court in our county has always allowed us to bring in out-of-state experts. They have never questioned that. Funding is up to OPDS to decide if they are going to pay for an out-of-state expert in that particular area. We work hard to use local people but we can't always do that. There are no DNA people in Ontario. You have to go to Boise or further.

1:59:27 Chair Ellis Other than doubling the compensation, any suggestions you have for us how we could do our job better?

1:59:34 M. Rader To me, certainly compensation is one of the issues and you have heard all kinds of proposals. I am not smart enough to provide you with any new ones. Two big issues for keeping particularly young people coming out of school are benefits and student loans. They have to come in, earn the wages that I can afford to pay, and pay their student loan and cover the huge deductible that is on the insurance policy that I can get for those people. To keep it at a rate that we can afford to handle, we have this massive deductible. Basically, you have to be on the gurney dying before the insurance kicks in around our office. It would be better for them and their families …

2:00:25 Chair Ellis This is just completely out of the blue but just let me raise the topic. Somebody who knows more about this will just tell me there is no way to go there. Given the number of providers that are in private practice such as yourself, I wonder if there is any way to do a group health policy, where the group is the statewide provider, as opposed to just your office.

2:00:53 M. Rader I have thought about that before. I have wondered if it could be done. Maybe it has to be purchased through the Commission and then we pay the Commission somehow. I think there are restrictions put in by the insurance company and not necessarily by you. The limitations are, "We will cover only these people and not people that you hire part-time" - different kinds of policy restrictions. There are only three different policy providers, actually there may only be two now, in the Ontario area who will actually provide health insurance.

2:01:40 Chair Ellis Peter may know something about this.

2:01: P. Ozanne	I know nothing about it, but I was going to ask, John, if your association ever looked into pooling?
2:01:43 J. Potter	We have looked into it. It has been a few years since we have done so, and the economics and scale for us and our members didn't work out at the time. I would have to check our minutes but I think it was four or five years ago. It may have changed. It may be worth another look.
2:02:04 Hon. Elizabeth Welch	Barnes, there is a group of non-profit agencies in Central Oregon looking at that too.
2:02:19 M. Rader	The only thing I could think of is if you bought the insurance for everybody and we just put our money in to pay for it. I don't know if you can do that.
2:02:34 Chair Ellis	I don't know either. That is on the list of long shot possibilities to look into. Any other comments you wanted to make?
2:02:41 M. Rader	Yes. I wanted to comment about prison cases a little bit. Judge Pratt filled in a lot of the stuff that I was going to talk about. I did want to point out, at least in Malheur County, the district attorney has a policy of basically not negotiating on prison cases.
2:02:58 Chair Ellis	Is that why there are 100 percent trials?
2:03:00 M. Rader	Almost. Frankly, he says that but he bends it, but not very much. If somebody does something bad in prison, instead of allowing the prison to handle it internally he charges a crime. He gets two benefits out of it. He increases his case count of felonies, and he says he is supporting the prison staff and those kinds of people. We get a lot of felonies out of it. No misdemeanors, it is always felonies. As Judge Pratt said there are problems in terms of time. What that really means is a problem in terms of your client relationship and control of your client. If we lose control of that client, in other words, have a bad relationship because we can't spend enough time with them that is when we get PCRs coming back against us. We have complaints with the bar that we have to deal with. Those are the kinds of things that pop up as a result. We don't necessarily have a bad result with the client. We may still get the best result possible, but by then he just hates you so bad that he is going to try something to get even. The time involved in issue development is a very, very important matter for us. That can't be done over the telephone. It can't really be done on video because …
2:04:24 Chair Ellis	What is your travel time to the institution?
2:04:27 M. Rader	I can be there in about 15 minutes but basically I allow an hour from the time I leave my office to the time I get into the prison and sit down with my client.
2:04:37 Chair Ellis	So fifteen minutes on the road and 45 minutes.
2:04:40 M. Rader	I allow another hour to get back. It is a two-way street. You have to get in and then you have to get back out again. Depending on what your client is in there for and where he is being housed determines whether you go into normal visiting or whether you have to go into the actual prison itself and down into the interior parts to go visit. There is just absolutely no substitute for face to face contact, shaking your client's hand, to develop that relationship.
2:05:11 Chair Ellis	You have the same issue with the witnesses.
2:05:17 M. Rader	Same exact issue, and the issue with the witnesses is that after there has been a crime committed, there are witnesses, usually some inmate witnesses, those inmates are now removed from the institution and spread around the state. Now we have driving time and those kinds of issues. You need to send an investigator, but preferably you and an

investigator, to go and interview that witness. I think the ABA Standards are turning to that direction. You have to be there to talk to the investigator. It is getting to the point where you can't rely on the investigator's work; you have to be there with him.

2:05:59 Chair Ellis — I take it where you are headed is in contract negotiations when we get to case counts there should be a weighting factor in prison cases.

2:06:09 M. Rader — There is to some extent now. I have to say it right off the bat. We are getting some advantage on that but we need a lot more.

2:06:24 Chair Ellis — This is, I think, the first time I have heard of this issue which suggests to me that your DA's practice of charging crimes and not leaving it to the administrative enforcement inside the institution is may be unique?

2:06:41 M. Rader — I don't know if it is unique or not. That is the way it works in Malheur County. I haven't done any prison crimes in other counties. I have done PCRs in the other counties.

2:06:54 Chair Ellis — Chief, in Marion County what happens?

2:07:01 Chief Justice De Muniz — I don't know what the charging practices are there. I know that they prosecute cases from the prison, but whether it is to the same degree that Mark is alluding to I have no idea. Maybe Judge Lipscomb knows?

2:07:17 J. Lipscomb — The most serious cases are prosecuted through the district attorney's office. Anything within the institutions we feel can be handled capably within are dealt with through disciplinary segregation and that sort of thing. There is always a natural tension of our system feeling itself overwhelmed. People cutting themselves are sometimes charged with inmate possession of a weapon in circuit court. I really always felt that that was something that could be dealt with perfectly well in the institution. There is a tension back and forth as to what is in and what is out and where it could be most appropriately handled. But in general, the most serious ones come outside to the DA's office in Marion County, and the more routine fist fights and that sort of thing stay within the walls of the institution.

2:08:15 Chair Ellis — Do you find the MCAD lawyers that do the prison cases have this same issue of it taking significantly additional time. You have to go to the client …

2:08:27 J. Lipscomb — I have only been at this new job for a month, but that was a complaint that I was well aware of as presiding judge, how much additional time they required. From time to time the judges get involved - it is not just an issue with the state institutions it is an issue with the local jail facilities as well - facilitating contact between attorneys and their clients within the institution. As judges, we quit doing the small claims cases inside the institution just because it is so inconvenient for judges simply to get inside. I have heard that lawyers feel the same way about getting into courthouses.

2:09:20 P. Ozanne — Mark, in your lengthy time in Ontario and working in the prison, have you seen a correlation with the superintendents? I would think it is not particularly in their interest for the superintendents to have a high litigation rate either. They have same issues, dislocation, etc. Have you noticed not just the prosecutor's charging but have you noticed any difference over time with superintendents in that institution?

2:09:41 M. Rader — Not really. It seems to be controlled by the DA. Something is happening, or some report is being given to the DA every time this happens, and he is choosing to charge. I don't know if he has drawn any lines about where he charges. There doesn't appear to be. Of course, I only know the cases that come to us. I don't know all the ones that are there. I haven't seen a big change or shift in that. Some of these same aspects that we talk about - getting out of prison,

having client control -also apply to the PCR cases that we handle. We handle those locally in Malheur County and are also doing those for Umatilla County. These same problems affect the handling of those cases and also add time to those. The one thing that is a big factor in working with these cases, and I have no way of fixing this and I don't think the Commission does or even the prison does, but very often our clients come to us after having talked to or associated themselves with the law library and the legal advice that they get within the law library. They come poisoned with that and there is always someone in the background who has given them advice that is different than your advice. You are always having to fight this thing. It is a huge time factor. It is nothing official. It is this inside prison stuff going on between fellow gang members, the law library personnel, whoever it may be giving this guy advice that makes no sense whatsoever, but he thinks so. Then we have to fight him and his advisor inside. That is something that I don't think you can prevent, but it is also a major factor.

2:11:43 Chair Ellis — His advisor inside is keying up the PCR case. Other questions for Mark? Thank you.

2:11:52 M. Rader — Thank you for the opportunity.

2:11:54 Chair Ellis — Krischelle Hampton.

2:12:06 K. Hampton — Good morning, Chair Ellis and Judge De Muniz and fellow board members. My name is Krischelle Hampton. I am a relatively new attorney. I passed the bar in 2006. I am 27 years old. I am the mythical young attorney that won't come to eastern Oregon. What I can tell you though is that my peers would like to.

2:12:30 Chair Ellis — Where did you go to law school?

2:12:31 K. Hampton — I did my first year at Baylor and then I transferred and finished at the University of Oregon. I have a number of peers that would love to practice in this area. I think the difference between me and those peers was that I willing to take a lot more risk in where I went in terms of my finances. I deal with a lot of stress all the time in that regard because I have quite a bit in student loans. I borrowed $20,000 to start a practice and just took a leap.

2:13:09 Chair Ellis — So let me see if I understand you. Out of law school you started your own practice here?

2:13:17 K. Hampton — Correct.

2:13:17 Chair Ellis — Good for you.

2:13:18 K. Hampton — The reason I could do that is twofold: One is Mr. Whitnah let me come into his office and rent space from him, rent free, for about a year. I now pay him rent and am able to do that. That is one of the reasons. The other reasons are great mentors in this area. I have a huge degree of respect for the attorneys who practice in this area. Some of the older attorneys have definitely helped me. Technology has changed. I am able to get all the CLEs, bar books, for about $500 for the year, as opposed to about $30,000 to start a law library. What I can't afford still is Lexus or some of those better research tools. I also can tell you, in terms of benefits, I think that that is a huge difference between what the DA's office can afford and what the defense bar can offer. I did apply for a deputy DA position here. I was one of two candidates and wasn't hired. I think that things happen for a reason and that was a very good thing for where I am going to go in my life. I probably would have been a lifer in the DA's office because they have benefits and things like that. Right now where I am at is I love doing criminal defense work and I love doing it for indigent clients. More than 50 percent of my time is spent on those clients, but less than 30 percent of my pay is from that. Right now I have 94 open matters and about 31 of those are indigent defense cases. I have been appointed 47 over the entire year. A lot of the 30 that are still left open are juvenile dependency matters. They have to be left open just because you don't do one hearing. I go to community resource

team meetings for those children. On DUI's I go to the DMV hearing with my client. I think it is malpractice to not ask for a DMV hearing and go. It is the one time as a criminal defense attorney you get to question police officers before trial. Every time there is some issue that comes up in those DMV hearings. Mostly why I wanted to talk to you today is that recently Mr. Whitnah and I have been discussing forming a partnership. I did a small website for myself. When I was doing that I Googled my name, so when I was thinking about a website for us I googled our names. One of the things that came up on my name was notes from one of your past meetings, saying that I was this young new attorney, and appeared to be a good attorney, and had been "preserved." I'm not sure what that means.

2:16:20 Chair Ellis It beats the alternative.

2:16:20 K. Hampton I assume what was meant was I had been preserved as an indigent defense provider in this area. What I can tell you is that I am not there. I struggled in making the decision to go ahead and do that because I was right at a place where, without advertising or anything, I could make a career here on private pay cases. The attorney-to-people ratios out of these counties, just Baker County, I just looked at Baker County when I came out here. In Portland it is about 240 people to one attorney. Out here it is over 1,000 people to one attorney. There is a demand for our time and we can be paid well in other areas. What I struggle with is I love this work, but I can't afford to pay my staff. No one in our office has insurance with the exception of me, and I have it because my parents pay for it and it is a $5,000 deductible. I guess mostly what I want to tell you is you have a real opportunity, and I think benefits are an area to look into. If there was a way that we could get our staff insurance then maybe we could make it. What I am toying with is almost every attorney in this county is approaching retirement. There is an opportunity for me to pick any area of law. Do I pick family law where I can make it or do I continue to do this work? I am not even paying myself many months. I pay $150 a month in rent. I have no kids, no family.

2:17:57 Chair Ellis Let me understand, you are part of a consortium?

2:18:01 K. Hampton Correct. Correct. I am part of the consortium with Mr. Kiyuna and Mr. Whitnah. Mr. Cronin does some of the juvenile cases, but he is no longer part of the consortium. At any rate, I am the young attorney that could stay here. At the present amount of pay with no benefits, and I can't use the loan programs because you have to be a full-time provider... I did well in law school. I paid attention. When Harvard graduates came to talk to us about our loans and they were forming a group of graduate students to collectively bargain with the banks to get lower interest rates, I was right in there. I have my federal loans locked in at two percent interest rate because I was in that group. Even so, I don't think that it is going to be a wise business decision if there is a similar contract for me in two years to enter into that contract. I just don't. I would love to be in a different position because I really do love these cases.

2:19:18 Chair Ellis I am very interested in all of what you said, but one part in particular. Here you come to the community without experience. You have the law school degree and you were getting mentoring and supervision even though you are not an associate in the firm. I think that is very impressive and I would like to hear more about it.

2:19:49 K. Hampton When I started practicing what happened was my parents have a little store in a town about 40 miles away. Mr. Whitnah happened to talk to one of their employees and said, "What is that girl doing?" He knew at that time that I hadn't been hired by the DA's office. He said to tell her to come in and rent space from me. He has been a very significant mentor because he is in the office, but one of the best pieces of advice that he gave me was to just talk to the other attorneys in town. That has been echoed by Judge Baxter and it is absolutely true. To the extent someone can answer a question they do. The (inaudible) help with that. There is a huge amount of mentoring. I did well in law school. That has made a difference in my ability to make it.

2:20:40 Chair Ellis You have family in the area. You mentioned in your earlier comments you believe there are other younger lawyers out there that would be interested in coming here if the conditions were right. I take it those would be ones without family ties here.

2:21:01 K. Hampton Some, but I went to law school with people, there was one who had family in Baker County; he practices in Boise. Another young attorney that I went to law school with is a very bright attorney; he practices in Eugene. His family is from Mecal. I am certain he would love to come out to this area. There are others that I know of in Bend that practice there. The ones there are doing private work because it is not feasible to pay loans and afford a family or anything else.

2:21:46 Chair Ellis Questions for Krischelle?

2:21:49 S. McCrea What area is your retained caseload in?

2:21:50 K. Hampton Right now one of the challenges I have is it is kind of spread across the board and I am narrowing. What I am absolutely sure of is that I could have a family law practice in eastern Oregon and make quite a large amount of money. Next to criminal defense, my next area is family law. I have quite a bit of estate planning that I do. I think that where I need to head is to specialize in a couple of things. I have got employment law, car crash cases, and a handful of other things that, for the most, I'm trying to get away from. In fact, the two car crash cases that I had I asked another attorney in town to take those. I can't spend the time to get the expertise. What I think I can do is cover a couple of areas of law. I think that could be family law and criminal law. Or it could be family law and estate planning. I don't know what it is going to be in a couple of years. My preference would be family law and criminal law. It is where the best stories are and you really get to make a big difference in somebody's life. I want to be an attorney that is more like Coughlin, Leuenberger and Moon that has their staff for 29 years. I was talking to Dave Coughlin about what kind of insurance benefits do you pay. I am trying to figure out if we could even pay a group policy, just the employee, and then have the employees pay for their dependents. The policies that we have been able to find, you have to have 100 percent of your employees on the group and then 75 percent of their dependents. I am just trying to figure out if I can afford the employees. Coughlin, Leuenberger and Moon pay employees and dependents and the first $500 in their deductible. My employees, my staff, are looking at $2,000 deductible. I think that I am going to be able to pay for the employees at $250 a month. They are going to have to pay the $500 difference to get their families covered. Mr. Whitnah and I were able to keep one key employee for me because we raised her salary to about $2,000. It is hardly anything, but she is key and we have to keep her. We gave her a bonus to keep her because she was headed to California. Her husband is a diabetic and they have to have insurance. We have to find insurance to be able to keep her. Last month my check from indigent defense was $1,903. I can't afford the $700 for her insurance. Most months it has been more than that. This last month it has been significantly lower because I had a number of cases where ethically I had to withdraw. Whenever you withdraw, with our current contract, the money that you had received gets withheld from your next check and goes to the attorney that takes over the case. We discussed that when we were working on the contract. One of the reasons that it was a struggle to enter it - and I think in large part, any contact that I have had with Public Defense Services Commission, or my office has had, has been excellent - when we were negotiating on that contract, I observed one of the providers that I had a huge amount of respect for that has done this work for 27 years, being talked almost down to when he was trying to explain what it was going to take for us to be able to make it out here. I almost didn't enter into the contract just because of the lack of respect that was given to him. He is an excellent attorney. It was upsetting.

2:26:00 Chair Ellis Did you respond to the survey?

2:26:00 K. Hampton Which survey?

2:26:03 Chair Ellis I have just seen the results, but it was customer service survey that we did just recently. Hopefully, all providers were included.

2:26:14 K. Hampton I don't believe so. I think I would have. One of things there is that I think a lot of that stuff goes to Mr. Kiyuna's office because he is the administrator. I think he gives the input for our group.

2:26:34 Chair Ellis Thank you very much. Good luck.

2:26:39 I. Swenson Mr. Chair, one comment at this point if I could. It is just to say that our office, as you are well aware, often receives from the bar reports about complaints about public defense attorneys. Only once do I ever remember receiving a letter from the bar complimenting an attorney and their sending a copy to us. They had received a letter from a client saying to the bar, "You should be very pleased with the work that this attorney is doing. I can't tell you what a marvelous job the attorney did for me," and it was a public defender. I think it could have been said about many, or all of the lawyers here, but it was about Ms. Hampton. I thought you should know that.

2:27:26 Chair Ellis Bob Whitnah.

2:27:34 B. Whitnah I want to apologize for how I am dressed. I have never been to one of these meetings before. I didn't know that it was going to be this formal and I do apologize.

2:27:41 Chair Ellis Well, usually people come with their fishing gear on.

2:27:43 B. Whitnah On that issue, I would say to you, sir, that I really think this dry fly issue is over. I think a strike indicator is more effective. Drop fish about a foot off the bottom. You can go with an atomic worm or blood nymph. I would like to comment that my system is more effective for catching steelhead than Matt Shirtcliff's. I can prove that because I catch more steelhead than he does.

2:28:27 Chair Ellis So from fish count to case count.

2:28:29 B. Whitnah I grew up in Baker City. My father was a dentist here. I actually grew up in a house on Third Street about 75 yards from the courthouse. As a kid, to be in the club with Greg Pittman, down the street - he was the older kid - you had to go through an initiation almost every week. It almost always included climbing on the giant, wooden wheels at the courthouse or flipping over the cannon that is there. I graduated from high school in 1984. I went to college and then I joined the Army. I spent three years in Germany as a military policeman. I got out and came back and finished college, got married and opened a restaurant here in Baker City. It was the Phone Company restaurant on First Street, then sold that and then built houses for a little while. One winter day I am eating a half frozen bologna sandwich drinking lukewarm coffee and decided that I have got to get an inside job. I took the LSAT test when I was about 29 or so. Six months later I went off to school in Oklahoma City for my first year and then transferred to the University of Oregon and finished up the last two years there.

2:29:50 Chair Ellis What year did you finish?

2:29:50 B. Whitnah I have an '01 bar number, sir. About a year and a half before I got out of law school, so in the middle of my second year, I started telephoning Matt Shirtcliff. I had never met him before, but I started calling and talking to him. Because I am from this area and because he is a transplant here, but likes the things that this place offers, we did bond over talking about fishing and hunting and those types of things. As I neared the end of my third year of law school I was calling him once a week. As luck would have it he had an opening and I got to slide into a deputy DA spot. It was where I wanted to go. The bravery that Ms. Hampton has

shown is incredible. To come here without something like that. I got to spend four and a half years in the DA's office. I spent an extra year here because another deputy, Kim Moser, had gotten a job at the AG's office and she was leaving. Mr. Shirtcliff asked if I would stay on an extra year to help train the next deputy. I did that. Then if it weren't for Mr. Cronin, one of the finest attorneys we have here in eastern Oregon, I would have had a very difficult time making the leap from deputy district attorney to private practice. At that point, I think Mr. Cronin had about 60 percent of the indigent defense contract for Baker County. He wanted to wean off of that because he had some big cases and I got to take the majority of those. What it translated into was about eight or nine cases a month that I personally received. That translates somewhere in the neighborhood of, sometimes it was down to as little as $5,000 a month. Sometimes, though, it was as much as $10,000 a month. That was great for me. I just want to be a simple, country lawyer. I don't want to make a million dollars. My plan is at retirement I want to have 120 acres and a nice house that my kids can come back to and visit at Christmas, with their friends from college, and sit on the porch and drink a gin and tonic and think about elk hunting. That is my plan when I am 65 or 70. I want to echo what Ms. Hampton said about this last round of negotiations. I have never been through anything like that before. I really struggled with whether I was going to be a part of the Baker County Consortium because the negotiation – I have never been through them before so I don't know how they go typically - but the negotiations went something like this. "We would like to provide indigent services." The Indigent Defense Services said, "Well, here is what we are going to pay you." We say, "We need this; could we get this?," and "No. There are other people who want to do it so if you don't want to do it, see you later." I did not appreciate the way Mr. Cronin was treated during his negotiations. I almost didn't enter into the contract except that I needed it. I have a choice to make. I would love to do indigent defense. I would be happy to just do indigent defense cases. It is an issue of compensation, but it is really an issue of compensation for time. If I could have more cases and be more efficient in my research abilities, I could handle more cases and that amount of money would be fine for me. I can handle eight, to nine, to 10 cases a month if I can get more efficient on my research capabilities. What I mean by that is, as deputy district attorney I had, at any given time, when I first started out, I had all the justice court cases, all of the juvenile lesser felony and misdemeanor cases. I didn't do any dependency cases. That is like 150 cases at a time. I could easily do that and I could easily prosecute against four, or five, or six different defense attorneys. The reason I could do that is because as soon as the defense motion comes in, I turn around and I pull out this binder. This binder that has the information in it was prepared by the AG's office, this binder of information of condensed case law wonderfully organized. Absolutely accurate in its legal detail, wonderful cites. These books are prepared by people who are paid to just prepare those. I flip it open and if it is a search and seizure issue, flip to search and seizure, if it is this issue, I flip to that, I look down the chart. It is on this page, I go to that page, and there is a list of 20 or 30 cases with just the quick cites, the rulings, the holdings of the court and there it is. Then, once I look at that it takes me 15 minutes to research what has taken the defense attorney three or four hours to research. I can look at this and there is the answer. Then, I get on the county Westlaw system, because it is right there on my computer on my desk, and I go look on that and research a case and make sure it has not been overturned. Then I go to Matt's office and pull out the advance sheets and make sure there is nothing brand new there. Heck, I can defend against a defense attorney's motion. It takes me an hour and a half, two hours, to research it and write it. I have gotten it to the court and it is no big deal. As a defense attorney the information that we get, the condensed case law versions that we get, are okay. They are prepared by people – well, if I had the gumption to do it, it would be prepared by somebody like me who is not getting paid to do it. I have to do it on my off time, so they are not as well researched, organized, they are not as condensed, the information is scattered. It costs me a lot of money to buy those in the first place and the help that it gives me is some, not much, and I can't afford to get Westlaw. If I had those research tools available to me, I could cut down the amount of time that I have to spend just researching and defending a case.

2:37:05 Chair Ellis Do you access the Appellate Division's people?

2:37:10 B. Whitnah Not as much as I probably should, but it is difficult. It is more time consuming to do that kind of thing.

2:37:26 Chair Ellis I am interested in this because certainly any efficiency that we can all share is a big plus. I had thought that there were within the Appellate Division of OPDS, the kind of briefing support that you are describing. Through email connection it is not hard to get there.

2:37:50 B. Whitnah That may be. That would be similar to one of the other backstops we used to go to as deputy district attorneys is you would call the AGs office. They go, "Yeah, yeah, yeah, here it is." They point you in the right direction to the cases. It is an option. I am just suggesting that one of the ways we could do this is to increase the amount of information that we as defense attorneys get.

2:38:19 Chair Ellis Becky is here.

2:38:23 B. Duncan I am with the appellate division and we have an attorney on duty and they will take calls from anyone. They field calls from clients and from trial attorneys. The attorney who is manning the phones that day may or may not have worked in a particular area. They may or may not be able to respond immediately to a research question. If they can't respond, they will circulate an email to the office. Anyone who has information can email back. We can send out briefs and sample motions that we have. We haven't prepared treatises on Oregon Criminal Law to the same extent that the AG has. We don't do individual research projects just by people calling in. We will supply any information that we happen to have. Oftentimes, if it is a recurring issue, we will have a brief that we will send out.

2:39:17 Chair Ellis So be sure that you get the information from Becky how to do that.

2:39:23 P. Ozanne I think you are also saying, if I understood you right, that in your experience the AG has a unit of paid, research lawyers, and the defense materials, etc., are done by volunteers and you don't find it as well organized?

2:39:37 B. Whitnah I'm finding the Oregon Criminal Lawyer's Association, which is the source of information that I know about to get this specialized stuff, is not as high quality as the information the district attorney's office has. Let's look at it from the beginning here. All of the fine print in a criminal case or anything, all of the fine print is on the side of the state. They have the easy job. All of the fine print in the law is on the side of the state. The criminal defense lawyer's job is a lot more difficult and the resources we are given from the state are a lot less. The DA's office gets police officers. The DA's office gets health insurance. The DA's office gets a set salary. The DA's office has nine to five hours. The DA's office also gets their private investigator.

2:40:34 P. Ozanne You're saying as to the publications, you are not finding them as focused. Your theory is it is done by people who are volunteering.

2:40:40 B. Whitnah And they are doing a great job but it is not nearly as good or easy to reference as those. That is one way that could really help. The other is they get Westlaw. We can't afford it. One of the other things I thought might help, and I was really glad to hear Mr. Rader talk about, is this issue of health insurance. I have to admit that one of the things I like about having Ms. Hampton in the office is she so smart and she is such a business minded person. Me, I am just a simply country lawyer. I just want …

2:41:20 Chair Ellis Do you ever tell juries that?

2:41:20 B. Whitnah Absolutely. One of my favorites was my first trial when I was deputy district attorney and I was against Mr. Bardizian. He gets up and he says to the jury, "My name is Ken Bardizian

and I started to practice here in Baker County here in 1984." I got to stand up and say, "My name is Bob Whitnah, and I have lived here my whole life, and I graduated from high school in 1984." I just want to work my cases, delve into the law, help people as much as I can, and be efficient and good at it. I am good at it. I am with Ms. Hampton. If something doesn't happen with the amount of money, I am not going to do indigent defense as soon as this contract is up. I may attempt to bow out of it sooner. Most of my time, 60 to 70 percent of my time is spent on indigent defense cases. It accounts for about 30 percent of the amount of money that I make in my office. It is undoable. At $200 an hour on a privately retained DUI case, I spend two hours on it and I have made more than I would make off of an indigent defense DUI case. DUI cases are incredibly complex. They are as complex as a lot of murder trials. As a defense attorney I have had six trials. I have lost two. Two of the six trials that I had were DUI cases. If I calculate that out I made about four or five dollars an hour doing that DUI case. I am happy to do it because the people need the help and I contracted for a case at that low amount of money, but I am not sure I can afford to do it anymore. I like doing this. Dan Cronin is a guy who likes doing this work and believes in it. He can't do it anymore and neither can I.

2:43:30 Chair Ellis — Other comments or questions? Thank you.

2:43:36 D. Cronin — Excuse me, Chairman Ellis, I would like to speak to one issue that Mr. …

2:43:46 Chair Ellis — What I am going to tell you is not going to take very long. I am a big boy. I can handle myself as far as the negotiations, but the thing that I think is a statewide issue that needs to be addressed, and I refuse to participate in, is this concept that Ms. Hampton was talking about where she had an ethical obligation to withdraw from a case. The way the system is set up statewide these consortia don't get paid. The money goes to somebody else. She gets paid $1,700 in a month because she is withdrawing from cases that she is obligated to withdraw from. I think it is unethical, and this was my point when I was doing my negotiations, it is unethical to have a system set up and for this body to foster a situation where an attorney has to make a decision. I have an ethical obligation and I need to get paid. Do I withdraw from this case because of an ethical obligation? You created that in this contract process and it is not right. It shouldn't be done that way. You should not tempt lawyers. Not all lawyers who have an ethical obligation are going to withdraw. They are going to stay there as long as they can just to get paid.

2:45:27 Chair Ellis — I'm not trying to argue the point, but it is a difficult issue from our point of view. Let me just comment. One of the big, avoidable expenses that we see is a lot of substitutions. You get part way into a case and then there is a need to withdraw. Then you have to start over. To the extent that the conflict was identifiable sooner, we could avoid a lot of that cost. From our point of view, we certainly want to put in place everything we can to get – and a lot of this is witness conflicts. You start down a track and it turns out there is a witness. You had prior representation of the witness and here you are. I am not trying to argue your point all the way but there is another side to it. We want to build in an early detection, as best we can, to identify those conflicts before the conflicted time occurs.

2:46:35 D. Cronin — I understand and I am happy to debate that particular issue. The smaller the community is the more likely that you are going to have a conflict that you will not discover until you have the police reports, sometimes not until you send an investigator out. You may be into the case three weeks. Just because of the nature of the discovery, obtaining it in time, you don't find out. You put all that time into it, and if you discover that you have a conflict, you have to withdraw.

2:47:13 Chair Ellis — Some counties do a terrific job of early discovery, making reports accessible, and the lawyer gets to see who the potential witnesses are much sooner. Maybe that is less so here?

2:47:26 D. Cronin I have practiced in five different counties here in eastern Oregon, as well as other counties throughout the state. I can assure you that from at least the attorneys that I dealt with, or from my own viewpoint, I didn't take a case if I knew there was a conflict. Many times you had a contact from the clerk of the court who asked, "Can you take this case?" They read out the names on the indictment and you don't take it. Many times you just don't know. You don't know enough until you get the discovery. It is going to happen over, and over, and over again. How you deal with that issue is difficult, but it is not fair for an attorney not to get paid for the work that they have been doing. Especially out here where there is very little money anyway.

2:48:33 Chair Ellis My only point is we want to put as much incentive on the lawyer as we can to identify those conflicts early in the process and not six or eight weeks later.

2:48:43 D. Cronin I think what you have done is you have set up a system where the temptation is going to be there for an attorney to keep that case and not disclose the conflict.

2:48:58 Chair Ellis That would not be the outcome we want.

2:48:58 P. Ozanne So, Dan, you would propose something, a middle ground, in individual cases, I assume. Is that your solution to the issue? To take a look at the case that should have been discovered earlier maybe you would say, "Well, you should have been alert," but if the conditions were such that the discovery was late. You would want you paid and then …

2:49:28 D. Cronin The attorney who is involved in it should at least get some compensation, where now they are having to give up everything they have got when they discover the conflict. That would be one way to handle it.

2:49:34 P. Ozanne On a case by case basis?

2:49:35 D. Cronin On a case by case basis. Ultimately, this issue can be resolved if you pay attorneys enough money that is not based upon the case system.

2:49:53 P. Ozanne That is an ongoing debate that we have.

2:49:55 Chair Ellis Yes. Come on up.

2:50:05 K. Bardizian I'm Ken Bardizian. I have been here since, like Mr. Whitnah says, 1984. As a matter of fact, Matt Shirtcliff was talking to me about contemplating whether he should hire Mr. Whitnah or not. I told him, "Well, I don't know how long he will work for you but he is not leaving. This is his home." So they hired him. Anyway, I think I can address Mr. Cronin's concerns. I have the very problem come up in my cases. The reason it comes up is because it is such a small community. If you are in Multnomah, or Lane County, or Marion, the likelihood of a conflict like we are concerned about just doesn't arise because of the number of lawyers that are available. That is compounded by the fact that here the DA will file an information and they will not allow a preliminary hearing. If we file for a prelim, he will dismiss the case, go the Grand Jury, and indict. He will not provide discovery when we request it when the case is just based on an information. That sort of hampers our ability to get discovery. In a misdemeanor we often don't get discovery for a couple of weeks. In the felonies we don't get them until there is an indictment. You have to keep working the case. What can you do? You have to get an investigator. You have to confer with the client. Talk to witnesses. Get the investigator involved. We are all spending time. In some cases it is obvious. If the main victim is a former client, or a former recent client, you have that figured out without spending a bunch of time in it. I have had cases come up where I have worked the case for a couple of months and then all of the sudden the DA says they are going to call somebody as a witness that I hadn't counted on. That occurred in a Measure 11 case. I had worked the case for two or three months and I had to bail. Luckily, I refuse to do Measure 11 cases on a contract. I do

it on time, but it could easily happen on a contract case. As Mr. Whitnah says, you work a DUII for example; we are getting paid something like $329 for a DUII. The way the legislative scheme is going any third DUII conviction we are pretty much forced to go to trial on just because of the consequences. I guess you can thank Kevin Mannix on that. With regard to flow of funds, a lot of us are really independent and don't like being under somebody's thumb, that is why we are all solo practitioners. I liked it great when I was able to contract independently with PDSC, but basically we got the consortium rammed down our throats. As Mr. Whitnah said, "If you don't want to do it for what we are offering we'll get somebody else." There were people in outside counties willing to contract and provide the service.

2:54:00 Chair Ellis — You can see the other side of that, though, can't you?

2:54:01 K. Bardizian — I understand. It is money. I understand the thing but we need local lawyers providing local service.

2:54:15 Chair Ellis — Which a consortium structure allows.

2:54:15 K. Bardizian — It does because we had to accept what was offered. We couldn't really negotiate because they had other lawyers from another county who were willing to step in and do the same work for what the state was willing to pay.

2:54:35 Chair Ellis — Given all of the distances was that credible?

2:54:41 K. Bardizian — Well they were willing to do it. I won't do a contract case out of county. That is the only way I can afford it and that is arguable.

2:54:56 S. McCrea — You know, Ken, one of the discussions that we have had is the hourly rate versus the consortia. We ended up with a public defender in Lane County, but we also ended up still with an hourly structure. One of the arguments against that and it was explained to the folks in Lane County and they wanted to do it anyway, is that they would be making more money if they went to a consortium situation than by doing it hourly. They didn't want to do that. It is different too because in the federal system under the Criminal Justice Act, the CJA, it is all done hourly and there are caps. It is like $7,000 for a felony but the judge has discretion to go over the cap.

2:55:40 K. Bardizian — I'd be glad to do them for $7,000.

2:55:43 S. McCrea — There are different kinds of cases too, with Ballot Measure 11 and all that. I guess my question is, and you are telling us that you are doing the Ballot Measure 11 cases hourly?

2:55:54 K. Bardizian — Yes. I contracted with state to do it that way because of the amount of time. I have had two Jessica's Law cases last year. I managed to settle them both, but I spent an ungodly amount of hours on it. I kept them both out of prison. I have had some other Measure 11s and the only way I can justify providing a fair amount of representation at a fair price is if I do it by the hour. Let's say I got a Measure 11 case and then it comes up I have a conflict. I bail out. What happens then? I don't deserve the entire amount of money. Do I get nothing out of it or do I get a prorated share? Is the other guy going to be able to do it for what is left? Is he going to do it for nothing? Because of the severity of the case I decided it was best to do it on an hourly basis. If I spend less time on it and resolve it where I get the guy maybe probation with the threat of prison over his head and spend maybe 30 or 40 hours instead of a 1,000, fine. I am willing to take less money. It is fairer that way. The other thing is, there is a concern about having enough lawyers in this area. I am going to be 63 this month. I am probably going to work another seven years, I figure, because I can't afford to retire and I got a kid in high school. I can't afford anybody as an associate.

2:57:50 Chair Ellis I was encouraged that we had two younger lawyers here.

2:57:57 K. Bardizian Most of us are getting older. I firmly believe that if we don't provide this service rights are going to be eroded and then the people who have got money to afford lawyers won't have the same rights as they have now. You have got to figure out a way to do it. I don't know if you can. I do know from what I have heard that Montana pays $80 an hour. I have nothing to back it up with. It is stuff that has been written on the internet. That information has been provided on the OCDLA lists. If they are getting that kind of money, I don't understand why Oregon can't provide it either, other than nobody cares about people who are charged with crimes.

2:58:55 Chair Ellis Other questions for Ken?

2:58:54 K. Bardizian Somebody had a question about subsidizing attorneys and making sure they are working criminal cases. The office can provide the statistics. They can provide a case count and show what the person is doing, I would think. I don't think Mr. Mallon answered that totally.

2:59:27 Chair Ellis I don't think there was an issue of do we trust people when they report what has been done. The issue was is there sufficient work, with the supervision that would be required; they could bring in a younger lawyer. What protection do we have if we subsidize that, that the lawyer stays in the system long enough that we can recover.

2:59:54 K. Bardizian That would be a hard one to answer. Until the economy around here improves I imagine that is a problem getting new lawyers here. The other one is when I first moved out here there was no internet, cable T.V., all the CLEs were in western Oregon, and money was tight. It is one thing getting a young lawyer out here. It is another thing to get somebody who is married to come out here if they are from the big city just because there is a lot canned entertainment and stuff like that. That has improved since you got the dish T.V. and the internet and stuff like that. It takes a certain kind of person who wants to live out here, somebody who doesn't mind being somewhat isolated, not having the things that are taken for granted in the city. I grew in San Francisco and I had to get out of there because it felt like an ant colony to me. I am the exception. Usually you are used to the environment that you grew up in and that is what you would prefer. I don't know what the incentives are but it is ….

3:01:27 Chair Ellis One of the incentives …

3:01:29 K. Bardizian I like the outdoors. That is why I am here.

3:01:32 Chair Ellis In Portland we hear the absolute opposite complaint that we were told here today. The younger lawyers don't get trial experience. They get paid but they don't get trial experience. Apparently here there is a real opportunity for younger lawyers to get that trial experience.

3:01:52 K. Bardizian There is and there isn't. I remember a couple of years ago the courthouse staff complaining about not having enough trials. The reason has been as Mr. Shirtcliff alluded to, we have always pretty much had an ability to negotiate and get fair and just results. Judges are willing to allow those. There have been jurisdictions where I can't work with the DA at all or the judge.

3:02:30 Chair Ellis Thanks a lot.

3:02:37 K. Bardizian I was just trying to take notes and fill in the blanks but I guess that is good enough.

3:02:44 Chair Ellis Thank you very much, Ken. Chris Zuercher?

3:03:07 C. Zuercher Good morning. My name is Chris Zuercher. I am an associate with Coughlin, Leuenberger and Moon. I was hired away from the DA's office. I was there when Bob was hired. I think

my first criminal trial was against Bardizian too. Pretty sure it was. I guess I am here because Bob was not able to be here today. I will tell you that this really is, I guess over the next several years, I think this really is a good time for young attorneys to make the move to eastern Oregon. Having said that, you have heard the difficulties of doing that.

3:04:00 Chair Ellis So in your case what made you come here?

3:04:03 C. Zuercher Somebody offered me a job. I am not from Oregon. I am from Ohio originally. My wife is a military brat so she kind of grew up all over. Her parents retired to Eugene. He was a Chaplain in the Air Force and retired to Eugene I guess about the time I started law school. We came out to visit and I thought, "Well, hey. Let's try Oregon after law school." Having no idea that there was anything to Oregon other than Portland and Salem and Eugene. It ended up, having never heard of Baker City when I filled out the resume, but somebody gave me a job here. We have been here since 2000. This is a good time for young attorneys if we can try to attract somebody. I guess what I am saying is this is the time to move.

3:04:57 Chair Ellis So you bucked the trend and came to Baker City and then you bucked the trend and left the DA's office to go into defense work. What happened there? How could you possibly afford to leave that lucrative DA job?

3:05:13 C. Zuercher Well, I am with a firm that doesn't do indigent defense completely, quite frankly. Mr. Whitnah, Ms. Hampton, Mr. Cronin, and some of the others have talked about, that is not all of what we do. We do indigent defense. I can tell you without reservation it is by far the work I prefer to do. In terms of just percentage of time, I do spend a larger percentage of time on those than other types of cases. It is not over 50 percent or anything like that but it is a larger percent than the others things. I just enjoy it. I enjoy working with clients that don't have to worry about footing the bill because we think there is a good motion to suppress issue or something like that, people who wouldn't otherwise have the resources to be able to litigate the issues to protect the rights that they think they have and obviously we all think they have or we wouldn't be here. That is why we can do it is because that is not all we do. We do a lot of family law. We do a lot of other types of cases as a firm. I have been lucky, in a way, because I have kind of been assigned to those cases, but they are the cases I prefer to do. It is not all we do and we wouldn't be able to do is exclusively, obviously. I guess what I am saying is this is the time it strikes me that if we can get some good, young attorneys in Baker County this is the time to do it. There is a generation of attorneys that was here when I got here eight years ago, good attorneys. I think I have had the best of luck in Baker County, like some of the other folks have said, because there are good people here who are willing to work with young attorneys. I think that holds true now. I am certainly not an old timer by any means. For younger attorneys who come in I think there is a willingness to work, and talk, and cooperate. I saw that coming in and I see that continue as I have been here in the system for a few years, but I think this is the time to do it. So despite the challenges, and I know there are many, I encourage anybody to act now to try and solve some of these issues so that we will have people coming in to take over these key roles with key people leaving over the next five or 10 years. This is the time to do it. I would just encourage you to do that if you can. That is really all I have unless you have questions.

3:08:05 J. Potter Chris, why does your firm do public defense work? It is not lucrative. You enjoy it and Bob Moon used to enjoy it. I don't think he is doing it as much anymore.

3:08:19 C. Zuercher He is the guy that had that contract. For years it is not something Coughlin or Martin Leuenberger has done. I think it was Bob Moon that had done that historically. I think he was just a person who was committed to criminal defense and indigent defense. I think it is something that he sees as kind of a community service. To give back to the people who need it. Obviously, in terms of criminal defense work, it is not the retained cases that make the world go round. We have got those. It is indigent cases that are, I don't know what the percentage are, but the big bulk of those kinds of cases and they are important cases because

they shape the system. I think that has something to do with it to. I think it is a commitment to the criminal justice system and criminal defense as a whole. By virtue of that you have to care about indigent defense if you care about that kind of stuff.

3:09:45 Chair Ellis — I like your attitude. It is good.

3:09:50 C. Zuercher — Good. Sorry you had to wait for it.

3:09:55 Chair Ellis — Any other questions for Chris? Thanks a lot.

3:09:56 C. Zuercher — Thanks.

3:09:56 Chair Ellis — Anyone else have thoughts they want to share with us before we break for lunch?

3:10:06 B. Whitnah — Can I just follow up on the last thing that Mr. Zuercher talked about. You asked Mr. Zuercher why their firm does the work and it never really occurred to me. You must know why we do it. It is certainly not the money. I may be off a little bit in this figure but I don't think it is far off. Ten percent of the population commits 90 percent of the crimes. That 10 percent of the population is also the lowest people in our socio-economic scale. The reason that they commit the crimes is not because poverty equals crime and crime equals drug use. It is not drug use equals crime and poverty. It is faulty thinking that leads to all three of those things. It is inability to make good decisions. Whether it is lack of education or genetics or whether it is learning from their families. Whatever it is, the idea in our society is we benefit from a good strong police force that keeps this social veneer together, but the police left unrestrained, we know where that leads. Every one of the defense attorneys that I talk to - the reason that they believe in indigent defense is because we want to keep this a country where we are happy to live, where the police don't kick in our doors. This is the battle line. This is where we are the ones who help to keep the police in the place that they should be which is protecting us and not taking advantage of us.

3:12:05 Chair Ellis — Very well said. On that note, tell me if we are okay here, Ingrid. Recess for lunch now and then we will do the budget after lunch.

3:12:18 I. Swenson — That would work, Mr. Chair, except the lunch isn't quite here. They were going to bring it at one so maybe we should do the budget piece now. I am sorry if you are all hungry.

3:12:31 P. Ozanne — Mr. Chair, short-term memory, my age is setting in. Would you remind me of the process now? We have taken testimony. We have got a report. When do we discuss the report?

3:12:50 Chair Ellis — We could do that now. The more usual time is at our next meeting we do discuss what we think we have learned here.

3:13:00 P. Ozanne — That will be another challenge to my memory.

3:13:03 Chair Ellis — That is why God invented minutes.

3:13:06 P. Ozanne — And I used to do them. I remember.

3:13:14 Chair Ellis — We do a revised report after that.

3:13:14 K. Bardizian — If it is okay I would like to add one thing that I forget to mention earlier. I think I went into private practice in 1977 and at that time the bar had a recommended fee schedule of $40 an hour. Indigent defense was paying $35. So you remember that? I am not trying to whine. If you want to do this kind of work it has just gotten increasingly difficult unless you can work for a PD's office. I am doing less civil work than I did a few years ago because this is what I would like to do. At this age in my life I should be able to.

3:14:07 S. McCrea — You are not whining. We need this input because it helps us to document the case.

3:14:12 K. Bardizian — The main thing is to somehow get it into the legislator's head. You might mention that. Until the restraint of trade issue came up that's the way it was. That was the recommended fee schedule.

3:14:26 P. Ozanne — What would be of help to you and us especially - and we have tried this over time - in rural areas where people know their legislators and legislators have more clout than maybe their numbers in terms of their constituents...

3:14:48 K. Bardizian — I would hope so. Have you ever seen that map of Oregon? The great void. I didn't mean to be disrespectful.

3:15:00 Chair Ellis — Where Peter is headed is don't be shy talking to legislators from here.

3:15:18 G. Kiyuna — Mr. Chairman, I would be remiss if I didn't pass on this little tidbit. Well, it is not a little tidbit. I recently had a Measure 11 trial that was very involved. My client didn't speak any English. Measure 11 and five other counts. The DAs and DHS came at us hard. You know we were able to get every expert that we needed from a polygrapher who was extremely high quality. This gentlemen had a contract with the U.S. State Department. They sent him to El Salvador so that they would teach those people to a polygraph rather than torture. We got a psychologist to indicate that my client didn't have problems. We got Bill Brady because it was a burn case. We got a lab expert, Mike Howard, who ran the Deschutes Crime Lab for many years. We got a certified court interpretrator that we needed because the detective came up with this written transcript that was shaded in certain areas. When there is so much at stake and you have a client that is absolutely courageous and absolutely innocent to be able to fall back and request and receive these resources is invaluable.

3:17:33 Chair Ellis — Gary shared with me the outcome of this trial which was acquittal on all counts.

3:17:43 G. Kiyuna — We got an acquittal on all counts. They won't let it go. We are going to have to have a hearing in juvenile dependency court. They are still coming after us on this thing. What does it mean for my client, 18 years old, two children, it is everything. They are just wonderful, wonderful people. They not only have passed on thanks to us and everybody on our defense team, but they are actually appreciative of what resources were available. They indicated that they couldn't pay for any of that. We had to explain every step of the way which expert we thought we should have and why and why they were important. They are appreciative not just of the effort that we put forth on her behalf - when I say "them" I mean the family, but for a system as well. You are talking about young people most of them couldn't understand 20 words of English if you gave them a test.

3:19:30 Chair Ellis — Congratulations. That was a great outcome.

3:19:24 G. Kiyuna — For what it is worth, there are some things that work very well.

Agenda Item No. 7 — **Budget Update**

3:19:28 Chair Ellis — Kathryn, do you want to share with us thoughts on the budget update?

3:20:00 K. Aylward — Mr. Chair, I feel as if I have to say a few words about some of the comments you just heard. It was surprising to me and actually quite upsetting. Fortunately I always have someone else in the room when we have these conference calls so I have someone else to say, "What are they talking about?" You heard that the consortium idea was forced down their throats. Not at all. We actually had gone as far as to prepare separate agreements with each of the entities when Gary Kiyuna called our office and said, "You know what? We were all just down at the

diner and we are thinking a consortium would be a good thing." We were like, "great, that's wonderful." We suggested it and it made sense.

3:20:47 Chair Ellis Apparently Ken Bardizian wasn't at the diner.

3:20:51 K. Aylward As far as characterizing the negotiations as talking down to them, I don't believe that I would have done that. It was an extremely difficult negotiation. There are five providers that have a contract with some component of Baker County and the caseload disappeared. Somebody was not going to continue to be a viable entity. That is partly why we suggested Baker County form a consortium. It just made more sense than having tiny little contracts. The difficult thing was the issue on conflicts and how strongly Mr. Cronin felt that this posed an ethical problem for him. We were prepared to do whatever would work for them. We did, in fact, continue to have a separate contract with Mr. Cronin because he didn't want to become a part of the consortium. From our point of view we provided as much flexibility and let them make choices as we could. I will speak to Mr. Cronin. As he said he is a big boy in negotiations, but I certainly did not mean to talk down to him.

The budget document in your materials is a spreadsheet that is a standard form. It will become a part of our budget notebook. It is a form prepared by Legislative Fiscal Office. The first page of it is the budget overall. The three different appropriations; the Appellate Division, CBS, and the Public Defense Services Account. Package 40 - we have talked about that before, that $19 million at the bottom of the first page. That is things like caseload growth, death penalty, mileage increases, personal services adjustments, and the appellate mandated caseload. At the bottom of the next page, in tiny print, you will see percentages. This is what LFO looks at. The percentage change from our current legislatively approved budget you will see is 28 percent, but that includes the policy packages. If you were to take those out our essential budget level is 9.8 percent more than our current budget level. The next pages actually mimic the spreadsheet and they are by divisions. You will see Appellate Division and then the account and then CBS. As I said overall it is a 9.8 percent increase. For the appellate division it is a 24.7 percent increase and that is principally because in their essential budget level they are adding attorneys and staff to handle increasing caseload. For the Public Defense Services account it is 9.1 percent increase and for CBS it is 7.7. I find those percentages a little more useful. If I realized in advance I probably would have put them in the information to you. The other thing from our telephone conference was the decision to have Policy Option Package 100 be – we had talked about how we would include quality in juvenile dependency representation. We said, "Well, we can address caseload. We can address compensation." What the Commission decided to do was to address the caseload issue. We had to figure out exactly how bad is the caseload situation. As you know, there isn't any kind of guideline for juvenile dependency matters. There is for delinquency matters. People say 250 cases a year. Our RFP used to limit people to 200 felonies per year, 400 misdemeanors, 250 delinquencies, and 300 civil cases. Those were based on ABA Standards. We thought, "If there is no yardstick how do we figure out how much extra caseload people are taking now?" We had done this exercise before regarding criminal caseloads and arrived at the figure of 30 percent more caseload than they should be handling. I think it is reasonable to assume that if you have an office that handles both criminal and juvenile, if your criminal people are overloaded by 30 percent; it is highly likely that your juvenile people will also be. You are not going to run an office where these people are overworked and these don't have enough to do. You are going to shift resources until everyone is equally overworked. I think that 30 percent is realistic. That is how we arrived at the figure of $17 million for Policy Option Package 100. I think that is it. As far as our budget binder itself we were originally aiming for a target of September 1. We were hoping to bring it to you at this meeting for approval. That rapidly became unrealistic. The Judicial Department is setting a deadline of December 1 for themselves to submit their binders. We thought that rather than rush it with everything else that we have going on that we set that target back a bit.

3:26:36 Chair Ellis So are you going all the way to December?

3:26:41 K. Aylward No. I don't think so. We are going to have other things going on. I hope at the next Commission meeting that we will have a draft to provide you.

3:26:56 Chair Ellis Questions for Kathryn? Okay.

3:27:09 K. Aylward Thanks.

3:27:14 Chair Ellis Any other business to bring to the good of the order?

3:27:23 P. Ozanne Back to the hearing we just had recognizing that we are going to be discussing it, Mr. Chair. Clearly back when we started this process of regional reviews and when we hit a rural court, I think we said "underserved" was more appropriate term. I know I looked at the literature and there was nothing on this problem which is persuasive in the west. The problem being a lot of counties and a lot of space. I went to Montana. Montana was mentioned, and I went to Montana about five years ago. I think Montana is a little larger in square miles than Oregon. At the time it had 695,000 people. Two-thirds of the state looks like Grant County. I think we could probably say Wyoming, Idaho and a number of places. I wondered whether other people, and this goes to Judge Welch's comment and she mentioned Kentucky, in the IT area, there are probably other states that have looked at these issues. It seems like every proposal that we consider has some controversy. Whether it is subsidizing young lawyers and having more senior lawyers say, "What about us?" subsidize underserved areas. I am just thinking before we go very far down, if we do decide on some road to go down, whether it would be good to explore some of the other states. I appreciate how hard our staff works and how overworked they are and they probably didn't expect that I would immediately propose something.

3:29:23 Chair Ellis Most of this side of the table.

3:29:26 S. McCrea I thought he was going to volunteer to do the research?

3:29:32 P. Ozanne I'm thinking there are a number of resources in our public defense community that I have in mind, semi-retired or retired people who have quite a bit of expertise. I wonder whether it might be a good idea to contract with one or more of them. Maybe 10 or 20 thousand, you know, enough to do a survey and you would probably have to contact the counterparts in some of these states to see what they are doing. I know the legislature in Montana when I went to testify there was very concerned. They were starting a state system and I know they did set $80, as I heard later, but they were also thinking of a state funded circuit system, and I am not suggesting that because I know that is not popular, but to figure out a way for lawyers, like judges sometimes, to ride circuit. They have huge problems out in eastern Montana. I just wondered if we might want to plum the debts of other states for other ideas, or simply to confirm that they have no better ideas. Again, not to think about staff doing it but maybe we could find somebody in the public defense community with some expertise who has the time to contract with us.

3:30:55 J. Potter You said you had looked at some of the research and there is nothing out there already?

3:30:58 P. Ozanne Five years I was really surprised that there wasn't any literature that I could find. Maybe there is now. This has to come up in a lot of places. It has to come in places like Illinois where there is Chicago and then there is downstate. It must be a common issue. Part of it is the counties are left to their own devices in so many places with county funding. You have to look at some state systems.

3:31:37 Chair Ellis Does Spangenberg have any help they could spare?

3:31:34 P. Ozanne Yeah. We probably have some in state people that would be available.

3:31:42 I. Swenson Mr. Chair, if I could comment just briefly on that. There is a list serve among public defense providers. It is called the American Council of Chief Defenders and then NLADA, National Legal Aid and Defenders Association. Both have list serves and very often people in other jurisdictions are trying to answer these same questions, so there is a lot of conversation that occurs about what do you do about some of these issues. We are able to gather some data from time to time. I have a collection of these but very often with public defense it is a moving target. As soon as you inquire about hourly rates, for example, you realize that they have changed from six months' earlier. The whole system is under funded, rates have been cut, and the system is dramatically different from what you read about earlier. It is not something that you can compile and then feel confident that you can present as accurate data. There are currently crises, severe public defense funding crises, in at least half a dozen states where defenders are refusing to accept more cases on ethical grounds. The courts have not determined how to proceed in those circumstances. Systems are essentially collapsing in a number states. Presumably that will get addressed in some fashion, but putting together data that you can rely on is difficult. It is certainly worthwhile and I like Peter's idea of asking somebody knowledgeable about this area to do a comprehensive …

3:33:53 Chair Ellis It is the kind of thing a recently retired executive director of MPD could do. Any other thoughts at the moment? If not, I think under our protocol we would entertain a motion to adjourn the meeting and then resume at our retreat. I have been asking myself what is the difference between a meeting and retreat? As I understand it, retreats are public and they have to be open. It think it has to do with there is no action item at the retreat. It is supposed to be much more just discussion and no fixed agenda. Do I have it about right?

3:34:43 I. Swenson That is correct although we try to have an agenda in the sense that there are topics that you have indicated need to be discussed in this kind of environment.

3:35:00 Chair Ellis Our tradition is that providers and other interested people are all there and often speak so there isn't that much difference.

3:35:09 P. Ozanne My expectation of retreats here and in other groups like this is we are often looking out and hearing, and interchange is really valuable I find. But I have been on groups where you never get around to talking to each other. It is often prevented by the state's ethical rules. That is what I see about retreats, you get to talk among yourselves.

3:35:34 Chair Ellis Maybe we ought to reconfigure the furniture a little bit. Paul explained to me how the travel from Portland to Salem in the state van is done. The rule is that you can talk until you get to the freeway and then there is no discussion while you are on the freeway so you can all read. Hopefully, we won't hit any freeways. Is that a motion?

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

Attachment 2

OPDS's Draft Report to the Public Defense Services Commission on Service Delivery in Judicial District No. 24 (September 2008)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Grant and Harney Counties undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

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

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

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

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their

organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

   Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger

[3] Id.

law firms, but in which they no longer wish to practice law.

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus,

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

OPDS's Preliminary Investigation in Judicial District 24

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

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

On June 23 - 25 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in both Grant and Harney Counties. In addition to talking to PDSC's contractors in the district, they met with the Circuit Court judge and the two district attorneys. Telephone interviews were conducted after the visit with the Grant County Juvenile Department Director, a DHS representative from Grant County, Christie Timko, the CASA Direcotor for Grant and Harney Counties, a Grant County Deputy District Attorney, two Assistant Attorneys General and the CRB coordinator for both counties.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense systems in Grant and Harney Counties, and the range of policy options available to the Commission – from concluding that no changes are needed in these counties to significantly restructuring their delivery systems.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 24's justice systems could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Grant and Harney Counties.

OPDS's Findings in Judicial District No. 24

Judicial District 24

Judicial District No. 24 is comprised of Grant and Harney Counties. In 2005 the population of Grant County was 7,685 and the population of Harney County was 7,660. There are two courthouses in the district, one in Canyon City, just south of John Day (Grant County), and one in Burns (Harney County). The distance between the two courthouses is 68.3 miles. Video appearances by attorneys and in custody clients are common.

Judge William D. Cramer is the sole Circuit Court Judge in the district. Each county also has a justice court.

The two public defense contract providers in the district are Markku Sario and John Lamborn, of Mallon and Lamborn. Ken Bardezian from Baker County and other attorneys handle conflict cases in the district on an hourly basis.

Both counties were preparing to initiate drug courts beginning in July 2008.

Grant County

Canyon City is the county seat of Grant County. The primary industries in the county are forest products, agriculture, hunting, livestock and recreation. More than 60% of the land is publicly owned. Grant County was not an "O&C" county but did receive federal forest payments. The loss of those payments represented a 22% reduction in the county general fund and a 73% loss in its road fund.

Ryan Joslin is the District Attorney. His only deputy left at the end of July when the domestic violence grant that helped fund his position expired[4]. In general, he expects the caseload to remain flat even though, over time, the population of the area continues to decline. Recently Mr. Joslin has been filing more misdemeanor cases in the Justice Court and fewer in the Circuit Court[5].

The Grant County drug court will have a capacity of 12 clients and will focus on persons charged with drug offenses and other felonies motivated by drug use. It is intended to be a court for high-risk offenders.[6] Although only out-patient drug

[4] He has been hired as a deputy district attorney in Morrow County.

[5] OPDS funds public defense representation at the trial level only in Circuit Court matters. ORS 135.055. Attorneys reportedly receive $60 per hour for justice court public defense representation.

[6] The DA will extend a plea offer to drug court candidates instead of requiring admissions to all the pending charges as is done in Umatilla County.

treatment is available in the county, the drug court has received a grant which will enable it to provide funding for residential treatment outside the county.[7]

Mr. Joslin noted that there is no early disposition program in his county because there is no lack of jail space. The county had previously rented beds to the state and to the federal government but these contracts are expiring.

Mr. Joslin said that his office tries a couple of criminal cases a month.

Ken Boethin has been the Director of the Grant County Adult and Juvenile Parole and Probation Services Department for many years. He would like to retire but the county has been unable to find a replacement so he agreed to stay on. He supervises one adult probation officer, a part time juvenile officer and two staff persons. His office prepares all of the paperwork in juvenile dependency and delinquency cases as well as probation violation cases. There are only 14 to 20 delinquency cases filed per year. Almost all of these youth have appointed attorneys. The department handles most referrals informally. The juvenile department also prepares all the paperwork in juvenile dependency cases. The court appoints counsel in all of these cases as well, for both children and parents. According to Judge Cramer there are a lot of children-per-1000-population in the county so the juvenile caseload is demanding. Less than half the time is court staff able to advise attorneys of shelter hearings in time for them to appear.

The Department of Human Services has experienced a high staff turnover rate in Grant County. Jan Keil is the current supervisor of that office. According to a number of reporters the agency is not held in high regard in the county as the result of events that occurred in the past and have not been forgotten. Many people feel that they have no one to go to with complaints or to get help.

Christie Timko is the CASA Director for Grant and Harney counties. She has nine CASA volunteers in Grant County. She is also the former District Attorney of Grant County. Travel time is a major issue for anyone who works in the Judicial District 24. In the winter it can take two hours to go from Canyon City to Burns and there is no cell phone service in the area to allow people to make better use of their travel time.

Harney County

Burns is the county seat of Harney County. The primary industries in the county are forest products, manufacturing, livestock and agriculture. When the federal forest payments ceased, the county lost only 3% of its general fund revenue but 70% of its road fund revenue.

[7] At a meeting in late 2008 or early 2009, the Commission will be reviewing drug court models from around the state and the role of defense counsel in those courts. Based on its review, the Commission may wish to establish guidelines for defense counsel in these cases.

Tim Colahan is the District Attorney of Harney County. He has been with the office for 21 years and has one deputy. He says the county is experiencing some growing pains with people moving in from Bend and Prineville primarily. He files all misdemeanors that don't involve domestic violence in the county justice court. When the current full time justice of the peace retires it will be appropriate to consider adding a second Circuit Court judge in the district.

Currently, there is a "minimally adequate" number of public defense attorneys who have to split their time between the counties. Even when there is pro tem judge time available the attorneys are not able to cover cases in two courts. The low number of attorneys presents a real challenge. The juvenile dependency caseload has increased in the county. The district attorney's office has always appeared in these cases. Now they are getting a small amount of compensation from the state to support them in this role. Attorneys are now appearing at CRB hearings more often and this has been a positive development.

Mr. Colahan said that funding for the Harney County Sheriff's office has been fairly stable. The sheriff also administers parole and probation services.

Public defense attorneys appear at arraignments when they are able to and at shelter hearings more often in Harney than in Grant County because the court is able to provide more timely notice in Harney County.

The Department of Human Services in the county is considered to be an effective office with experienced caseworkers who have good working relationships with the public defense attorneys.

Christie Timko has thirteen CASA volunteers in Harney County. She says the dependency caseload has been declining because DHS is removing fewer children than in the past.

Ms. Timko served as a deputy district attorney in Harney County before she became the Grant County District Attorney. She believes that another public defense attorney is needed in Harney County.

Public Defense Contractors

Markku Sario. Mr. Sario is an attorney in private practice with an office in Canyon City. Although he considered hiring an associate, he was not able to do so and, instead, has hired a non-lawyer assistant to attend CRB hearings and handle other tasks. He handles most case types in both counties. He receives one rate for Grant County cases (where his office is located) and a different and higher rate for Harney County cases. Since the justice court in Harney County handles most of the misdemeanor matters, the cases in the circuit court there are mainly felonies. Mr. Sario is also the defense attorney for both of the new drug

courts. His contract provides for representation in 204 Grant County cases per year and 120 Harney County cases.

Mallon and Lamborn, PC. John Lamborn handles the great majority of public defense cases in Judicial Distrct 24 since Gordon Mallon devotes most of his time to his death penalty contract. The firm currently has two members and maintains its office in Burns. Gordon and Mallon gets a higher rate for cases in Grant than in Harney County. The firm has contracted to handle 180 cases in Harney County and 48 in Grant.

Mr. Mallon noted that the cost of travel is a major issue for attorneys in this part of the state. He also said that as the current generation of lawyers retires new associates will need to be brought in and trained even if there are not a sufficient number of cases to provide them with full caseloads as they learn the practice.

In addition, as noted above, there are attorneys from other areas who are regularly appointed to handle cases in Judicial District 24.

Comments on Quality

Although the focus of this review is on the structure of the public defense system in Judicial District 24, quality of representation is an important measure of how well the system is working particularly where, as here, quality is very much affected by the lack of a sufficient number of attorneys.

The following comments were provided by one or more of the persons interviewed and represent only a summary of the information provided.

One reporter said that all of the attorneys are doing a pretty good job but they do not put in the time that is needed on their cases.

Some interviewees said they had no difficulty contacting attorneys, others said they could not get them to return their calls.

Other comments were: Attorneys are always pressed for time. They are so overworked they cannot give a case the attention it needs. Some are very good trial lawyers but there are very few trials. Some attorneys are unprepared in criminal cases. Some do the best they can but are just too overworked. There is one hourly attorney from outside the county who should not be permitted to handle public defense cases. He is incompetent. There was an hourly paid attorney who appeared in Grant County recently and provided very high quality representation – he was described as “a consummate professional.” Attorneys are clearly frustrated by the number of cases they have. All are stretched thin in their criminal and juvenile practices. One attorney was said to do good work but lacked the training and resources to provide the quality of work that is the norm in other counties. One of the attorneys is prepared 99-100% of the time but

juvenile work is not his preferred area of practice. There are no juvenile law specialists in the area. Attorneys are not meeting with child clients in dependency cases or delinquency cases. One person's biggest frustration is that most of the lawyers never meet with child clients at all, even over the course of multiple years of representation. Another said that when they represent children most attorneys have done nothing but read the DHS court report and often say nothing in court. Some are not prepared to represent parents either and their clients are confused about what is happening in their cases. Juvenile dependency cases are not a priority for these lawyers.

Responses to OPDS's 2007 Public Defense Performance Survey in Judicial District 24 included similar comments by some of the same reporters. In addition, it included the following statements:

"I believe the quality of representation will increase proportionately with an increase in compensation of the defense attorneys. The dollars paid to these contractors don't allow adequate time to be spent on each case, and ethics aside, it seems unrealistic to expect adequate time to be spent on each case when the attorney is not appropriately compensated."

While compensation was increased under the current contract, the increase does not appear to have been sufficient to address the needs reported in 2007.

OPDS's Recommendations for Further Inquiry at PDSC's
August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Grant and Harney Counties in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Judicial District 24.

1. Need for Additional Attorneys

Although not unique to Judicial District 24, the scarcity of attorney resources is probably as great in Judicial District 24 as anywhere in the state. As one person noted in response to the 2007 survey:

> "I am very concerned in both counties that there is an insufficient number of attorneys to do the required work. We need the assistance of the commission in recruiting attorneys to do work here in our counties. …. I am very concerned that even the current contractors and att[orney]s won't continue to take cases unless there is a real and substantial raise in their wages. This latter point may be my greatest concern for the criminal and juvenile systems and their efficient functioning."

Judge Cramer told OPDS that the system is working now because the attorneys are experienced but the number of available attorneys continues to go down and it is very hard to bring in new attorneys. Fluctuation in the caseload, the need for attorneys to handle matters in other counties, and attorney vacations make scheduling very difficult. The court is unable to use much pro tem time because of the limited availability of the attorneys. There is probably not enough civil work to supplement another attorney's practice. The attorneys should receive enough for their public defense work so that they don't have to do other things.

The problem described by Judge Cramer and others is not new. In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered."

> The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. …. In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

2. Representation in Juvenile Cases

In both delinquency and dependency cases, juvenile system representatives noted significant deficits in representation being provided to youth, children, and parents in Judicial District 24. As has been noted in previous staff reports, OPDS believes the training tools needed for high quality representation are available to lawyers in all parts of the state. There are frequent CLE events, some offered without cost, that focus on juvenile representation. There are websites and list serves. There is a bi-monthly newsletter sent to all OPDS contractors devoted to developments in juvenile law. OPDS's general counsel is available to work with providers to help them identify their particular training needs and available training options. In the most recent contract negotiation period, OPDS outlined for all contractors the expectations of attorneys representing children. (See Exhibit A, "Role of Counsel for Children.") Although as one commentator noted, additional compensation is going to be necessary to achieve any improvement in the quality of representation, assuming additional funds were available, how could the commission ensure that improvement would actually occur in the representation provided in these cases? Should it consider tying future rate increases to conformance with established performance standards? Should it consider mandatory CLE credits?

Summary of Testimony at August 14, 2008 Meeting of the
Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial Distrcit 24) provided written testimony (Exhibit A). He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the

current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately $3,000 which would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to make it necessary to open a new office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to

month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. Defense attorneys do better work if they can focus on criminal cases. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often

than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges $90 per hour for private cases and is paid $28 per hour on public defense cases. Most investigators charge between $65 and $75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike Gordon Mallon's experience in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. If takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUII cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was $1,903. Insurance coverage for her employee would have cost her $700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

A Service Delivery Plan for Judicial District 24

[This portion of the report will be completed after the PDSC has developed its service delivery plan for this district.]

Exhibit A

OREGON CIRCUIT COURT JUDGES ASSOCIATION

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August 14, 2008

STATEMENT BEFORE THE

OREGON PUBLIC DEFENSE SERVICES COMMISSION

-IN BAKER CITY-

Chairman Ellis, commission members, and Ms. Swenson, My name is Bill Cramer. I am the presiding judge for the 24th Judicial District, which consists of Grant and Harney Counties.

I want to sincerely thank each of you for your willingness to serve on this commission and for allowing me to appear before you. I recognize it is a difficult and ever ongoing task to educate the public and legislative branch of the constitutional need to provide adequate legal representation for those facing state initiated proceedings, and who are indigent. Since preparing the initial draft of my remarks, I received Ingrid Swenson's draft report to the commission. It ably addresses my concerns, and I have reduced my own comments accordingly.

I am here to speak briefly about my concerns for my rural, or better classified, as frontier district.

LONGER TERM CONCERNS

At, present those whom are indigent and, needing legal counsel are receiving adequate representation. Primarily two contractors provide these services. Markku Sario is the primary provider in Grant County and "first" conflict provider in Harney. Mallon and Lamborn, P.C., primarily John Lamborn, provides the alternate services for Harney and Grant. Additional coverage is provided by attorneys traveling over a hundred miles (usually) for cases needing additional attorneys or where the primary providers have ethical conflicts.

However, having one attorney in each county creates scheduling issues. Attorneys need vacations, may take civil cases and have other family obligations. Incarcerated defendants, shelter care hearings, release revocations, and similar proceedings are time sensitive, and may need to be addressed before that absent attorney returns. It is frustrating to schedule around cases in other court jurisdictions. Ideally these offices would have multiple attorneys who could cover each other's schedules. Better would be having more local attorneys, perhaps in a consortium model that could and would take cases.

To add context, while the 24th Judicial District is a one judge district, when accounting for case types under the weighted case-load studies, this district ranks high, usually in the top two, of busiest districts based upon judge availability. That translates into a need to keep the docket moving. (*Exhibit 1, 2005 Statistics*) That also leads to another issue involving attorney availability.

Again because of essentially being limited to one attorney in each county who provides services for the county in which they reside, and the "first conflict" cases in the other county, this court is unable to take advantage of authorized pro tem judicial resources.

As part of the Willis Committee study and recommendations, the judicial branch has authorized three to four weeks each year of pro tem service. This is in addition to any other such coverage that I would otherwise receive, when I am personally gone. This time would normally allow cases to be set in both counties simultaneously, with a pro tem in one of the counties and myself in the other. This would relieve some of the court docket pressures; however, most cases are criminal and juvenile cases and the indigent provider attorneys can only appear in one of the courts at a time.

Perhaps of greatest concern is the loss of attorneys in our area. Law firms have shrunk in size or disappeared. I am concerned that when the present contractor, indigent providers, no longer do this work, that there will be no one to replace them. Obviously that would be a public safety crisis and in effect shut down the processing of cases requiring counsel. I am asking that this commission begin considering how to respond and fill this need.

It may involve assisting the current firms to hire, train and qualify additional counsel within their firms to assume these services in the future; or setting up public defender offices, managed by this commission, in each of the counties. It's an issue that may need to be concretely addressed within the next five years.

OTHER CONCERNS

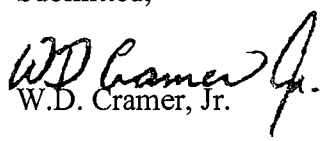
Fair, reasonable, adequate compensation is an immediate, as well as long term issue. To attract bright, competent attorneys to this field of law benefits the community. Good, competent attorneys mean efficiency in representing clients, from quicker more direct negotiations, to better tried cases and hearings, less appeals, less post-conviction cases, and a resulting increase in the fairness and integrity of the judicial system. These attorneys represent children in dependency cases, as well as parents, and criminal case defendants.

Though anecdotal, I believe the system is saved significant cost when competent, qualified counsel is involved. I know there have been token pay increases, but believe strongly they have been wholly inadequate and that the level of compensation is one of the substantial factors in making it difficult to bring attorneys to the rural areas for this legal work and for existing firms to hire associates to assist. I should comment that pure case load contracts have some weakness in our particular circumstance. As stated earlier, based upon judge availability, we are one of the busiest judicial districts. At the same time, case loads can fluctuate

significantly from year to year, up to 15%. Contracts that recognize and account for these peaks and valleys to enable firms to consider hiring associates are needed. This would require contracts that have terms for more years, subject to state funding limitations.

My analysis may be over simplistic, but the trends and concerns are real. Again thank you and I would attempt to answer any questions you might have.

Submitted,



W.D. Cramer, Jr.

Joint Committee on Trial Court Judicial Resources
Circuit Courts by Rank
(Based on Need Predicted by Judicial Workload Assessment Model)

District	2003 W*F	2004 W*F	2005 W*F	2-Year Trend	Authorized Positions as of 1/1/07	Supply	Predicted Demand	Predicted Need (Difference)	Demand to Supply	Rank
24 Grant/Harney	50,866	61,987	55,926	9.9%	1	0.63	0.86	0.23	37%	1
3 Marion	1,235,777	1,325,578	1,353,966	9.6%	14	13.80	18.51	4.71	34%	2
16 Douglas	415,826	408,875	471,964	13.5%	5	4.86	6.51	1.65	34%	3
20 Washington	1,223,291	1,242,311	1,315,281	7.5%	14	13.80	17.97	4.17	30%	4
1 Jackson	770,199	830,453	815,352	5.9%	9	8.72	11.27	2.55	29%	5
5 Clackamas	984,712	946,021	1,003,250	1.9%	11	10.80	13.70	2.90	27%	6
14 Josephine	341,103	328,894	349,989	2.6%	4	3.83	4.83	1.00	26%	7
9 Malheur	150,827	142,780	160,057	6.1%	2	1.84	2.29	0.45	24%	8
23 Linn	425,504	422,724	442,281	3.9%	5	4.86	6.03	1.17	24%	9
4 Multnomah	3,477,826	3,279,169	3,328,111	-4.3%	38	37.68	45.47	7.79	21%	10
6 Morrow/Umatilla	329,499	365,952	391,396	18.8%	5	4.71	5.47	0.76	16%	11
17 Lincoln	197,045	225,949	237,761	20.7%	3	2.86	3.29	0.43	15%	12
12 Polk	197,829	231,302	239,398	21.0%	3	2.86	3.28	0.42	15%	13
22 Crook/Jefferson	192,687	186,559	221,079	14.7%	3	2.69	3.04	0.35	13%	14
10 Union/Wallowa	146,207	137,150	137,752	-5.8%	2	1.76	1.96	0.20	11%	15
13 Klamath	372,550	392,894	386,861	3.8%	5	4.85	5.37	0.52	11%	16
2 Lane	1,135,666	1,102,484	1,131,271	-0.4%	15	14.80	15.47	0.67	5%	17
11 Deschutes	496,846	503,919	518,050	4.3%	7	6.86	7.14	0.28	4%	18
8 Baker	56,815	55,860	58,630	3.2%	1	0.84	0.84	0.00	0%	19
21 Benton	197,330	200,866	204,836	3.8%	3	2.86	2.81	-0.05	-2%	20
25 Yamhill	283,904	283,986	273,552	-3.6%	4	3.86	3.73	-0.13	-3%	21
19 Columbia	174,776	172,657	191,898	9.8%	3	2.86	2.64	-0.22	-8%	22
15 Coos/Curry	376,736	365,481	383,248	1.7%	6	5.82	5.34	-0.48	-8%	23
7 Hood River/W/G/Wh/S	222,032	229,848	214,857	-3.2%	4	3.55	2.95	-0.60	-17%	24
18 Clatsop	174,295	165,847	169,657	-2.7%	3	2.86	2.34	-0.52	-18%	25
27 Tillamook	105,610	97,168	103,831	-1.7%	2	1.86	1.43	-0.43	-23%	26
26 Lake	34,830	33,882	31,440	-9.7%	1	0.84	0.44	-0.40	-48%	27
TOTALS	*13,770,588*	*13,740,596*	*14,191,694*	*3.1%*	*173*	*167.56*	*194.98*	*27.42*	*16%*	

Notes:

1. Case weights (W) are from the Oregon Circuit Court Judicial Workload Assessment Model developed by the National Center for State Courts (NCSC).
2. Filings (F) are from the Statistical Report Relating to the Circuit Courts of the State of Oregon for 2003, 2004, and 2005.
3. "Supply" is the number of positions authorized effective January 1, 2007, less deductions to account for time lost to a district because of demand not directly related to case processing.
4. "Predicted demand" is the number of FTE judicial resources needed to process a district's case-specific workload at 2005 filing rates as predicted by the NCSC Model.
5. The percentage of "demand to supply" is an indicator of a district's need relative to its current judicial resource "supply."

OSCA/mwm/4-07-06

EXHIBIT 1

Attachment 3

OPDS's Draft Report to the Public Defense Services Commission on Service Delivery in Baker County (September 2008)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Baker County undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

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

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

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

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their

organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

   Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger

[3] Id.

law firms, but in which they no longer wish to practice law.

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus,

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

OPDS's Preliminary Investigation in Baker County

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

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

On June 23 - 24 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in Baker County. In addition to talking to four of PDSC's contractors in the county they met with District Attorney Matt Shirtcliff. Telephone interviews were conducted after the visit with the Judge Gregory Baxter, the Juvenile Department Director, the Citizen Review Board coordinator for the County and the Assistant Attorney General assigned to the area.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense system in Baker County, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring its delivery systems.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Baker County's justice system could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Baker County.

OPDS's Findings in Baker County

Baker City is the county seat for Baker County. The county population in 2005 was 16,500. Although the county previously received federal timber funds, these

were used in the past for roads rather than for public safety. Although the termination of these funds will not immediately affect funding for the county's public safety agencies, ultimately the county will have to allocate more of its general fund dollars to roads, limiting the amount available for other services.

The Circuit Court

Judge Gregory Baxter is the only circuit court judge for the county. There is a justice court which handles most misdemeanors except those involving domestic violence and non diversion eligible DUIIs. It was reported that some cases that were being filed in the justice court are now being filed in the circuit court.

The county has an adult drug court that currently serves approximately seventeen high risk clients. The county is also starting a juvenile drug court targeting fourteen to sixteen and a half year olds. It expects to serve ten to twelve youth at a time. The combined drug courts are expected to have a total of approximately 50 clients when they are both at capacity. Both out-patient and in-patient drug treatment are available in the county but they generally have to use some out-of-county beds as well. Access to mental health care is limited.

District Attorneys Office

Matt Shirtcliff is the District Attorney for Baker County. He currently has two deputy positions, one of which is open. It has been difficult to retain deputies. They generally come from elsewhere and stay for only two or three years before moving on. The office is able to offer a starting salary of $45,00 to 48,000. Baker County contracts with the District Attorney to provide a deputy to handle justice court cases.

Criminal Case Processing

In-custody criminal arraignments are generally handled by video. Attorneys are not present for arraignments. Plea hearings are scheduled four to six weeks after arraignment. Unless there is going to be a guilty plea defendants generally appear at the plea hearing by video as well. The defense attorney is generally in the courtroom rather than with the defendant in the jail. Sentencing usually occurs at the same time as the plea. Trials are set approximately six months after arraignment. Motion hearings are scheduled as needed.

The manager of the parole and probation department is Will Benson. Two of the special programs offered by the department are the "Mile Program" – the Managing Independent Living Effectively Program, which offers classes to assist offenders in avoiding recidivism. The second program is a grant funded transitional housing program for persons released from jail or prison. Rent is waived while the individual finds employment and longer term housing. Probationers may also use the residence for a minor daily or monthly fee.

Juvenile Case Processing

Dependencies:

The Juvenile Department in Baker County prepares most of the documents in dependency cases. They draft petitions that are then reviewed by the district attorney. Parents in dependency cases are notified to appear for shelter hearings a half an hour early in order for them to be able to confer with counsel before the hearing. Attorneys are appointed in virtually all juvenile dependency cases but there are not many dependencies filed, usually only one or two a month. The county had a Juvenile Court Improvement Project (JCIP) model court program but it was recently discontinued because the judge and the other members of the team, including the attorneys, felt that they had done everything they could to accelerate case processing and although the average period is still more than 90 days, they don't believe they can improve significantly on that number.

Delinquencies:

Delinquency preliminary hearings occur on Mondays unless the youth is in custody. Youth are summonsed to court with their parents. Attorneys are not present for these hearings. The Juvenile Department does not generally meet with youth or their parents until after counsel has been appointed and can be present. Some parents contact the department before the preliminary hearing and sometimes resolve cases at that stage, without the involvement of counsel. There is no detention facility in the county. Youth must be transported to Pendleton if they are held. Formal petitions are not usually filed against youth under 12. Even cases involving alleged sexual misconduct are diverted if parents are supportive of appropriate treatment. The District Attorney generally decides which youth will be treated informally. In alleged sex abuse cases involving youth between fourteen and sixteen formal petitions are generally filed.

There is reported to be no gang involvement by youth in Baker County.

The District Attorney serves as the Juvenile Department Director but Stacy Erickson manages the day-to-day operations of the department. She and two other counselors supervise youth offenders and prepare most of the petitions, summonses and other documents. She reports that her department handles a lot of cases informally, rarely filing a petition in first-time misdemeanor or non-person felony cases.

PDSC Contract Providers

Two providers contract to handle public defense cases only in Baker County. **Dan Cronin** contracts for 122 juvenile and drug court cases per year in Baker

County. His office is in John Day and he used to be the primary public defense provider there but because the only circuit court judge in the county is his brother-in-law he now contracts with PDSC for cases in Baker County. He also handles conflict cases in Malheur County. In the past he handled mostly criminal cases but his current contract provides only for juvenile and drug court cases. He reports that the rate he receives for drug court t cases is not sufficient to cover the many appearance that are required in these matters, over what is often an eighteen month period.

Mr. Cronin is concerned that public defense in the area is "disintegrating." He has been trying to hire an associate for ten years but can't compete with the district attorney's salary. He has seen a gradual reduction in the number of attorneys wiling to practice in the area. Travel is a problem; maintaining adequate contact with in-custody and juvenile clients is also a problem. Ideally each of the eastern Oregon counties would have an additional full time defender.

The **Baker County Consortium** is a new consortium. It contracts for a total of 530 criminal and juvenile cases per year. Consortium members are Ken Bardizian, Gary Kiyuna, Charles Simmons (PCR cases only), Krishelle Hampton and Bob Whitnah.

Ken Bardizian, although part of the consortium, also handles cases in Grant, Malheur and Union Counties. Mr. Bardizian finds that there are some disadvantages to consortium membership including being paid only once a month for consortium cases and being entitled to payment only once when conflicts require substitution. He thinks Baker County is better served by the current system with resident attorneys handling most of the cases. Mr. Bardizian also contracts with Baker County to handle justice court cases. He would like to be able to hire a half-time associate.

Three other providers contract for cases in both Baker and Malheur Counties. **Michael Mahoney** handles mainly PCR cases (78 per year) in both counties. **David Carlson** handles criminal and juvenile cases in both counties. He contracts for a total of 501 cases per year. **Coughlin Leuenberger and Moon** contract for a total of 196 cases per year in the two counties. In Baker County Chris Zuercher handles most of the public defense representation for the firm. Mr. Zuercher was a deputy district attorney in the county before being hired by Couglin, Leuenberger and Moon.

Comments regarding structure and number of public defense contractors

Judge Baxter reported that, structurally, the current system is working well. He likes to have providers from the immediate area if possible. He is concerned when a large volume of cases is moved from the justice court to the circuit court as has been happening recently. Other members of the court staff indicated that

they do not have enough local attorneys and need more due to the high number of conflicts in juvenile cases. The district attorney said that he believes clients would benefit if the lawyers didn't have to handle civil cases since these cases limits the time they have available for their public defense clients.

The CRB coordinator said that a major issue for attorneys is the distance they have to travel within the county to visit with their clients (or clients must travel to visit with them.) A lot of attorneys appear for review hearings by telephone.

One commentator said a lot of matters are handled by phone in Baker County and that it is never the equivalent of having people actually present in the courtroom.

Comments regarding quality of representation

Judge Baxter said he is very satisfied with the quality of representation being provided. Some of the attorneys do excellent work, others very good. He has confidence in all of them. He was pleased to see that more experienced lawyers are making themselves available to advise the newer attorneys.

The defense and prosecution are said to work well together and the district attorney had very positive comments about the work of the public defense providers.

According to the Citizen Review Board (CRB) coordinator attorneys have recently started meeting with clients before CRB hearings. Some attorneys are excellent advocates, others provide minimal representation but, unlike what occurs in other parts of the state, all of the attorneys participate in CRB hearings and have had contact with their clients beforehand. They still need training about how to conform to the Oregon State Bar's Performance Standards[4]. On the whole she believes Baker County attorneys are stronger advocates than attorneys in the other counties with which she is familiar.

In juvenile delinquency cases lawyers are properly challenging competency to proceed in some matters. It was reported that in some alleged sex abuse cases they provide copies of psycho-sexual evaluations to the state even when they are harmful to the client. It is not clear whether such disclosure is made with the client's approval and in furtherance of the client's expressed wishes or as part of a best interest approach to representation.[5] A couple of the attorneys are so overwhelmed that they usually meet with their clients only 10 minutes before

[4] Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases, Oregon State Bar Indigent Defense Task Force, adopted by the Board of Governors September 15, 1996, revised May 2006.

[5] A "best interest" approach to representation in delinquency cases has been specifically disapproved by OPDS in the "Role of Counsel" document sent to all contractors in 2007, and attached as Exhibit A to this report.

court. Even if the case is resolved after these brief meetings, disposition cannot occur until a later date.

Attorneys do appear to be meeting with their dependency clients before court, including child clients.

One commentator said that most of the attorneys do not specialize in juvenile law and do not have the training or resources to do the same quality of work seen in other counties.

In OPDS's 2007 statewide quality of representation survey, respondents rated contractors fairly high in terms of legal knowledge, skill and training but lower when asked if their caseloads allowed them to devote appropriate time and resources to their clients. Overall respondents rated the quality of representation provided by one contractor as fair, one as good and two as excellent. In juvenile cases two were rated as fair and two as excellent. (The work of the attorney who handles only PCR cases was not addressed in the survey.)

OPDS's Recommendations for Further Inquiry at PDSC's
August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Baker County in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Baker County.

The structure:

The structure of the current system appears to be working satisfactorily for the court and for OPDS although at least one member of the newly formed consortium is dissatisfied with particular terms of the contract. The system combines maximum flexibility in the management of conflicts with the benefits of fewer contracts to manage and added oversight.

While the county lacks a public defender office to provide initial training for attorneys,[6] it does appear that experienced Baker County attorneys have been willing to provide information and advice to newer attorneys. OPDS's General Counsel is also available to assist new attorneys in all parts of the state to access the training that is currently available and to help plan new approaches to local and regional training.

[6] The principal obstacle to the creation of a public defender office in a county the size of Baker is the firm unit rule that would prevent attorneys in the office from representing more than one party in a juvenile case.

Need for Additional Attorneys:

A number of commentators noted a need for additional attorneys to handle public defense cases in the county. While the need may be somewhat less urgent in Baker County than in Judicial District 24 (Grant and Harney Counties), it is a region-wide problem and not a new one.

In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered."

> The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. …. In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

Summary of Testimony at August 14, 2008 Meeting of the
Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial

district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial Distrcit 24) provided written testimony (Exhibit A). He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately $3,000 which would allow the attorney to appear in court or confer

with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to make it necessary to open a new office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. Defense attorneys do better work if they can focus on criminal cases. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help

on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges $90 per hour for private cases and is paid $28 per hour on public defense cases. Most investigators charge between $65 and $75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike Gordon Mallon's experience in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters

internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. If takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUII cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was $1,903. Insurance coverage for her employee would have cost her $700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr.

Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

A Service Delivery Plan for Baker County

[This portion of the report will be completed after the PDSC has developed its service delivery plan for this county.]

Exhibit A

OREGON CIRCUIT COURT JUDGES ASSOCIATION

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Hon. Dan Harris, Vice President
Hon. Deanne Darling, Treasure
Hon. Tom Kohl, Secretary

August 14, 2008

STATEMENT BEFORE THE

OREGON PUBLIC DEFENSE SERVICES COMMISSION

-IN BAKER CITY-

Chairman Ellis, commission members, and Ms. Swenson, My name is Bill Cramer. I am the presiding judge for the 24th Judicial District, which consists of Grant and Harney Counties.

I want to sincerely thank each of you for your willingness to serve on this commission and for allowing me to appear before you. I recognize it is a difficult and ever ongoing task to educate the public and legislative branch of the constitutional need to provide adequate legal representation for those facing state initiated proceedings, and who are indigent. Since preparing the initial draft of my remarks, I received Ingrid Swenson's draft report to the commission. It ably addresses my concerns, and I have reduced my own comments accordingly.

I am here to speak briefly about my concerns for my rural, or better classified, as frontier district.

LONGER TERM CONCERNS

At, present those whom are indigent and, needing legal counsel are receiving adequate representation. Primarily two contractors provide these services. Markku Sario is the primary provider in Grant County and "first" conflict provider in Harney. Mallon and Lamborn, P.C., primarily John Lamborn, provides the alternate services for Harney and Grant. Additional coverage is provided by attorneys traveling over a hundred miles (usually) for cases needing additional attorneys or where the primary providers have ethical conflicts.

However, having one attorney in each county creates scheduling issues. Attorneys need vacations, may take civil cases and have other family obligations. Incarcerated defendants, shelter care hearings, release revocations, and similar proceedings are time sensitive, and may need to be addressed before that absent attorney returns. It is frustrating to schedule around cases in other court jurisdictions. Ideally these offices would have multiple attorneys who could cover each other's schedules. Better would be having more local attorneys, perhaps in a consortium model that could and would take cases.

To add context, while the 24th Judicial District is a one judge district, when accounting for case types under the weighted case-load studies, this district ranks high, usually in the top two, of busiest districts based upon judge availability. That translates into a need to keep the docket moving. (*Exhibit 1, 2005 Statistics*) That also leads to another issue involving attorney availability.

Again because of essentially being limited to one attorney in each county who provides services for the county in which they reside, and the "first conflict" cases in the other county, this court is unable to take advantage of authorized pro tem judicial resources.

As part of the Willis Committee study and recommendations, the judicial branch has authorized three to four weeks each year of pro tem service. This is in addition to any other such coverage that I would otherwise receive, when I am personally gone. This time would normally allow cases to be set in both counties simultaneously, with a pro tem in one of the counties and myself in the other. This would relieve some of the court docket pressures; however, most cases are criminal and juvenile cases and the indigent provider attorneys can only appear in one of the courts at a time.

Perhaps of greatest concern is the loss of attorneys in our area. Law firms have shrunk in size or disappeared. I am concerned that when the present contractor, indigent providers, no longer do this work, that there will be no one to replace them. Obviously that would be a public safety crisis and in effect shut down the processing of cases requiring counsel. I am asking that this commission begin considering how to respond and fill this need.

It may involve assisting the current firms to hire, train and qualify additional counsel within their firms to assume these services in the future; or setting up public defender offices, managed by this commission, in each of the counties. It's an issue that may need to be concretely addressed within the next five years.

OTHER CONCERNS

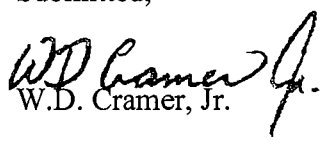
Fair, reasonable, adequate compensation is an immediate, as well as long term issue. To attract bright, competent attorneys to this field of law benefits the community. Good, competent attorneys mean efficiency in representing clients, from quicker more direct negotiations, to better tried cases and hearings, less appeals, less post-conviction cases, and a resulting increase in the fairness and integrity of the judicial system. These attorneys represent children in dependency cases, as well as parents, and criminal case defendants.

Though anecdotal, I believe the system is saved significant cost when competent, qualified counsel is involved. I know there have been token pay increases, but believe strongly they have been wholly inadequate and that the level of compensation is one of the substantial factors in making it difficult to bring attorneys to the rural areas for this legal work and for existing firms to hire associates to assist. I should comment that pure case load contracts have some weakness in our particular circumstance. As stated earlier, based upon judge availability, we are one of the busiest judicial districts. At the same time, case loads can fluctuate

significantly from year to year, up to 15%. Contracts that recognize and account for these peaks and valleys to enable firms to consider hiring associates are needed. This would require contracts that have terms for more years, subject to state funding limitations.

My analysis may be over simplistic, but the trends and concerns are real. Again thank you and I would attempt to answer any questions you might have.

Submitted,



W.D. Cramer, Jr.

Joint Committee on Trial Court Judicial Resources
Circuit Courts by Rank
(Based on Need Predicted by Judicial Workload Assessment Model)

District	2003 W*F	2004 W*F	2005 W*F	2-Year Trend	Authorized Positions as of 1/1/07	Supply	Predicted Demand	Predicted Need (Difference)	Demand to Supply	Rank
24 Grant/Harney	50,866	61,987	55,926	9.9%	1	0.63	0.86	0.23	37%	1
3 Marion	1,235,777	1,325,578	1,353,966	9.6%	14	13.80	18.51	4.71	34%	2
16 Douglas	415,826	408,875	471,964	13.5%	5	4.86	6.51	1.65	34%	3
20 Washington	1,223,291	1,242,311	1,315,281	7.5%	14	13.80	17.97	4.17	30%	4
1 Jackson	770,199	830,453	815,352	5.9%	9	8.72	11.27	2.55	29%	5
5 Clackamas	984,712	946,021	1,003,250	1.9%	11	10.80	13.70	2.90	27%	6
14 Josephine	341,103	328,894	349,989	2.6%	4	3.83	4.83	1.00	26%	7
9 Malheur	150,827	142,780	160,057	6.1%	2	1.84	2.29	0.45	24%	8
23 Linn	425,504	422,724	442,281	3.9%	5	4.86	6.03	1.17	24%	9
4 Multnomah	3,477,826	3,279,169	3,328,111	-4.3%	38	37.68	45.47	7.79	21%	10
6 Morrow/Umatilla	329,499	365,952	391,396	18.8%	5	4.71	5.47	0.76	16%	11
17 Lincoln	197,045	225,949	237,761	20.7%	3	2.86	3.29	0.43	15%	12
12 Polk	197,829	231,302	239,398	21.0%	3	2.86	3.28	0.42	15%	13
22 Crook/Jefferson	192,687	186,559	221,079	14.7%	3	2.69	3.04	0.35	13%	14
10 Union/Wallowa	146,207	137,150	137,752	-5.8%	2	1.76	1.96	0.20	11%	15
13 Klamath	372,550	392,894	386,861	3.8%	5	4.85	5.37	0.52	11%	16
2 Lane	1,135,666	1,102,484	1,131,271	-0.4%	15	14.80	15.47	0.67	5%	17
11 Deschutes	496,846	503,919	518,050	4.3%	7	6.86	7.14	0.28	4%	18
8 Baker	56,815	55,860	58,630	3.2%	1	0.84	0.84	0.00	0%	19
21 Benton	197,330	200,866	204,836	3.8%	3	2.86	2.81	-0.05	-2%	20
25 Yamhill	283,904	283,986	273,552	-3.6%	4	3.86	3.73	-0.13	-3%	21
19 Columbia	174,776	172,657	191,898	9.8%	3	2.86	2.64	-0.22	-8%	22
15 Coos/Curry	376,736	365,481	383,248	1.7%	6	5.82	5.34	-0.48	-8%	23
7 Hood River/W/G/Wh/S	222,032	229,848	214,857	-3.2%	4	3.55	2.95	-0.60	-17%	24
18 Clatsop	174,295	165,847	169,657	-2.7%	3	2.86	2.34	-0.52	-18%	25
27 Tillamook	105,610	97,168	103,831	-1.7%	2	1.86	1.43	-0.43	-23%	26
26 Lake	34,830	33,882	31,440	-9.7%	1	0.84	0.44	-0.40	-48%	27
TOTALS	*13,770,588*	*13,740,596*	*14,191,694*	*3.1%*	*173*	*167.56*	*194.98*	*27.42*	*16%*	

Notes:

1. Case weights (W) are from the Oregon Circuit Court Judicial Workload Assessment Model developed by the National Center for State Courts (NCSC).
2. Filings (F) are from the Statistical Report Relating to the Circuit Courts of the State of Oregon for 2003, 2004, and 2005.
3. "Supply" is the number of positions authorized effective January 1, 2007, less deductions to account for time lost to a district because of demand not directly related to case processing.
4. "Predicted demand" is the number of FTE judicial resources needed to process a district's case-specific workload at 2005 filing rates as predicted by the NCSC Model.
5. The percentage of "demand to supply" is an indicator of a district's need relative to its current judicial resource "supply."

OSCA/mwm/4-07-06

EXHIBIT 1

Attachment 4

OPDS's Draft Report to the Public Defense Services Commission on Service Delivery in Malheur County (September 2008)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Malheur County undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

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

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

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

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their

organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

   Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger

[3] Id.

law firms, but in which they no longer wish to practice law.

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus,

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

OPDS's Preliminary Investigation in Malheur County

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

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

On June 24 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in Malheur County. In addition to talking to two of PDSC's contractors in the county they met with Judge Patricia Sullivan. Telephone interviews were conducted after the visit with the District Attorney Dan Norris, with the Juvenile Department Director, the CASA director, the Citizen Review Board coordinator and the Assistant Attorney General assigned to the area.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense system in Malheur County, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring its delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Malheur County's justice system could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Malheur County.

OPDS's Findings in Malheur County

Malheur County is the second largest county in Oregon with 9,926 square miles. The total population of the county in 2005 was 31,800. It has three principal cities: Vale which is the county seat, Ontario which is the population center, and Nyssa. The principal industries are agriculture and ranching. The county has a large Hispanic population. In 2004 it was one of four counties in the state in which the Hispanic population exceeded 20% of the total population.[4]

The Circuit Court

There are two circuit court judges in Malheur County, Presiding Judge Burdette Pratt and Judge Patricia Sullivan. There is a justice court in the county but it handles only violations. The county also has a mental health court (located in the justice court) and a drug court. There are actually three drug courts – a small one for juveniles (three or four youth), a men's drug court and a women's drug court. Women's drug court clients often have open dependency cases as well. Clients in all of the drug courts are represented by counsel. There is also a deferred sentencing program in domestic violence cases. Clients in this program report monthly unless excused. They are not represented by counsel since no sanctions are imposed. A show cause order is issued if sanctions for non-compliance are being considered.

According to court staff approximately half of the persons who come before the court are Hispanic. Most of them are citizens and fluent in English but some are migrant workers who do not speak English and who may be undocumented. Only about 10% of the criminal cases require interpreters. There is a high percentage of court staff, of local agency staff and attorneys and their staffs who provide linguistically and culturally competent services to Hispanic clients. When Judge Sullivan was the district attorney for the county she obtained a grant to staff a diversion program for Spanish speaking defendants. The program significantly increased the success rate for Spanish speakers before the funding expired.

District Attorneys Office

Dan Norris is the District Attorney of Malheur County. Mr. Norris has four deputies. One deputy handles only juvenile dependency and delinquency cases. He does not have a retention problem because the county is able to provide adequate compensation. The starting salary is $53,000 plus benefits. Mr. Norris indicated he can recruit defense attorneys to a position in his office "at will."

[4] "Demographic and Economic Profile, Oregon," updated May 2006, Rural Policy Resource Institute.

PDSC Contractors

The Rader, Stoddard and Perez firm contracts for 1,476 criminal and juvenile cases per year.[5] There are currently four attorneys handling cases under this contract. Mark Rader is also a PDSC death penalty contractor. Manuel Perez is Spanish speaking and Steve Stoddard speaks some Spanish. The firm also has a Spanish speaking investigator.

Mr. Rader indicates that prison cases take more time than other cases and that a special rate of compensation might be in order. He also noted that passage of either of the ballot measures on the November ballot relating to property offenses would significantly increase the number of women in prison and might result in a corresponding increase in dependency cases.[6]

The firm is pleased to have found two new associates recently but is still seeking a third. It is difficult to compete with the district attorney and the State of Idaho for attorneys.

David Carlson is an attorney in private practice who contracts to handle 501 criminal and juvenile public defense cases a year in Baker and Malheur Counties. His office is in Vale.

Coughlin Leuenberger & Moon is a Baker City lawfirm that contracts for 196 criminal and juvenile cases per year in Baker and Malheur Counties. The principal attorney assigned to public defense cases in Malheur County is Doug Rock.

Mike Mahoney is an attorney in private practice who contracts with PDSC to handle 78 cases per year, 18 of which are juvenile cases and 60 post conviction relief cases.

Gary Kiyuna is a member of the Baker County Consortium but also handles cases on an hourly basis in Malhuer County. His office employs a Spanish speaking investigator. He reported that cases arising in the prison consume a lot more resources than other criminal matters. He explained that everything takes longer, including just getting into the prison to see the client.[7] Travel between

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[5] The contract also includes post conviction and habeas corpus cases in Umatilla County.

[6] Ballot Measure No. 61 would provide mandatory minimum prison sentences for certain theft, identity theft, forgery, drug and burglary cases. Ballot Measure No. 57, referred by the legislature as an alternative to Ballot Measure No. 61, would provide for enhanced sentences for drug trafficking, theft from the elderly and specified repeat property and identity theft crimes and would require addiction treatment for certain offenders. While the statewide prison population would grow substantially under either measure (but far more dramatically under Measure 61) it would not be likely to have a significant impact on the Snake River Correctional facility since it is currently at capacity and according to the district attorney not under consideration for expansion.

[7] Mr. Kiyuna did note that access greatly improved when Jean Hill became the superintendent and has remained good under succeeding administrators. Nevertheless, it simply takes more

Eastern Oregon communities also takes a significant amount of time. He put 25,000 primarily business-related miles on his vehicle last year. He has ceased taking cases in Harney County because of the distance.

Criminal Cases

Attorneys are required to be present for arraignment in criminal cases in Malheur County but may appear by telephone. Plea hearings are held 21 days after arraignment for persons in custody and 35 days for those who are not. If a not guilty plea is entered, further negotiations are prohibited except in complex cases. Continuances are permitted, if needed, before a plea is entered.

According to Mr. Norris, although there has been a slight drop in the number of law enforcement referrals recently, the number of cases filed by his office has remained relatively constant because of the fixed population at the Snake River Correctional Facility. The 3000 inmates in the institution generate a significant percentage of the felony caseload. Most of the prison cases go to trial. Mr. Norris estimated that 90% of the non-prison criminal cases settle but only about 10% of the prison cases do. The prison cases are all felonies since the prison handles misdemeanors through administrative procedures within the institution.

Juvenile Cases

Delinquencies:

Thursdays are delinquency days in Malheur County. The police cite youth to appear in court on this day. By the time of the first appearance, the juvenile department and district attorney will have decided whether they intend to proceed formally or not. The court will not proceed if the youth's parents are not present. The judge questions the youth and her parents before allowing them to waive counsel for the youth and strongly encourages them to accept appointed counsel in felony cases. If an attorney is appointed the case is set for a pre trial conference at which the youth and her parents, the juvenile court counselor and the attorney are present. Most cases in which a plea is entered at the pre trial conference can proceed immediately to disposition because juvenile department staff are assigned to the schools and are there every day so they generally know all of the students and are familiar with their circumstances.

Linda Cummings is the Director of the juvenile department. There is also an assistant director who oversees the court process, five probation officers and one diversion specialist. The assistant director and the deputy district attorney assigned to the juvenile department share an office and jointly review new referrals. As of July 1, 2008, the court, rather than the juvenile department, assumed responsibility for docketing juvenile matters and contacting counsel.

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time to see clients, investigate crime scenes, and interview witnesses within the institution. In addition, as indicated below, more of these cases go to trial.

The county has a short term juvenile holding facility. It is the former county jail. The county received a federal grant to remodel the facility into offices and a short term holding facility. It has five beds. Youth are generally held there for only a couple of hours. If the county wishes to detain a youth (or hold a 15 year old accused of a Measure 11 offense) it must transport him to Umatilla County (3 hours one way) or to Ada County, Idaho (an hour away). Depending on a youth's age and delinquency history, Measure 11 charges may be resolved with a juvenile court disposition. The county uses formal accountability agreements, rather than formal adjudication, in most misdemeanor cases.

The District Attorney anticipates that delinquency cases will become more difficult as the percentage of gang-related offenses, which generally involve serious firearms violations, increases. According to the court there is an increasing number of youth involved with three local gangs.

Dependencies:

Attorneys are present at shelter hearings in Malheur County. It was reported that although the court encourages them to seek appointed counsel many parents waive counsel because of the cost. A pretrial conference is set for 30 days after the shelter hearing. An "admit/deny" hearing is set a couple of days later. Contested hearings are generally scheduled within a couple of months after the admit/deny hearing.

Attorneys noted that review hearings are sometimes set without notice to them and may conflict with other scheduled court hearings.

Tammy Burt is the CASA supervisor for Malheur County. Her program has been able to provide a CASA for every child who is the subject of a dependency case. CASAs see the children at least once a month.

DHS was reported to have experienced a lot of staff turnover in Malheur County, with all of the current supervisors being new to supervisory work.

The local Juvenile Court Improvement Project team is instituting a number of procedural changes in the way juvenile dependency cases are handled.

Comments regarding the structure of the public defense system
and the need for more attorneys

Judge Sullivan said that there is a need for more attorneys, particularly in juvenile dependency cases. On one recent occasion it was necessary to draft a private attorney to represent a party in a juvenile case. OPDS can always identify an attorney from another county but out-of-town attorneys are not as available. Attorneys try to be physically present in court but are forced to rely on telephone

and video appearances in many cases. She believes that ordinarily the attorney should be in the same place as the client. In addition, the court's telephone and video systems don't have the capacity to permit confidential communication between attorneys and their clients. In order to permit a client to confer with counsel in private it is necessary to use cell phones or to have everyone else leave the courtroom.

It is difficult to attract more attorneys to public defense work in Malheur county because of the proximity to Idaho where attorneys and even investigators receive a higher hourly rate than attorneys do in Oregon.

Comments regarding the quality of representation in criminal cases

Malheur County public defense attorneys were described as being very good at what they do, very professional and hard working. It was reported that "past problems" have been completely resolved. It was also reported, however, that workload interferes with their ability to be prepared. In-custody clients are not seen in a timely way. Inmates report at their arraignments on grand jury indictments that they still have not met with their attorneys. Plea discussions are not occurring as promptly as they should.

Comments regarding representation in juvenile cases

Delinquency cases:

Although some of the attorneys meet with their delinquency clients well in advance of court hearings, others do not see them until minutes before the court hearing. One attorney uses investigators more often than others but the use of investigators in delinquency cases lags significantly behind their use in criminal cases. Some attorneys have challenged a youth's capacity to proceed but there is otherwise not a lot of motion practice in these cases. It was reported that attorneys do their best work in sex abuse cases. In some cases the court has allowed youth to admit to non-registrable offenses while acknowledging behavior which would constitute a registrable offense. Should the youth fail to engage in appropriate treatment, the court can then amend the petition to adjudicate the youth on the registrable offense. The county generally uses the services of a local psycho-sexual evaluator to assess a youth's risk level but some attorneys are obtaining independent evaluations which allows them to review the results before deciding whether to provide the evaluation to the state.

Dependency cases:

It was reported that attorneys appear to be in good contact with their dependency clients, including at least older child clients. They work cooperatively with the CASA volunteers and respond promptly to telephone and email communications

with other parties to the juvenile case. Attorneys frequently contest changes in the permanent plan. A recent permanency hearing was litigated for a day and a half. Although there are not a lot of termination trials the lawyers do good work in these cases. Lawyers for children are very engaged and often participate in a team effort with DHS and the CASA. Lawyers for children sometimes file petitions to terminate. Two attorneys were identified as providing particularly strong advocacy. Nevertheless many appearances are handled by telephone and from at least one participant's point of view actual presence is always more effective. The same observer noted, however, that the judges in Malheur County do an especially good job of handling telephone appearances and don't "forget" the phone participants. The same person said that there is a need for additional training and resources for some of the attorneys in this county. She was pleased to see a senior member of one firm accompanying a newer member to his court hearings. One contractor expressed particular pride in the representation his office provides in juvenile dependency cases.

Responses to OPDS's 2007 statewide quality survey:

Respondents to OPDS's 2007 statewide quality of representation survey rated the quality of services provided by contractors in both criminal and juvenile cases in Malheur County as good to very good, noting that contract attorneys possess the legal knowledge, skill and training necessary for effective representation in most cases, although due to heavy caseloads they sometimes are not able to devote appropriate time and resources to each of their clients. Specific comments noted that a least one contractor was having difficulty keeping up with the caseload, and was failing to maintain contact with clients and prepare in advance for some hearings, especially in cases arising in the prison. The principal barrier to improvement identified in the survey responses was that lawyers were forced to take more cases than they could handle in order to receive adequate compensation. Attorneys were said to be especially "unprepared or overwhelmed" in dependency cases."[8]

OPDS's Recommendations for Further Inquiry at PDSC's August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Malheur County in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Malheur County.

The structure

The structure of the current system which includes three independent law offices appears to be working satisfactorily for the court and for OPDS although the

[8] In interviews conducted in June of 2008 the degree of concern about preparation in dependency cases appears to have declined substantially. Additional resources allocated under the 2008-2009 contracts may have helped address some of this need.

court points to a need for additional attorneys. Although the Rader firm may be seeking an additional associate, the principal area of need is in juvenile dependency cases and, for purposes of avoiding conflicts a fourth local contractor might be needed. If another independent contractor were added, OPDS might wish to explore the creation of a consortium including all of these providers. Since they represent a scarce resource in this part of the state, however, the provider's individual needs must be understood and addressed in order to ensure their continued ability to handle public defense cases.

While there is no public defender office to serve as the principal trainer of new attorneys in the area, Rader Stoddard and Perez is the largest contractor and is currently training two new associates. OPDS's General Counsel is also available to assist new attorneys in all parts of the state to access the training that is currently available and to help plan new approaches to local and regional training.

Need for Additional Attorneys

Judge Sullivan and others noted a need for additional attorneys to handle public defense cases in the county. While the need may be somewhat less urgent in Malheur County than in Judicial District 24 (Grant and Harney Counties), it is a region-wide problem and not a new one.

In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered."

> The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. …. In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level

caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

Compensation in Prison Cases

PDSC may want to consider whether, locally or statewide, cases arising in prisons require more resources than other cases and, if so, may want to direct OPDS to apply an increased rate to such cases in 2010-11 contracts.

Expanded use of video and audio communication

Since many judicial districts, including all of the eastern Oregon ones make extensive use of video and audio systems, OPDS and affected contractors should request a meeting with Oregon Judicial Department staff and other affected agencies such as the Department of Corrections, the county sheriffs and others to discuss (1) existing systems and their limitations, and (2) currently available technology which could enhance the quality of participation in court hearings and expand the use of such technology for attorney-client contacts. The group could then explore the feasibility of upgrading the technology as a means of making more efficient use of court and attorney time and of improving the quality of interaction between the court and the parties and between the attorneys and their clients.

Summary of Testimony at August 14, 2008 Meeting of the Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial Distrcit 24) provided written testimony (Exhibit A). He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately $3,000 which would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to make it necessary to open a new office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. Defense attorneys do better work if they can focus on criminal cases. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two

courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even “bad check” cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges $90 per hour for private cases and is paid $28 per hour on public defense cases. Most investigators charge between $65 and $75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour’s drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike Gordon Mallon’s experience in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney’s time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. If takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same

institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUII cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was $1,903. Insurance coverage for her employee would have cost her $700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the

defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

A Service Delivery Plan for Malheur County

[This portion of the report will be completed after the PDSC has developed its service delivery plan for this county.]

Exhibit A

OREGON CIRCUIT COURT JUDGES ASSOCIATION

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Hon. Dan Harris, Vice President
Hon. Deanne Darling, Treasure
Hon. Tom Kohl, Secretary

August 14, 2008

STATEMENT BEFORE THE

OREGON PUBLIC DEFENSE SERVICES COMMISSION

-IN BAKER CITY-

Chairman Ellis, commission members, and Ms. Swenson, My name is Bill Cramer. I am the presiding judge for the 24th Judicial District, which consists of Grant and Harney Counties.

I want to sincerely thank each of you for your willingness to serve on this commission and for allowing me to appear before you. I recognize it is a difficult and ever ongoing task to educate the public and legislative branch of the constitutional need to provide adequate legal representation for those facing state initiated proceedings, and who are indigent. Since preparing the initial draft of my remarks, I received Ingrid Swenson's draft report to the commission. It ably addresses my concerns, and I have reduced my own comments accordingly.

I am here to speak briefly about my concerns for my rural, or better classified, as frontier district.

LONGER TERM CONCERNS

At, present those whom are indigent and, needing legal counsel are receiving adequate representation. Primarily two contractors provide these services. Markku Sario is the primary provider in Grant County and "first" conflict provider in Harney. Mallon and Lamborn, P.C., primarily John Lamborn, provides the alternate services for Harney and Grant. Additional coverage is provided by attorneys traveling over a hundred miles (usually) for cases needing additional attorneys or where the primary providers have ethical conflicts.

However, having one attorney in each county creates scheduling issues. Attorneys need vacations, may take civil cases and have other family obligations. Incarcerated defendants, shelter care hearings, release revocations, and similar proceedings are time sensitive, and may need to be addressed before that absent attorney returns. It is frustrating to schedule around cases in other court jurisdictions. Ideally these offices would have multiple attorneys who could cover each other's schedules. Better would be having more local attorneys, perhaps in a consortium model that could and would take cases.

To add context, while the 24th Judicial District is a one judge district, when accounting for case types under the weighted case-load studies, this district ranks high, usually in the top two, of busiest districts based upon judge availability. That translates into a need to keep the docket moving. (*Exhibit 1, 2005 Statistics*) That also leads to another issue involving attorney availability.

Again because of essentially being limited to one attorney in each county who provides services for the county in which they reside, and the "first conflict" cases in the other county, this court is unable to take advantage of authorized pro tem judicial resources.

As part of the Willis Committee study and recommendations, the judicial branch has authorized three to four weeks each year of pro tem service. This is in addition to any other such coverage that I would otherwise receive, when I am personally gone. This time would normally allow cases to be set in both counties simultaneously, with a pro tem in one of the counties and myself in the other. This would relieve some of the court docket pressures; however, most cases are criminal and juvenile cases and the indigent provider attorneys can only appear in one of the courts at a time.

Perhaps of greatest concern is the loss of attorneys in our area. Law firms have shrunk in size or disappeared. I am concerned that when the present contractor, indigent providers, no longer do this work, that there will be no one to replace them. Obviously that would be a public safety crisis and in effect shut down the processing of cases requiring counsel. I am asking that this commission begin considering how to respond and fill this need.

It may involve assisting the current firms to hire, train and qualify additional counsel within their firms to assume these services in the future; or setting up public defender offices, managed by this commission, in each of the counties. It's an issue that may need to be concretely addressed within the next five years.

OTHER CONCERNS

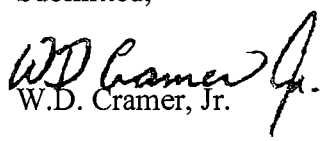
Fair, reasonable, adequate compensation is an immediate, as well as long term issue. To attract bright, competent attorneys to this field of law benefits the community. Good, competent attorneys mean efficiency in representing clients, from quicker more direct negotiations, to better tried cases and hearings, less appeals, less post-conviction cases, and a resulting increase in the fairness and integrity of the judicial system. These attorneys represent children in dependency cases, as well as parents, and criminal case defendants.

Though anecdotal, I believe the system is saved significant cost when competent, qualified counsel is involved. I know there have been token pay increases, but believe strongly they have been wholly inadequate and that the level of compensation is one of the substantial factors in making it difficult to bring attorneys to the rural areas for this legal work and for existing firms to hire associates to assist. I should comment that pure case load contracts have some weakness in our particular circumstance. As stated earlier, based upon judge availability, we are one of the busiest judicial districts. At the same time, case loads can fluctuate

significantly from year to year, up to 15%. Contracts that recognize and account for these peaks and valleys to enable firms to consider hiring associates are needed. This would require contracts that have terms for more years, subject to state funding limitations.

My analysis may be over simplistic, but the trends and concerns are real. Again thank you and I would attempt to answer any questions you might have.

Submitted,



W.D. Cramer, Jr.

Joint Committee on Trial Court Judicial Resources
Circuit Courts by Rank
(Based on Need Predicted by Judicial Workload Assessment Model)

District	2003 W*F	2004 W*F	2005 W*F	2-Year Trend	Authorized Positions as of 1/1/07	Supply	Predicted Demand	Predicted Need (Difference)	Demand to Supply	Rank
24 Grant/Harney	50,866	61,987	55,926	9.9%	1	0.63	0.86	0.23	37%	1
3 Marion	1,235,777	1,325,578	1,353,966	9.6%	14	13.80	18.51	4.71	34%	2
16 Douglas	415,826	408,875	471,964	13.5%	5	4.86	6.51	1.65	34%	3
20 Washington	1,223,291	1,242,311	1,315,281	7.5%	14	13.80	17.97	4.17	30%	4
1 Jackson	770,199	830,453	815,352	5.9%	9	8.72	11.27	2.55	29%	5
5 Clackamas	984,712	946,021	1,003,250	1.9%	11	10.80	13.70	2.90	27%	6
14 Josephine	341,103	328,894	349,989	2.6%	4	3.83	4.83	1.00	26%	7
9 Malheur	150,827	142,780	160,057	6.1%	2	1.84	2.29	0.45	24%	8
23 Linn	425,504	422,724	442,281	3.9%	5	4.86	6.03	1.17	24%	9
4 Multnomah	3,477,826	3,279,169	3,328,111	-4.3%	38	37.68	45.47	7.79	21%	10
6 Morrow/Umatilla	329,499	365,952	391,396	18.8%	5	4.71	5.47	0.76	16%	11
17 Lincoln	197,045	225,949	237,761	20.7%	3	2.86	3.29	0.43	15%	12
12 Polk	197,829	231,302	239,398	21.0%	3	2.86	3.28	0.42	15%	13
22 Crook/Jefferson	192,687	186,559	221,079	14.7%	3	2.69	3.04	0.35	13%	14
10 Union/Wallowa	146,207	137,150	137,752	-5.8%	2	1.76	1.96	0.20	11%	15
13 Klamath	372,550	392,894	386,861	3.8%	5	4.85	5.37	0.52	11%	16
2 Lane	1,135,666	1,102,484	1,131,271	-0.4%	15	14.80	15.47	0.67	5%	17
11 Deschutes	496,846	503,919	518,050	4.3%	7	6.86	7.14	0.28	4%	18
8 Baker	56,815	55,860	58,630	3.2%	1	0.84	0.84	0.00	0%	19
21 Benton	197,330	200,866	204,836	3.8%	3	2.86	2.81	-0.05	-2%	20
25 Yamhill	283,904	283,986	273,552	-3.6%	4	3.86	3.73	-0.13	-3%	21
19 Columbia	174,776	172,657	191,898	9.8%	3	2.86	2.64	-0.22	-8%	22
15 Coos/Curry	376,736	365,481	383,248	1.7%	6	5.82	5.34	-0.48	-8%	23
7 Hood River/W/G/Wh/S	222,032	229,848	214,857	-3.2%	4	3.55	2.95	-0.60	-17%	24
18 Clatsop	174,295	165,847	169,657	-2.7%	3	2.86	2.34	-0.52	-18%	25
27 Tillamook	105,610	97,168	103,831	-1.7%	2	1.86	1.43	-0.43	-23%	26
26 Lake	34,830	33,882	31,440	-9.7%	1	0.84	0.44	-0.40	-48%	27
TOTALS	*13,770,588*	*13,740,596*	*14,191,694*	*3.1%*	*173*	*167.56*	*194.98*	*27.42*	*16%*	

Notes:

1. Case weights (W) are from the Oregon Circuit Court Judicial Workload Assessment Model developed by the National Center for State Courts (NCSC).
2. Filings (F) are from the Statistical Report Relating to the Circuit Courts of the State of Oregon for 2003, 2004, and 2005.
3. "Supply" is the number of positions authorized effective January 1, 2007, less deductions to account for time lost to a district because of demand not directly related to case processing.
4. "Predicted demand" is the number of FTE judicial resources needed to process a district's case-specific workload at 2005 filing rates as predicted by the NCSC Model.
5. The percentage of "demand to supply" is an indicator of a district's need relative to its current judicial resource "supply."

OSCA/mwm/4-07-06

EXHIBIT 1

Attachment 5

OPDS's Draft Report to the Public Defense Services Commission on Service Delivery in Judicial District No. 1 – Jackson County (September 11, 2008)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam, Sherman, Umatilla, Morrow, Union and Wallowa Counties . It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Jackson County and a summary of the testimony presented to the PDSC at its April 10, 2008 meeting in Jackson County. The final report will include a service delivery plan for this county.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

approved by the Commission in June of 2007.

In February of 2008 the Commission began a review of the delivery of public defense services in post-conviction relief cases. That review it ongoing.

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

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

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

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

through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense

services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

   While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of

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

effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

   Consortia offer the advantage of access to experienced attorneys, who

[3] Id.

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

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually

well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District 1 – Jackson County

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

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

On February 19 Commissioner John Potter, OPDS public defense analyst Billy Strehlow and Executive Director Ingrid Swenson visited with stakeholders in Jackson County. In addition to meeting with PDSC's contractors in the district, they also talked with judges, the trial court administrator, the District Attorney, juvenile department staff, representatives of the Citizen Review Board. Written responses to questionnaires were also received from the three contractors in the district. Copies of these responses are attached as Exhibits A, B and C.

The preliminary draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of Jackson County's public defense system and services, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring the delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 1's justice systems could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Jackson County.

OPDS's Preliminary Findings in Judicial District 1

Jackson County is the sixth largest county in Oregon with a current population of 198,615. The county has experienced an increase in population of approximately one and a half percent every year for the past ten years. Medford (pop. 73,960) and Ashland (pop. 21,430) are its two major cities. There are nine other incorporated communities.[4]

The largest employer in the county is government, which includes education, the Bureau of Land Management and forest services. Fifty-two percent of the land in the county is owned by the federal government. The largest private sector employer is the health care industry, followed by retail, tourism, agriculture, manufacturing and timber.[5]

Jackson County lost more than 30% of its general fund revenue when federal forest payments were terminated in September of 2006.[6] Unlike other counties affected by the loss, Jackson County made the necessary cuts to its budget in 2006. Those cuts included cuts to public safety agencies, which included termination of jail contracts with other counties and a loss of 100 adult jail beds, the loss of five corrections deputies, an investigator and two clerical staff; elimination of almost all misdemeanor probation; a reduction of five adult probation officers, three community justice officers, one juvenile probation officer and three adult and juvenile community justice administrators. Cuts to other critical support services included the loss of 40 positions in health and human services; termination of a program targeting at-risk mothers of newborns; significant reductions in mental health clinical staff; loss of 12 medical and mental health services staff in the jail and the community justice system; closure of a alcohol and drug transition home and the residential substance abuse treatment program for youth; and significant reductions in alcohol and drug treatment services. Cuts in these services would have been even greater if the county had not closed fifteen branches of its library system and terminated 81 library employees.[7] The county's potential responses to the loss of federal forest funds are limited. Permanent property tax rates in each county were fixed by Measure 50. Relying on timber revenue, the county had set its property tax rate at 2.01.[8]

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[4] This data was obtained from the county's website: http://www.co.jackson.or.us.
[5] *Id*.
[6] PL 106-393, the Secure Rural Schools and Community Self Determination Act of 2000, expired in September of 2006. A one-year extension was passed by Congress and signed by the president in May of 2007. That extension expired on September 30, 2007. Association of Oregon Counties, presentation to Governor's Forest Payments Taskforce on January 23, 2008.
[7] Libraries have since been reopened on a very limited basis but may be permanently closed if stable funding is not forthcoming. Information regarding the impact of funding cuts was provided by Trial Court Administrator Jim Adams.
[8] The lowest rate in Oregon is in Josephine County with a permanent rate of 0.5867, the highest permanent rate is in Sherman County at 8.7141.

The Circuit Court

Jackson County comprises the First Judicial District. There are nine circuit court judges. Mark Schiveley is the presiding judge. The Jackson County Circuit Court designates some judges as primarily civil judges and others as primarily criminal judges. The court maintains a master calendar for criminal cases but civil cases are assigned to individual judges. The four judges who handle criminal cases also handle the drug court, probate matters and domestic relations cases. There are two judges assigned to juvenile cases.

Criminal Court System

Attorneys appear with clients at all in and out-of-custody arraignments. Arraignments occur daily. Trial dates are not set at arraignment. Instead a pretrial conference is scheduled for two weeks after arraignment for in-custody defendants and four weeks for out-of-custody defendants. Set-overs are usually taken in Measure 11 cases. By local court rule, cases are set for trial within eight weeks after the pretrial conference but may continued for good cause. There are status hearings on Mondays for all cases scheduled for trial during the week. Many cases are either continued or resolved at these hearings. Jury trials are generally held on Tuesdays through Thursdays and are assigned at docket call at 8:00 on Tuesdays. Some cases are resolved at docket call. Miscellaneous criminal hearings are scheduled on Fridays including court trials, contempt hearings, and probation violation proceedings. Sentencing proceedings are scheduled daily.

Community Family Court

Jackson County's Community Family Court was established in 2001 through a collaborative effort overseen by the presiding judge. It is funded principally by grants. The court is a combination family and drug court. There are approximately 50 families involved in the court. A family is referred to the court by DHS after adjudication on a dependency petition. The district attorney must also approve of the family's involvement. Participation on the part of the parents is voluntary. Lawyers for parents and children are generally involved only at the beginning of the process although participants have access to the attorneys who represented them in the underlying juvenile dependency case and who, in most instances, continue to represent them throughout the dependency proceeding. The program generally lasts 15 to 18 months. In the earliest phase the family appears before the court on a weekly basis. In the final phase appearances may occur as infrequently as once a month. Participants are required to waive many of their constitutional rights and may be jailed for non-compliance with court directives. The court can provide access to a variety of resources to help clients succeed. Cases are staffed on Mondays, and hearings are held on Tuesdays before each of the three judges assigned to the court. The court

enjoys a high success rate greatly exceeding the state average for similar courts. DHS can be dismissed from the dependency case if adequate progress has been made, even though the family remains engaged with the court.

Drug Court

The Jackson County drug court began accepting clients in March 2006. There are currently more than 50 clients in the program and several classes have already graduated. There were 22 clients in the most recent graduating class. To date none of those who completed the program have been rearrested. This court operates on a schedule similar to the Community Family Court schedule in terms of the length of the program and the frequency of appearance. Defense attorneys are present for hearings in this court, however. These clients must enter pleas of guilty and waive laboratory analysis of drug samples in order to be admitted to the program.

Other Specialty Courts

At this time there are no plans to create other specialty courts such as DUII, mental health, or domestic violence courts because of scheduling difficulties for both the judges and the attorneys.

DUII Diversion Program

DUII cases comprise approximately 25% of the court's docket. It is estimated that 90% of DUII diversion participants successfully complete the program.

Juvenile Court System

Juvenile dependency matters are assigned to Judge Rebecca Orf. She conducts shelter hearings at 11:30 a.m. daily. Review hearings, permanency hearings and trials are usually scheduled for Wednesdays and Thursdays. Termination of parental rights trials are assigned primarily to the civil bench. Judge Lorenzo Mejia handles all of the delinquency matters. He holds detention hearings daily as needed and hears other matters on Tuesdays and Wednesdays, and trials on Fridays.

In dependency matters it is the practice for parties to appear at shelter hearings without counsel. Despite efforts by the court and public defense attorneys to arrange for counsel to be present at these hearings, it has been determined that this cannot occur under present circumstances. Instead the court instructs the party for whom counsel has been appointed to contact the attorney after court and arrange to meet with the attorney before the next court date, which is the date set for the jurisdictional hearing. If there are urgent issues regarding removal or placement the attorney can request a second shelter hearing although these are normally not held for a month or so after the initial hearing.

Attorneys are appointed for children in all cases in which parents receive appointed counsel. Jackson County has an active Court Appointed Special Advocate (CASA) program.

In Delinquency cases, much of the prosecution function is performed by juvenile court counselors. They ordinarily file the petitions and negotiate resolution of the cases. The deputy district attorney assigned to juvenile court is available for consultation and to represent the state in the few cases that go to trial.

The county has a new 40-bed detention facility and currently uses 20 of those beds for detention and 20 for assessment and evaluation, and residential substance abuse treatment.[9] The facility also provides suitable attorney-client meeting rooms.

The court appoints counsel for approximately 95% of all youth. Attorneys are present for initial court appearances in delinquency cases.

Civil Commitment Proceedings

In addition to juvenile matters, the Jackson Juvenile Consortium handles all of the civil commitment cases in which counsel is appointed. In Jackson County it is the mental health investigator, instead of the county counsel or the district attorney, who presents the case to the court. Hearings are held at the hospital at 7:30 in the morning. Discovery is usually obtained by the attorney directly from the hospital two days prior to the hearing.

The District Attorney

Mark Huddleston is the District Attorney. He became the District Attorney of Jackson County in 1992 after serving as a deputy district attorney from 1980 to 1988 and the chief deputy from 1988 to 1992. Mr. Huddleston currently has nineteen deputies. The 2007 Legislative Assembly allocated funds for an additional half-time deputy to handle juvenile dependency cases. The county will fund the other half of that position. His office did not suffer any losses due to budget cuts and, unlike some district attorney offices, his has not been forced to limit prosecution in any category of offenses. He is able to pay a starting salary of more than $54,000 per year so recruitment has not been a major issue for his office. Retention was a problem in the past but the salaries of senior deputies were recently increased to a more competitive level.

[9] These beds are funded by the Oregon Youth Authority. The county also has a 16 bed shelter which is used primarily for children and youth in the custody of the Department of Human Services. In July of 2008, however, all 40 beds will be available for detention since the evaluation and treatment programs will be moving to other locations.

Two deputy district attorneys are assigned to handle juvenile matters, one does exclusively dependency cases and the other handles a combination of delinquency and dependency matters. An assistant attorney general is assigned to represent the state in termination of parental rights cases. Additional AAG assistance will be available as a result of funding received from the 2007 legislature to permit AAG review of each DHS case at five and eleven month intervals after initiation of the proceedings.

Jackson County has a "district attorney's drug conditional discharge program" independent of the drug and family community courts. Conditions for participation are similar to those for the drug court and many of the requirements for completion are the same except that regular attendance at court hearings is not required.

Public Defense Providers

There are three public defense contractors in Jackson County.

1. Southern Oregon Public Defender

The Southern Oregon Public Defender (SOPD) [10] is a private non-profit corporation established in 1985. Bert Putney organized the office and continues to serve as its administrator. SOPD also has an office in Josephine County. There are currently fifteen attorneys in the Jackson County office, five investigators, two paralegals and nine other staff members including a polygrapher and an interpreter). This office currently receives appointments in approximately two thirds of the criminal cases and one fourth of the juvenile cases in the county. Until 2006 SOPD did not contract for any juvenile cases. It assigned two attorneys to juvenile matters in the 2006-2007 contract period and has added a third under the current contract. SOPD represents clients in drug court in Jackson County and receives an annual amount to staff that court.

SOPD occupies an office in downtown Medford, close to the courthouse, the jail, the juvenile department and other county offices. The office is businesslike, attractive and well furnished.[11]

SOPD has a five-member Board of Directors that reviews major actions by the director, makes decisions not appropriate for the administrator to make, and oversees the office's functioning within the local criminal and juvenile justice systems. The office has a written policy manual which is distributed to all employees and which describes procedures for handling personnel matters. The office also provides attorneys with a manual outlining local procedures, forms

[10] SOPD's response to the OPDS questionnaire was attached to the original draft of this report..
[11] Mr. Putney indicates that he would have purchased the building had he been permitted to do so under the terms of his contract with PDSC. He believes that he could have saved a significant amount of money by owning rather than leasing the property.

and expectations. Although the office manager and the administrator oversee the work of the entire staff, training and supervision are principally provided by the attorney or staff person who is assigned to supervise each new employee.

SOPD conducts monthly in-house CLEs, sponsors CLE sessions for local attorneys emphasizing issues of particular significance to local practitioners, and sends its attorneys and staff to OCDLA and other CLE trainings in areas of more general interest. SOPD uses an informal evaluation process for attorneys and staff that is based on open and regular communication and feedback. There are plans to initiate a formal evaluation process in the spring of 2008. Underperformance is addressed by consultation, mentoring, establishment of timelines, and, when necessary, termination. Excellence is most often rewarded by acknowledgment in the presence of co-workers.

Caseloads of individual attorneys are monitored weekly and monthly.

By its own policy, as well as PDSC's, SOPD requires that every in-custody client be seen within one working day. The initial visit is usually handled by a staff person rather than the assigned attorney who generally does not meet with the client until discovery is received.

SOPD has recently implemented a client feed-back process. Clients are given a form to complete at the conclusion of the case, which is submitted to the court and then forwarded to SOPD.

Bert Putney and other SOPD attorneys and staff are active participants in the criminal and juvenile justice systems in the county, serving on numerous local public and private boards, committees and advisory groups. One attorney served on the City Council and another served as the president of OCDLA. The firm is a permanent member of the Local Public Safety Coordinating Council. Mr. Putney is regarded as a problem solver who works to make the whole system function better.

SOPD received a 13.48% rate increase for the 2008-2009 contract period. Recruitment and retention of attorneys has been a challenge for this office where attorneys' starting salaries have been significantly lower than the starting salaries of their counterparts in the district attorney's office. Under the new contract the entry level salaries were increased to $45,000. Vacancies can now be filled in a more reasonable time. In the past it was not unusual for it to take two to three months to fill a vacancy. Mr. Putney believes that it was equally important to increase salaries for mid-range attorneys in order to increase retention of attorneys with two to four years of experience. After receiving training and experience at this office, attorneys often find better paying jobs in other areas. All of the members of the local criminal consortium, Los Abogados, came from the public defender's office.

2. Los Abogados

Los Abogados[12] was originally formed to handle only those cases in which SOPD had a conflict. Since 2002 the consortium has contracted with PDSC to handle a specified caseload that is not significantly greater than, but is not limited to, the cases in which SOPD has a conflict. There are currently seven attorneys (3.03 FTE) who provide representation under this contract. The percentage of professional time devoted to public defense cases varies among the member attorneys from 10% to 75%. Some consortium members are also members of the juvenile consortium. Los Abogados contracts to handle only criminal cases. Each of the consortium attorneys has an office located in downtown Medford within a short walking distance from the courthouse, the jail and other county offices. Each of the attorneys has staff support compensated under the contract with PDSC.

The consortium does not have a board of directors or written bylaws or operating rules. The organization has two co-administrators. When the consortium needs to add a new member the existing members discuss who might be appropriate and extend an invitation. Cases are distributed evenly among members except that some members do not handle Measure 11 cases. Lawyers are notified by the consortium administrator of their appointment to a case before 5:00 p.m. on the day the appointment notice is received. In general, the consortium reports that lawyers meet with their clients in the time frames required by the PDSC contract. Members confer with each other informally and as needed. There are no formal mechanisms for regular communication. There is no system in place for evaluating members and the consortium relies on judges and its own members' observations to make it aware of any problems that might arise. The consortium reports that it has not yet had to deal with an underperforming member but would approach a member attorney directly if a problem were encountered.

3. Jackson Juvenile Consortium

The Jackson Juvenile Consortium[13] includes four[14] attorneys (2.82 FTE) who handle both juvenile and civil commitment cases under the contract with PDSC. Each of the attorneys has a practice outside of the consortium, handling either

[12] Los Abogados's response to OPDS's questionnaire was attached to the original draft of this report.
[13] The juvenile consortium's response to the OPDS questionnaire was attached to the original draft of this report.
[14] The Consortium noted in a response to an earlier draft of this report that a fifth attorney was handling review hearings during this period even though he was not accepting new cases. In 2007 it was reported that he had 245 cases but was not included in the FTE figure provided by OPDS.

private cases or other public defense cases. Each member also has office staff persons who devote a percentage of their time to consortium cases.

The consortium has a board of directors that includes a retired circuit court judge, the former county counsel, and the former administrator of a Medford School District. It meets only sporadically, however, and plays a limited role.

The consortium has an operating agreement between members. Each of the four members owns a 25% interest in the business (organized as a limited liability company). The agreement provides that income will be allocated among members in proportion to the number of appointments they receive "which shall be aligned as close as reasonably possible to membership percentages." It does not provide a protocol for handling performance issues except to provide that an attorney may be required to withdraw from membership if the member becomes "disabled or incompetent."

Caseloads

The total public defense caseload in Jackson County for FYE 2006 was 7,559 cases[15]. For FYE 2007 it was 8,189, an 8.33% increase. Increases were in felonies and juvenile dependencies.

SOPD received credits for a total of 4,715 cases in FYE 2007 which included 775 juvenile cases and 3940 criminal cases. Los Abogados received 1,147 criminal case credits, and JJC received 98 civil commitment and 2,227 juvenile case credits.

OPDS expects the caseload in Jackson County to remain stable through the biennium assuming the court continues to conduct regular review hearings in juvenile dependency cases.[16]

Comments provided to OPDS Staff during February interviews:

Functioning of the criminal court system. The criminal system is functioning well. The court runs smoothly and handles cases efficiently. The distribution of cases between SOPD and Los Abogados is appropriate, with the consortium filling in the blanks "nicely" and providing excellent representation. In general, the quality of defense in criminal cases is good. SOPD has had a lot of turnover but is able to get new lawyers "up to speed" very quickly.[17]

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[15] A "case" is a unit for which OPDS awards a case credit and does not necessarily correspond to a case as defined by the court and other justice system agencies.

[16] Approximately 66% of all juvenile case credits for JJC were for dependency review hearings. In calendar year 2007, reviews comprised 76% of all JJC's juvenile case credits.

[17] It should be noted that the district attorney's office in Jackson County is reported to be open to plea negotiation and reasonable dispositions, even in Measure 11 cases. That may account for the relatively low trial rates in the county. For the calendar year 2007 the statewide average of

Role of contractors in the community. Bert Putney has been a major participant in the shaping of the county's justice system. His organizational skills are legendary. Despite the difficulty of attracting and retaining high quality lawyers to work at rates significantly below market levels, and other obstacles to long term financial stability such as the past prohibition on purchasing an office site, he has maintained a well structured office with a highly professional group of lawyers. Both criminal contractors participate regularly in justice system planning meetings.

Representation in juvenile delinquency cases. Some attorneys provide excellent representation to youth in delinquency cases. Attorneys for both sides are not openly adversarial. Motion practice is minimal and not many cases go to trial although sex abuse cases are tried more often than other types of cases. There are no alternative treatment options available in these cases in Jackson County. It is rare for an attorney to challenge a youth's competence even though some of the youth who come through the court have intelligence quotients in the fifties. One especially able defense attorney recently left the area to work in another county. There is a need for additional attorneys in these cases.

Representation in juvenile dependency cases. In juvenile dependency cases the need for additional attorneys is even greater.[18] The scheduling of trials and other hearings has been difficult for some time[19]. After the public defender's office began accepting appointment in juvenile cases an additional attorney became available for appointment in each case but scheduling remains a major problem. Lack of attorney availability has also made it difficult to implement new initiatives such as settlement conferences in termination of parental rights cases. Court officials believe that the number of juvenile dependency matters will continue to increase.[20] A subcommittee of the local Juvenile Court Advisory Committee is attempting to address the scheduling issue. Despite recent efforts led by the court to have counsel present at initial hearings in dependency cases, the parties still appear without counsel and the effort has been abandoned. There has been improvement in the quality of representation in dependency cases in the last couple of years, at least in part as the result of the interest and attention that Judge Orf has brought to these cases. Two commentators said that in 2005 the juvenile consortium "was not working" but has now turned things around. The change was attributed in part to the fact that the public defender's office now represents clients in some of these cases. Two attorneys, one with

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cases that went to trial were 4.5% of felonies and 4.4% of misdemeanors. In Jackson County 2.7% of felonies and 2.4% of misdemeanors were tried.

[18] This comment was endorsed by all of the juvenile system representatives interviewed.

[19] JJC notes in its written response to an earlier draft of this report that the time to jurisdiction in Jackson County juvenile matters is generally within the requisite 30 day time period.

[20] In addition, the practice of accepting admissions from unrepresented parents at shelter hearings that was reported to a Quality Assurance Task Force site team in 2005 has apparently ended and attorneys are now being appointed for parents and children in most cases. JJC noted that the number of **new** dependency petitions declined between 2005 and 2007.

the consortium and one with the public defender's office, were singled out as having "raised the bar" for all of the other attorneys, especially in the representation of child clients.[21]

OPDS's Recommendations for Further inquiry at PDSC's April 10, 2008 Meeting in Medford

In light of the information which came to its attention during interviews with representatives of the juvenile and criminal justice systems in Judicial District No. 1, OPDS recommended that the commission focus its inquiries and discussion at its April 10, 2008 meeting in Medford on the following topics.

Structural Issues

Although the public defense structure in Jackson County is the same for both juvenile and criminal cases – a combination of a public defender office and a consortium, it appears to be working well in the criminal area but not as well in the juvenile area.

In criminal cases both the public defender's office and the consortium fulfill their roles to the benefit of the community as a whole. Despite recruitment and retention problems at the public defender's office, the quality of representation provided by both contractors also appears to be good.

The same structural model has not proven sufficiently flexible to meet the needs of the juvenile system, however. There is an insufficient number of attorneys to handle the caseload. While the Commission has received reports in other communities such as Clatsop, Coos and Curry about the difficulty of recruiting attorneys to practice in some geographic areas, the problem in those counties was deemed to be principally a recruitment issue rather than a structural issue.

There is certainly a recruitment issue in Jackson County for both criminal and juvenile lawyers. But when caseloads reach levels that are four times higher than recommended by national standards,[22] it is appropriate to consider whether the problem may lie with the particular provider or with the model itself.

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[21] Another consortium attorney was singled out, on the other hand, for generating a high number of complaints from clients and for being inaccessible to clients and the court.

[22] The current contract with Jackson Juvenile Consortium (JJC) provides for appointment in 2,376 cases per year (which includes 96 civil commitments). The agreement indicates that four consortium attorneys will devote 2.82 attorney FTEs to this contract. That amounts to 842 cases per FTE attorney per year. National standards recommend appointment in no more than 200 juvenile cases per FTE per year. The standard recommended in the PDSC RFP is 250 juvenile cases per year, adjusted from the national standard to reflect the fact that additional case credits are awarded for review hearings in Oregon. Approximately 66% of JJC's case credits in FYE

The following table compares the annual caseload per attorney per year for all contractors who handle exclusively, or primarily, juvenile cases.[23]

	2007 Caseload	Attorney FTEs	Attorneys	Cases per FTE	Cases per attorney	Review percentage
Jackson Juvenile	2,298	2.82	4	815	575	66%
Linn Juvenile	2,672	4.1	6	652	445	56%
JAC	8,195	13.6	18	603	455	73%
Lane Juvenile	5,405	10.8	13	500	416	73%
IDI	2,779	6.28	11	443	253	61%
MJDC	5,392	14	15	385	359	71%
JRP	4,089	13.4	18	305	227	74%
NAPOLS	756	2.8	3	270	252	89%
Average	31,586	67.8	88	466	359	

JJC is not currently seeking to add attorneys to the consortium and when asked how representation could be improved in the county, the consortium's response was that, "More efficient use of court time through better scheduling would allow members to deliver better quality representation."

While PDSC must recognize the need of consortium attorneys to receive an income from public defense cases that, combined with income from other sources, is adequate to permit them to continue representing public defense clients, should PDSC contract with providers for caseloads that significantly exceed accepted standards even though contractors represent that they are able to provide quality representation?

As noted below, while some concerns were expressed about the quality of representation in dependency cases, the principle concern is that such high caseloads simply preclude high quality representation in at least some cases.

2007 were for review hearings. (The number of reviews for calendar year 2007 was 1,592 or 76% of the total juvenile case credits.) The percentage was artificially high because when the public defender's office began taking juvenile cases, they received appointment in a greater percentage of delinquency cases and new dependency cases since JJC had already been appointed in the dependency cases that were in review status. SOPD's two attorney FTEs assigned to handle juvenile cases received 775 case credits, or 388 credits per FTE, 38% of which were for review hearings. Please note that final numbers for FYE 2007 were 2,325 case credits to JJC, 98 of which were in civil commitment cases and 2,227 in juvenile cases. The numbers in the table, which was created on April 2, 2008, were actual credits awarded for calendar year 2007 and did not include civil commitments.

[23] SOPD is not included in the table but in FYE 2007 the two FTE attorneys at SOPD who were assigned to the juvenile caseload handled 388 cases per FTE attorney, or less than half the number assigned to each JJC attorney FTE.

Alternative Models and Providers

It would probably not be feasible for OPDS to impose a strict limit on the number of FTE attorneys who would be required to provide representation under a consortium contract since there are many circumstances that might arise that would cause a consortium to exceed such limits, at least on a temporary basis. For example, if a current member withdrew or became inactive for a period of time and a replacement attorney could not be found despite earnest effort, would that amount to a contract violation?

Assuming that in future contracts the Jackson Juvenile Consortium was unwilling to commit to adding FTE attorneys to its contract, or that even if such a commitment were made that OPDS would be unable to enforce it, are there other options that the Commission could direct OPDS to pursue?

As indicated in the discussion at the beginning of this report OPDS realizes significant benefits by contracting with consortia rather than a multitude of individuals and law firms.[24] But in a county the size of Jackson County, contracting with individual attorneys and law firms might be a reasonable approach.

A second public defender office, possibly handling only juvenile cases, would be another option. The need for a second public defender office in this particular community is questionable in view of the cost that would be involved in establishing such an office and the role that SOPD already plays there.

A third possibility would be for OPDS to explore with Los Abogados and its members whether there are attorneys currently handling only criminal cases under that contract who might be willing to handle juvenile cases as well. Two Los Abogados attorneys are already members of JJC but their participation has not solved the problem of excessive caseloads. Expansion of this contract would carry some of the same risks as contracting with the juvenile consortium except that the overall quality of representation provided by this consortium is reported to be very good.

Quality Issues

In addition to the comments included above about the quality of representation provided by public defense contractors in Jackson County, OPDS has tabulated the results of its December, 2007 statewide survey on public defense performance. There was only one respondent who provided information about representation in criminal cases, so that information is not included here. Four respondents provided information about JJC. Those respondents indicated that

[24] Some of the benefits are that the administrative function is built-in to a consortium, attorneys are available to provide back-up for each other when needed, and conflicts can be reassigned without additional cost to OPDS.

although consortium lawyers possess the legal knowledge, skill and training needed for effective representation, only "sometimes" do the attorneys appear to devote adequate time and resources to each of their clients. Three of the four respondents reported that the contractor did not appear willing to receive and act upon complaints about attorney performance. Specific comments about consortium lawyers singled out one member for doing consistently excellent work, but said that others members have too many cases, are unable to schedule matters in a timely way, and have insufficient contact with their clients.

While there was some indication in interviews that the consortium was taking steps to improve its performance, the concerns expressed in the survey responses and in the interviews conducted in February of 2008 confirm that extraordinarily high caseloads are impacting the quality of representation and the functioning of the court. It is difficult to imagine that they would not. If an attorney handled 815 cases a year, assuming 20 working days a month for 12 months, that attorney would have to handle more than three cases every day from beginning to end, which in a dependency case would include receiving and processing the new case, arranging for an interview with the client, reviewing discovery, meeting with the client, conducting an investigation, retaining an expert if necessary, conferring with the expert, communicating with the other attorneys and parties in the case, informing and advising the client of what the attorney had learned, appearing in court on at least one occasion, and closing the file. A multi-day trial or other hearing would mean that the attorney would be required to process even more cases on other days. Even cases in review status require the attorney to take similar steps in every case.[25]

The quality issues appear to be directly related to the caseload, rather than the knowledge and skills of the attorneys and would probably be resolved by a significant decrease in the caseload of each JJC FTE attorney.

Testimony Received at PDSC's April 10, 2008 Meeting in Jackson County

Bert Putney, the Administrator of Southern Oregon Public Defender, Inc. testified that SOPD was founded in 1985; that it currently has 23 attorneys in two offices, 16 of whom work in Medford. There are administrative efficiencies that result from operation of multiple offices. In addition CLE events and the like can be organized for both offices (as well as for other providers in all southern Oregon counties) and attorneys can be sent from one office to the other to assist in case coverage. Recruitment and retention have been a problem for SOPD. Between 2004 and 2007 approximately 25 lawyers left the office, which is a turnover rate of more than 100%. Inadequate compensation is the main reason people leave but the area is also less attractive as a place to live than other areas of the state. There is a core of experienced attorneys in both offices, but it is the people with two to three years of experience who seem to leave. All of the members, but

[25] See Oregon State Bar "Performance Standadrs – 3: Specific Standards for Representation in Juvenile Dependency Cases," Standard 3.12 – 3.14.

one, of the Los Abogados consortium came from SOPD but most of the lawyers trained by SOPD seem to go to other parts of the state. There is a significant difference in compensation levels between SOPD and the Jackson County District Attorney's office.

Mr. Putney believes that the Jackson County justice system functions very effectively. He believes that SOPD is currently handling approximately the maximum percentage of the adult criminal caseload it is capable of handling. His office, which first began handling juvenile cases in January of 2006, could, however, handle additional juvenile matters.

SOPD has an active board of directors with a very stable membership. Mr. Putney keeps the board informed about developments in the office at meetings that occur at least quarterly.

Mr. Putney has an investigator who is trained to administer polygraph examinations. He would recommend that other offices consider having a staff polygrapher as well.

Mr. Putney also recommended that the Commission consider having a single organization provide services in all of the southwestern counties in the state in order to create administrative efficiencies and improve quality. He described some recent quality control issues in the Medford office and how they were handled and said that he solicits information from the judges about the work of his attorneys on a routine basis.

Judge Raymond White said that public defense services have been very good in Jackson County. Attorneys appear to be trying the right cases although, as a former deputy district attorney, he is not sure that the district attorney's office always chooses to pursue the right cases. He would encourage defenders to be more persistent in the pursuit of plea agreements that would benefit their clients. The more persistent defenders get better offers. He noted some errors in the draft report regarding the timing of criminal trials and the reasons that additional specialty courts are not under consideration at the present time.

Doug Engle testified on behalf of the Los Abogados consortium. He said that there are five lawyers who do approximately 95 percent of the work, one who handles only Measure 11 cases, and one who is available only as a backup when needed. All of the lawyers are very experienced. Currently the consortium is receiving only about 75% of the cases contracted for in this biennium. Mr. Engle and another consortium member share the administrative duties. The members have not yet experienced a situation that would require them to have more structure in their organization. Other than the attorney who handles only Measure 11 cases, case distribution is based on rotation without distinguishing between case types except for murder cases which are on an independent

rotation schedule. The consortium has not needed to add members for the past three years.

Jim Mueller testified about the work of the Jackson Juvenile Consortium. He said that the attorneys in the consortium are all very experienced. They know the law and the juvenile court system and work hard, often working more than an eight-hour day. He discussed a number of factors which he believed made the caseloads handled by consortium members appear greater than they are. He noted that an attorney who had left the consortium approximately two years ago is now returning and will be handling a portion of the cases. He also believes that the number of new cases is less than the percentage indicated in the table on page 21. Mr. Mueller questioned the applicability of national caseload standards which refer to juvenile delinquency cases only. Mr. Mueller also informed the Commission that consortium members had met to discuss reported quality of representation issues on the part of one member and that the member is now taking steps to address the issues.

Christine Herbert said that she handles cases for both the juvenile consortium and Los Abogados and that she has not received complaints about her work. She works hard and sometimes on weekends and evenings but she enjoys her work and believes her workload is manageable. Commissioner McCrea told her that the Commission was not questioning the competence of the attorneys but inquiring whether, as a matter of policy, the Commission should be contracting for caseloads of this magnitude.

Commissioner Welch said that comparing caseloads from one judicial district to another is like comparing apples and oranges since cases are handled so differently from one district to another.

Judge Rebecca Orf said that it is a struggle to schedule juvenile cases in Jackson County because of the consortium lawyers' busy schedules. There was a time when attorneys were not visiting with child clients. They are doing better in that regard although she spoke at a meeting of the foster parents' association recently and was asked whether attorneys were supposed to call foster parents or have contact with them or their child clients. Some attorneys do better than others. There is one consortium attorney and one public defender office attorney who have really raised the bar for other lawyers.

Mark Huddleston, the Jackson County District Attorney, said that although caseloads are high in Jackson County , as they are around the state, the Commission is getting its money's worth with the public defense lawyers in Jackson County. He said there is an active Public Safety Coordinating Council in the county and that the district attorneys and the defense lawyers meet with the court on a regular basis and maintain good communication.

Vance Walliser said he had worked at SOPD for eight years as a criminal defense lawyer and then went into private practice, specializing initially in criminal defense as a member of Los Abogados. In 2005 he began taking juvenile cases as a member of the Jackson Juvenile Consortium and now devotes the majority of his time to juvenile matters. He believes that it is beneficial to have lawyers who handle mainly juvenile matters and if the consortium is forced to add new members he and others may find it necessary to take on other kinds of cases, limiting their ability to specialize. He believes that parents and children in the county receive superior representation.

Additional Information Provided after April 10, 2008

Additional Investigation:

In an effort to clarify information received during the meetings with juvenile court system representatives in February and the testimony provided at the April Commission meeting, OPDS staff interviewed additional representatives of DHS and the state as well as members of the Jackson Juvenile Consortium and obtained the following information.

It appears that, despite the fact that lawyers are not present at initial shelter hearings, representation in the early stages of dependency proceedings is generally good. Specifically, OPDS was informed that attorneys are in good contact with DHS at this stage, seek second shelter hearings in some cases, and resolve cases in a timely way. At the initial disposition attorneys have obtained and reviewed DHS file materials and the proposed plan before the hearing and are prepared to comment on the plan and argue for or against particular services.

A CRB review is the next event in most cases and for the last year or so attorneys have been appearing at and participating in these hearings.

It is at this stage, however, after the initial CRB review, when attorney engagement appears to end. One consortium attorney said that cases in review status require no attention unless a client calls and asks for specific advice or information. It was reported that lawyers “rarely” attend family meetings even though much of the planning for families occurs at these meetings. It is a relatively new practice for attorneys to visit with child clients but even though they are now visiting, they never seem to develop a relationship with even their adolescent clients because they tend to see them, if at all, just prior to a court hearing.

DHS rarely hears from attorneys between court proceedings. DHS continues to send discovery to the attorneys, including evaluation reports and the like and notifies them if there are significant changes in the client’s circumstances. One representative explained that if the attorney does not review this information as it comes in, he or she does not have a feel for what is going on in the case and

can't take appropriate measures to protect the client's interest, such as getting an independent evaluation or advocating for more appropriate treatment options. If discovery indicates a client is giving positive urinalysis test results, attorneys should be meeting with clients and talking about the implications of these test results. Twice a year DHS sends the client a list of expectations as part of the agency's mandate to make reasonable efforts to reunify families. These documents can be complicated and should be explained by the attorney. A representative of the state who works in multiple counties said that the attorneys in Jackson County are among the best in the region in terms of ability but the caseload in Jackson County prevents attorneys from providing services to clients between hearings and from attending family decision meetings nearly as often as their colleagues in Douglas and Josephine Counties. He noted that in dependency cases, involvement of the attorney through the life of the case often has a direct impact on the likelihood of a child being returned to the parents.

After a termination petition is filed, attorneys again participate actively in the preparation and presentation of the case. Lawyers for children are said to be very involved in these trials, unlike their colleagues in some counties who are said to act more like spectators than advocates in these cases.

Summary of Commission Discussion at May 8, 2008 Meeting:

At the May 8, 2008 PDSC meeting, Ingrid Swenson summarized the draft report and the testimony received at the April 10, 2008 meeting in Medford.[26] Commissioners were also provided with a handout, a copy of which is attached to this draft report as Exhibit B. She referred to the standards developed by the American Council of Chief Defenders (ACCD) and said that ACCD had recently performed a comprehensive review of caseload studies and literature from around the country and had determined that the original ACCD standards were "resilient" and still valid. The group advised, however, that each jurisdiction review its own case types and perform its own analysis.

She pointed to a number of the studies described in the handout and noted that some jurisdictions have adopted standards that limit the number of cases per year that attorneys should handle and others limit the number of clients at any given time that an attorney should represent. She described a pilot program in Washington State that was eventually extended to half of the counties in the state. It limited the number of juvenile dependency clients a full time public defense attorney could represent at any given time to 90.[27] She noted that as a result of the success of the Washington program, four Oregon legislators proposed SB 411 in the 2007 Legislature. That bill would have increased public defense funding by $23 million statewide to limit caseloads and increase compensation in order to improve representation in Oregon juvenile cases. She

[26] A copy of the transcript of these comments and the Commission discussion that occurred at the meeting is attached as Exhibit A to this report.
[27] This number was later lowered to 80.

pointed to the final document in the handout, which described the three principle systems for measuring caseloads.

The other documents provided to Commissioners at the May meeting included a copy of the Oregon State Bar's Performance Standards for attorneys in juvenile dependency cases, a copy of a letter to Judiciary Committee Counsel setting forth a proposed PDSC plan to implement SB 411 and a copy of an email to committee counsel describing some of the things lawyers fail to do when they have excessive caseloads. The information in this email was derived from reports prepared in OPDS site visit evaluations.

JJC Response

Commissioners were also provided with a copy of a response from the Jackson Juvenile Consortium to the draft report[28]. While taking issue with some of the information in the report, particularly the number of attorneys handling consortium cases and the caseloads per attorney, the consortium nevertheless acknowledged the need for improvement and committed to taking the following steps:

(1) closely monitoring the number of new appointments and adding attorneys as needed;
(2) amending the operating agreement to implement objective standards; monitoring compliance with the standards;
(3) holding monthly consortium meetings;
(4) addressing the need for more involvement in Family Decision Meetings in the next contract negotiations.

Additional Developments

On June 9, 2009 Judge Orf advised that since the Commission's April visit to Jackson County she had seen "marked improvement in the attorneys' efforts, particularly in representing children. In fact, the attorneys [from both the consortium and the public defender's office] were given kudos from the CASA program at our May Juvenile Court Advisory Committee meeting for their efforts to see children in their foster homes." She thanked the Commission for coming to the area and "nudging up the bar."

PDSC is grateful for the cooperation and hospitality extended to its staff and its members during its visit to Jackson County and the initial investigations made in preparation for that visit. PDSC expresses its sincere appreciation to all the members of the Jackson County criminal and juvenile justice communities for their assistance in informing the commission and helping to guide the creation of a service delivery plan for the County.

[28] A copy of the response is attached as Exhibit C.

A Service Delivery Plan for Jackson County

[This potion of the report will be completed after the PDSC has developed its service delivery plan for this county.]

Exhibit A

EXHIBIT A – Excerpt from transcript of PDSC discussion at May 8, 2008 Commission meeting

Agenda Item No. 3 Commission Discussion of Service Delivery Plan for Judicial Districts 1 (Jackson County) and 14 (Josephine County)

017 Chair McCrea

Our third agenda item is a discussion of the service plan for Jackson County and Josephine County where we were at our last meeting. Ingrid, would you like to begin that discussion for us?

019 I. Swenson

I would be happy to, Madam Chair. If it is helpful, I could do a quick summary of the system as we found it. Then you have some materials that have been provided to you this morning including a letter received yesterday from the Jackson Juvenile Consortium.

When we were there last month we found a county that is growing in population, by about one and a half percent a year. They made most of their budget cuts from the timber funding shortfall in '06, so they are not currently looking at further drastic cuts, although the '06 cuts to their public safety system and their social services systems were significant.

The Circuit Court has nine judges. Judge Mark Schively is the presiding judge.

With respect to criminal court cases, it was notable that attorneys do appear at arraignments. They don't appear, as you know, in all counties but they do there. The trial rates in the county are relatively low. In 2007, 2.7 percent of the felonies and 2.4 percent of the misdemeanors were tried. I think we heard the defense representatives report that they found the district attorney's office to be reasonable and the court indicated that in its opinion attorneys resolve cases in an appropriate manner.

They have a Family Community Court, which is a combined family and drug court, which currently serves about 50 families with open dependency cases. Attorneys don't represent clients in that court but they have continuing representation in connection with the underlying dependency matter. Every week when they go to court, however, they are unaccompanied by counsel. There is a drug court in the county. Defense attorneys do participate in that court on a weekly basis.

In juvenile court, Judge Orf is the judge who handles most of the dependency cases. Attorneys do not attend initial hearings, shelter hearings, in those cases. There are occasional second shelter hearings for parents or others requesting them but they are very rare and they cannot be scheduled sooner than a month after the initial hearing. The court there appoints counsel for children in all cases in which it appoints attorneys for the parents, so that is the guide they use. In delinquency cases, Judge Mejia is the principal judge hearing those matters. He reported that counsel was being appointed in approximately 95 percent of the cases in which petitions were filed, contrary to the practice you heard about in Umatilla County where it is less than 50 percent.

The District Attorney is Mark Huddleston. He has been there since 1992. He has 19 deputies and currently reports no recruitment or retention problems in his office and said that he is able to pay an attractive initial salary.

We have three contractors in the county. Bert Putney is the Executive Director of Southern Oregon Public Defender. That provider has two offices with 15 attorneys in the Jackson County office. They handle about two-thirds of the criminal caseload and about a third of the juvenile caseload in Jackson County, but they have only been doing juvenile cases for about two years. That office has an active and longstanding board of directors. They have a policy manual, a procedures manual; they have a trainer, and assign a mentor to every new attorney in the office. They sponsor regular CLE events for themselves and other members of the legal community. They regularly monitor attorney performance and report that the increase they received under their new contract will help them with recruitment and retention, but they still anticipate continued difficulty recruiting and retaining lawyers there. Their starting salary is well below that of the DA, I think about $9,000 less per year.

Los Abogados is a consortium of seven attorneys who participate on reportedly a 3.03 FTE basis, so they all do other things besides criminal public defense cases. They have no board, no written bylaws and the members confer only informally and yet they report no performance problems and no one else in the system reports performance problems on their part, either now or historically. In fact they are considered the "A" team by a lot of people in that county.

Jackson Juvenile - there were four attorneys participating in that consortium at the time of our hearing. They have added back an attorney who was formerly associated with the consortium. Their FTE number, as reported in conjunction with the new contract, was 2.82 but with the addition of this fifth attorney that will be adjusted. I haven't been informed how much of his time he intends to devote to juvenile cases. They also handle civil commitment cases. They have a board of outside members but they report that their board is not very actively involved. They have an operating agreement between their members. As I say, you did receive a copy of an email that was forwarded by Jim Mueller, who is the new administrator of that consortium, which raises some questions about the information provided in the initial report and about the statistics and we can talk more about those later.

The structure in this county certainly appears to be working well. In criminal cases we have a very effective public defender office, and a very effective consortium, and that is a good structural combination. It adds stability and flexibility through both of those providers. Bert Putney did suggest that you consider, in the long term, the use of regional public defense provider. He was thinking specifically of the southwestern counties in the state and he thought there might be an administrative advantage in the sense there would be one administration with a number of offices and that you could move lawyers from one place to another as needed.

Caseload is probably the main issue that arises here. We weren't just picking on the Jackson Juvenile Consortium. It has, as far as I know, the highest number of cases or case credits that anybody in the State of Oregon currently has on a public defense contract. There are some interesting questions about what that means and how you compare one provider with another and we can talk further about that. I have prepared for you and provided some additional materials that you haven't had a chance to look at. I will just quickly tell you what they are. You may want to continue some of this discussion to another time if you wish to

study some of this. I gave you an outline of a workload discussion. This was prepared for our Contractor Advisory Group, to talk about what caseloads amount to, how we compare them, and whether Oregon should add some kind of limitation other than that that appears in our RFP on the number of cases that attorneys handle. On page one, I started with a reference to our RFP document. The caseload numbers contained in that document have been in place for some time. It recommends that contractors propose caseloads not in excess of 200 new felonies a year per FTE, 400 misdemeanors per year per FTE, 250 juvenile cases assuming that there will be a combination of delinquency and dependency cases, and then 300 mental commitment cases per year. When asked, sort of on the spur of the moment, to produce a statewide number in terms of where we are, and just as a "guesstimate" if you will, Kathryn said that if we added up all the new cases, all the case credits that are awarded each year and divided it by the number of FTE attorneys we would end up with 346 case credits per attorney per year, which would be a mix of all of those case types. Under national standards that number would be 265 so we estimated, in general, that our public defense attorneys have caseloads that are probably about 30 percent above national standards. That may not be good, but it is certainly a lot better than some states where caseloads are sometimes twice the recommended number. Other states limit them very carefully and are either on target or below the recommended numbers, but it varies significantly from one state to another.

I referred to the American Council of Chief Defenders (ACCD). The national standards most people refer to were actually devised in 1973, so they are very old. Very recently this group of defenders – the ACCD - decided to take a look at standards once again. They reviewed all of the literature, all of the studies that had been done since 1973 and their determination was that those standards were "resilient." In other words they are still valid today even if the cases have gotten more complex. They saw no reason to change those numbers, recognizing that in each jurisdiction, and for each provider, it would be advisable for that jurisdiction to look at their own cases and the effort and time that are involved in handling each particular case type and do its own analysis. There is no way that any national standard can take into account the differences from one jurisdiction to another in how cases are handled. If you don't have Measure 11 it is a very different equation in terms of figuring the amount of time and effort that needs to go into a particular felony case. I won't call all of these to your attention at this point but the next standard that is referred to is the one enacted recently in Spokane, Washington. They just adopted caseload standards in October of 2007. In Washington State most of the funding for public defense is provided by the counties, but the state subsidizes public defense as long as the county meets certain state requirements and one of the requirements is the setting of caseload limits. So when Spokane adopted caseload standards the county then qualified for state funding. They did not address juvenile dependencies, which apparently are not handled by public defenders. But they did adopt a limit of 250 delinquencies per attorney, per year. I included standards from some of the other states. On page two, I would call your attention to Montana which is a state that Peter Ozanne visited when they were trying to figure out how to reorganize their public defense system. They needed to make some significant changes and they did. They now have a Commission very much like this Commission and among the tasks undertaken by that Commission was the establishment of caseload standards. They created "suggested standards" at this point, so they are not mandatory, but it is interesting that in dependency cases they set a limit of 20 cases per attorney at any given time. This is another approach that some jurisdictions are using to measure caseloads. One is how many new cases do you get every year, assuming some of them close and some new cases are opened. Other states are

measuring the number of cases at any point in time. That is particularly true in juvenile dependency cases, the thinking being that these cases last a long time, that a certain amount of involvement and effort is required over that entire period of time, so for each client that you have at that time you need to be devoting a certain amount of energy and effort to that case. Twenty is the lowest I have seen anywhere, and I'll inquire further of them if that is actually being applied, and if so how it is working, but it is pretty new.

On page three, I set out some of the caseload standards and limits that are being recommended in juvenile cases in particular. One study is the Child Advocate Attorney Representation Workload Study. This arose out of the *Kenny A* litigation in Georgia and it has been going on for some time in terms of what kind of representation parties to juvenile cases are entitled to. In any case, they recommended three different standards. There were some internal and external reforms that they also suggested, internal being within the public defense provider's office, external being system-wide changes. They said, "If you make no changes internally or externally then nobody should be handling more than 80 open dependency cases at any given time. If you enact the internal reforms only, then you could handle up to 100 because the reforms would include additional staff, and if you adopt both internal and external reforms then you could handle as many as 120 open cases at any given time." In 2006 the American Bar Association adopted standards of practice for attorneys representing parties in abuse and neglect cases. There had already been standards adopted for representation of children. They recommended a caseload of no more than 50 to 100 cases at any time. That is a substantial range and perhaps they were thinking it depends on whether they are termination cases, or dependency cases, or cases in review status. I am not sure. The U.S. Department of Health and Human Services adopted 100 children as the standard for anybody who represents just children in dependency cases. If there are three children in one family they count as three of your 100 children. Then I included some state guidelines. Some of these are a little old now. Arkansas had a limit, and this is current, of 75 dependency cases at any given time. California did a monumental study of case weighting. They studied every single county; they measured the time every lawyer spent doing every task for each client and then they tried to determine from that, "Okay, this is what they are doing now and here is how many lawyers it would take if we assume they are only working 2,000 hours a year." They came up with that number and then they extrapolated and said, "But, they should also be doing X, Y, and Z, which they are not doing now and which would be beneficial to do if they could, so what would the caseload be if we added that on?" Well, they came up with some numbers and they ultimately recommended a maximum of 141clients. They said, "That is not optimal, but unfortunately we can not afford the optimum. Eighty-two would be the appropriate number, per attorney, at any given time." They have not implemented these standards. They did this huge study, found the result, and so far have not implemented them.

I think Washington State may be the most useful example for us to examine. They did a pilot project, I think it started in 2003 or '04, selecting two counties and this had to do with representation of parents not children. It resulted from an effort by some legislators to enhance the representation of parents, which the legislators had determined was inferior to the representation that was being received by children and others in the system. They created this pilot in two counties and initially they imposed a limit of 90 clients per attorney at any given time at the pilot sites. They accompanied that with a series of expectations in terms of what each lawyer would do in each case. They then measured the outcome and in Washington this was the only thing that changed significantly in

the child welfare system at the time they implemented the pilot. They could look at certain kinds of statistics and say that must be an effect of the change we made because we have no other significant changes that could account for it. The reduction in the number of terminations was huge. I am sorry I don't have the number here but I will get it for you. It was something like 42 percent fewer terminations. The other thing that they were doing – Oregon no longer does this - but they were paying stranger foster providers but not paying family foster providers. There was a significant savings if you were able to find members of the child's family to care for them instead of placing them in stranger foster care. That was another major change because by having better representation of parents, they were better able to identify qualified family members who could take children in. Because of the savings and the good outcome, they then extended the pilot to half of the providers in the state. There was an effort in the last Washington legislative session to extend it statewide. They did not have the funds to do that because it is a significant funding increase for parental representation, but they did come and testify in our legislature in support of an effort which was made last legislative session to enhance juvenile dependency representation in Oregon.

There were was four legislators who came together as the result of information they received about a single case that concerned them significantly, and they put together Senate Bill 411 in the 2007 session, which would have increased public defense funding by $23 million statewide to enhance representation of both children and parents, limit caseloads, create a resource center, and do some other things. It didn't pass. It ended up in Ways and Means. It passed through Judiciary Committee unanimously but it did not survive the Ways and Means process.

Then, thirdly, in this document, starting on page four is a discussion of caseload measurement methodologies just for your information. It talks about the three principle systems which are case-based systems, time-based systems, and number of open files systems.

I also provided you with the bar performance standards in juvenile dependency cases. Some of you will have seen this and be familiar with it. It is a very useful document. It was originally approved by the Oregon State Bar Board of Governors in 1995 and then modified in 2006 to update it with new statutory references, new expectations, and so forth. It is based largely on national standards and standards from other states, but also incorporates specific Oregon provisions. It describes what a lawyer should do, or should at least consider doing, in every case at every juncture in the case, so for that reason it is a great help, a great training device for lawyers. A lawyer can say, "Let's see. I have a new case. How do I get started? What do I need to do?" The standards describe how you might approach that case, the things you should be familiar with the things you should do. They also address review hearings and what you do between hearings and all of those things. They are an excellent guide. They are considered aspirational standards, not mandatory. You don't have to do all of these things in order to provide adequate assistance of counsel.

The other document I gave you includes two items. These were prepared in connection with Senate Bill 411 last session. The first is a letter to Bill Taylor. I prepared it. You will notice on page 3 it jumps from the top line to the next page. I am sorry. I don't know what happened there. In any case, this letter was an attempt to say, "If we were to receive the funding that we are asking for in Senate Bill 411, these are the things we would want to implement as part of that new approach to dependency cases. These would be the new expectations

for lawyers." There were two workgroups that worked throughout the interim before the 2007 session, very broad based groups including the Department of Human Services, the Attorney General's staff, legislative staff and others with the purpose of saying, "What do we need to accomplish in order to provide representation that would enhance the entire system and how is that different from what we are doing now?" It was a very useful process and most of this, most of the contents of this letter, were things that were discussed in those workgroups as to what lawyers should be doing in these cases.

Then at the conclusion of that letter I added a copy of an email that I sent to Bill Taylor. You will find some typographical errors there. I apologize for those. That was prepared somewhat in haste at the request of some of the legislators. It was a response to the question, "What is it that lawyers are failing to do currently? What doesn't get done if lawyers are significantly overworked? We had done approximately ten site visit reviews of juvenile providers by then, so we were able to go through all of those reports and say, "Well, these are the things we noticed." And very often the judges, the DHS staff, and other people would say, "It's their caseload. That is why they can't do X, Y and Z. We would like them to do it but they can barely make it to their court hearings let alone do all the things that we think they should be doing."

I made a quick list of those. One was the failure to appear at initial hearings. I can't tell you what the percentage of counties is where attorneys are not present at initial hearings. It is changing and in some counties attorneys have been appearing for years. Both parents and children need to have representation at that critical, initial hearing where the court often has to make a decision about whether a child is going to be placed in care and, if so, where? That is a critical piece and yet it cannot happen in some counties. You will notice in Union County, where there are very few providers, sometimes traveling 130 miles round trip to court, that they are there for every one of those hearings. They get the same 24 hours notice that most lawyers do and they are getting there. It is just an interesting difference. The second main concern is failure to contact clients in a timely way. In a number of places we heard that attorneys may not see their clients until the next court hearing which may be as long as a month after the shelter hearing. A lot has transpired in that time. Sometimes bridges have been burned and that kind of thing, so attorneys should be accelerating that initial contact, and complying with the terms of the OPDS contract, which essentially says, "For out of custody clients you must contact the client within 72 hours." That doesn't mean that you have to do a full interview but you have to have contacted them and set up that interview within that period of time.

A third common failure is the failure to maintain contact with the client, DHS, and other parties between hearings. Again, a lot is happening or not happening in these cases. Time frames are short and unless you are maintaining contact you don't know that your client is no longer engaging in services or that the agency has declined to provide the services they had agreed to provide, whatever it is; failure to litigate significant legal issues. The judges report that they almost never hear challenges to practices that invite challenge. The appellate lawyers have also reported to us that there are challenges they would like to see being brought that they are not seeing at the trial level and that they can't deal with on appeal since they are not in the record.

Another deficiency is failure to attend important meetings with clients. There are a lot of informal meetings beyond court hearings and citizen review hearings. There are family meetings. DHS doesn't use these meetings in the same way in every county, but in some counties these meetings are the principle

place where plans are made for the family's reunification, for identifying services for each of the family members, and if you fail to attend with your client, your client is at a significant disadvantage, but lawyers often cannot and do not attend these.

Also, there is often a failure to perform independent investigations or obtain independent expert opinions. In almost every case there is going to be at least one expert opinion because you can be assured that in probably 90% of the cases the state is going to have, at some point, obtained an evaluation of the parent's mental health or addiction history or something of that nature. There are many times when the parent's attorney says, "That is a good report. It is supportive of you. It lists some things that you need to do." You understand that it is what you would expect to find from a good evaluation. Many other times it is biased. At the very least, it is only one opinion and so it is appropriate in many cases for a parent to obtain an independent evaluation. Maybe it will confirm the finding of the earlier evaluation but that is useful too. Maybe it will say, "That is absolutely the wrong analysis. This isn't the way I would view this case at all." As indicated in the second document, in one of our site visits we found that no lawyer in that county had requested any service of any kind on behalf of a client for the last three years. No evaluation. No investigation. No funds for any of extraordinary expenses for three years. Look at the disadvantage to those clients compared with clients in counties where lawyers do this routinely. We like to save money. OPDS funds pay for these expenses, but of course we approve them when they are reasonable and necessary in the context of the case. It is not heartening to see that some people don't get the advantage of those essential services.

Then lawyers can fail to obtain proper training and there are certainly other ramifications of just being too busy, but that said, I had hoped that somebody from the Jackson Juvenile Consortium could be here. They can't. They are in court. Thursday, if you recall, is their principle juvenile dependency day. They could not extricate themselves today. Jim Mueller, or one of the other attorneys will be available by phone at noon. He is willing to answer questions and we can certainly provide him with any information that we have. I did look at the written materials that they provided and we could talk a lot about different numbers. You can read what he has to say and there is, of course, a difference between a new case and a case in review status. Although when you look at the bar performance standards many of the same kind of things have to be done on an ongoing basis. You don't meet with your client once; you need to meet with them periodically. You may need to investigate after an event of some kind not just at the outset of the case. An evaluation is rarely required in connection with the initial adjudication unless there is a trial, but the need for one frequently arises between those hearings. So, yes, there are differences between newly filed cases and cases in review status, and we don't pay them as much for review credits. We pay them approximately half as much for a review as for a new case.

Now when Mr. Mueller talked about FTEs, the number that we used to do this analysis was the number the consortium gave us – the percentage of their lawyer's time that was going to be devoted to public defense cases. Because even if they work really hard and devote much more time than the eight hours per day used to define an FTE, they also have other cases. Some of them are also members of the criminal consortium so there are part-time FTEs there, sometimes halftime. It is fine to say, "These FTEs are a public employment concept we don't know what that means," but these lawyers aren't just doing juvenile cases.

497	Chair McCrea	I'm sorry. When you talk about the number that we use is the number that they gave us, you are talking about the number on page 21 on the chart?
498	I. Swenson	Yes.
498	Chair McCrea	Okay. I just wanted to confirm.
499	I. Swenson	Yes, 2.82 is the number they provided us, at least with the new contract and I am not sure if it was true in 2007, but that is what they said. That is how many lawyers are going to be able to devote full-time to juvenile cases, so it is a convenient method of measuring cases per FTE attorneys instead of somebody who is doing a little of this and a little of that. They have added back another attorney so that FTE number will probably be adjusted and that would be a good thing.
508	Chair McCrea	He seems to say, on page two in the first paragraph that during 2007, five attorneys, not four handled the cases set forth.
510	I. Swenson	What he is indicated is that Mr. Kochlas had at least 245 case credits for reviews that carried over from earlier cases. He had ceased taking new cases, but 245 of the 2,298 case credits were his cases rather than the people who were apparently included in the FTE. He talked about the 348 new dependencies, but they also had 149 new delinquencies and 98 new civil commitments, so that is a total of 595 new cases per 2.8 FTEs or essentially 200 new cases per lawyer and 500 cases per lawyer in review status. That is a lot. You would have to handle all activities in one new case and two reviews every single working day of the week in order to do that. These lawyers work hard and they probably exceed the 40-hour week every single week. We're talking about a 2,000-hour work year. They are not. We do have to keep that in mind.
537	J. Potter	Ingrid, assuming that we take into account their corrections, have we refigured the total cases per FTE?
541	I. Swenson	If we add Mr. Kochlas?
541	J. Potter	Yes.
541	I. Swenson	To the new contract numbers?
542	J. Potter	That is right.
542	I. Swenson	I don't know if anybody has had a chance to do that?
544	B. Strehlow	If you subtract out the 245 cases for Kochlas that comes to 2,053 divided by 2.82 FTE that is 728 per FTE or 513 per attorney.
549	J. Potter	That is helpful, thank you.
550	I. Swenson	The only other comment I would have about the email from Mr. Mueller is that he says the harshest criticisms seem to be coming from somebody who has an interest in competing against us, and I'm sure he is referring to Judge Orf who said she was inclined to think about applying for a contract, herself. I want you to know that I checked back with other agency and state representatives and asked for more information for them, and before preparing this final report I included all the information they provided too. The interesting thing that they

emphasized, and this is what I included in the final report, is that, unanimously, they would say these are good, experienced lawyers. They do a very good job at the outset of the case and in the adjudication phase. They handle the CRB hearing professionally and well and when it gets to termination they are good trial lawyers. They do a good job even when they represent children. (In some counties attorneys for children reportedly just watch instead of participating actively in the case. That is not true in Jackson County.) But these same people said that it is between the outset of the case and the termination that they see almost no activity by these lawyers, certainly no actions taken on their own initiative. That is not to say that if a client calls them they don't respond, or if the client has an issue that they don't assist them, but my guess is – no it is not a guess because I confirmed this with a consortium attorney. They consider those cases as dormant. So the case files are there in the office and if the client calls, and they have instructed the client to call if there is an issue, the case file comes off the shelf. It is this period of time, when the case is "dormant," that I think explains their ability to have these huge case numbers.

587 Chair McCrea — Okay, so what should they be doing during that time that they consider the case dormant? What would we like them to be doing? The kinds of things that you talk about in your email?

591 I. Swenson — Exactly, and, yes, you can wait for a client to call, you can wait for DHS to call, or you can institute a system where you make regular contact, certainly with the case worker. "How is it going? How is my client doing? Did she get in that program? So she has dropped out of treatment?" You need to know that. There are family meetings and in Jackson County DHS says they do a lot of family meetings and that they are critically important but they say these lawyers are never present for those meetings. At those meetings you do the kind of planning where you say, "Okay, we are all together. We have all the resources in this family seated at this table. What are we going to do?" Some family member might say, "I think we ought to just give up on her," and only if you are there as the attorney to say, "Let's just take a look at this. What has she done? What does she need to do," can you have a significant impact on the planning for reunification, family placement, or whatever the immediate issue is. As I say, a need may arise for additional investigation. Somebody may say in an updated DHS report that the mother has reportedly to be seeing the violent father whose conduct caused the removal of the children. You may need to investigate that. Maybe it is a rumor; maybe it is true. If it is correct, you need to meet with the client and figure out what is going on. All of these things happen and if you wait until you get the court report that is prepared by DHS just prior to this review hearing, you can scramble around and try to get ready for that at the last minute but, even that may not be happening because the report I received was that it is not uncommon for lawyers not to have met with their clients before that hearing, so they have that report, with no information from the client. They are out there in the hallway going over it. It is not uncommon for court reports to include psychological evaluations of the clients. You need to go over those with great care. The Department of Justice attorney assigned to this region indicated that they send out case plans to these clients at least every six months. They have to do this in order to obtain continued funding. It appears that nobody is going over those plans with the clients. The parents aren't aware of what is expected of them unless they happened to be present at the meeting where it was prepared. Otherwise, it would be the expectation that the lawyer would review it with them. There are all these kinds of things committed, hard working lawyers need to be doing at that stage of the case. It is critical to act quickly because it is very often too late if you wait for the next hearing. Too much time has gone by. Other options have to be examined and potentially pursued.

654 Hon. Elizabeth Welch

Where to begin? The issues here are gigantic, just gigantic, and I am wondering since we talked about this at the last meeting whether the staff has talked about separating out delinquency just to simplify the discussion a little bit. In other words, in trying to solve this, if there is anything to be solved, and I don't know if you all think there needs to be something done here. I do, but it seems to me the delinquency is so uni-dimensional by comparison, let's put it that way, to take those out so that we can look at case numbers consistently.

669 K. Aylward

We do keep track of the cases separately.

671 Hon. Elizabeth Welch

Remember Umatilla County and the fact that a lot of kids apparently plead guilty in Umatilla County without a lawyer, then a county like Multnomah and many others where that is not permitted. It is another way of just simplifying. Just some of the issues here that you haven't talked about have to do with the role of the CRB, which varies all over the state, in terms of how much responsibility the court delegates to the CRB. Do you know what ASFA is? The Adoption and Safe Families Act was passed by Congress in, I believe, 1988 and it created some very, very firm, short timelines for parents to get their acts together or lose their kids permanently. That revolutionized the practice in juvenile court. Back to another thing you said, Ingrid, the idea that there doesn't need to be a reexamination of the standards for representation of children and parents in dependency cases since 1973. The process is unrecognizable to anyone who was in the system before 1973 and continuously since then, it is simply not true. The expectations, all those hearings, none of that stuff happened in the good old days. It was much more like what you are reporting happens maybe in some of the counties now where we are raising questions. That whole role of how much – when you have a case in the CRB does the lawyer go, or does the investigator go – and I am not saying that is a bad thing. A lot of lawyers' offices, Jim's I'm sure does this, sends people other than lawyers because nothing happens in the CRBs. CRBs don't have any authority. Obviously, if you have a hearing to go to and a CRB to go to, you are going to go to the hearing. There may be representation but who is it? How thin are you spreading your legal resources, your lawyer resources I should say.

The final thing, and I have a lot to say but I am trying to restrain myself here a little bit, is philosophical. This business about lawyers who don't have any contact with clients between review hearings. I have always felt that there is a problem with people, and Ingrid is a good example of why this isn't always true, but lawyers come from a criminal background and they end up representing parents, they sometimes don't really morph in the process of making that move. They continue to have a very criminal system perspective on what they are doing. That is, "You are on your own lady and you take care of yourself and you do what you are supposed to do here. You know what the rules are; you know what the expectations are, and I will see you in court." I think that somebody who practices law like that would say, "I am a lawyer. I am not a social worker. I am not a parent here. I am a lawyer and this isn't my job." I don't know how much you do in all the training that you put on to address that. I am sure there is some, but, as an observer I know I can just about label these attorneys for you. The final thing I am going to say, and I really will stop for the moment at least, as a result of being retired I get to travel around the state and boy is that an education. I haven't blinked since I started doing plan B. I almost always am asked to do juvenile which is fine with me. The only place I do domestic relations is in Multnomah County. The variability of everything is just

breathtaking and these poor lawyers. I feel so sorry for them. I was in Burns last October. It was a life-altering experience for me. The lawyers all came massive distances to represent these clients. How practical is it if your lawyer is in Bend and you live in Burns for there to be regular, meaningful communication. I am criticizing no one just noting the realities are horrendous.

781 J. Stevens — They do the same thing to see their doctors though too.

781 Hon. Elizabeth Welch — Exactly, and I bet you there are not a lot of dependency clients who go to Bend for anything, even to go to Costco, which I understand is one of the cultural events in town.

788 Chair McCrea — Well, Ingrid, I want to say thank you for the materials that you put together for us because the synthesis of the workload information is extremely helpful. It is slightly disturbing, I guess I would say, and it indicates to me that really what we as a Commission are dealing with here are potentially three different issues. One is the general question of whether we should set caseload limitations or standards in cases in general; the second is whether we want to try to set something concerning juvenile matters, and I don't think we are going to get to either one of those today. The third question is what, if anything, do we want to with Jackson County and with the JJC and I want to come back to that in just a second. The performance standards you provided us are great and somehow I didn't get exactly where those are coming from?

809 I. Swenson — They are from the Oregon State Bar and on their website but they have been notoriously difficult to find. Now it is much better. They are now in a place where people can find them under "performance standards."

816 Chair McCrea — I am assuming that is something that we are encouraging juvenile practitioners to do.

817 I. Swenson — Yes.

817 Chair McCrea — What you provided us concerning your letter to Bill Taylor concerning Senate Bill 411 is extremely helpful in terms of practices and the issues as you have outlined them. Then I guess coming back full circle, my question becomes do you have a recommendation for the Commission as to what we may want to do with JJC? I know that Mr. Mueller is prepared to answer any questions we have by phone at noon. He has set out at pages three and four of his response to the draft report, a number of things that JJC wants to do in terms of trying to implement and facilitate even better representation, and those all look fine, but the question of the caseload is still at least, for me, a concern.

841 I. Swenson — Well, Madam Chair, I think the Commission has a number of options. We have a current contract in place and frankly I really appreciate their willingness to make some changes at this stage including adding Mr. Kochlas back to the contract and taking some other steps to maximize the availability of lawyers. One other thing I have spoken with them about is it may not just be a matter of adding more lawyers. Kathryn and I were talking about them and other providers and thinking that if you can add staff sometimes they can do a lot of the necessary client contact if they are well trained, can do a lot of the DHS contact, those kinds of things, and we do have providers who have added paralegal FTEs to their contract. They are less expensive. They can be very effective. Some of them can be shared even in a consortium setting. Others can't. We had suggested that they contact Klamath Defenders, for example,

because they have a contract with a former DHS worker who does all the child visits, the visits with very young children, who is very skilled in observing the child's circumstances. They also use this person to evaluate information in DHS files. There are different approaches that can be taken and I do believe that they are examining some of those things.

Although the numbers are extreme here, this is but one example of a situation that prevails more broadly than that. Our group of four legislators is still interested in pursuing this issue although they have determined that probably, since our package failed last time, that they would prefer a pilot approach. We are working with them on identifying some potential pilot sites for a bill that they would prepare and sponsor. But in June at the next meeting of the PDSC you will be looking at, among other things, potential policy option packages for our budget for the 2009-11 biennium and one of those policy packages could be for enhanced representation in juvenile dependency cases, a specific legislative appropriation. Twenty-three million was the number that best described what we thought was needed …… [end of tape]

TAPE 1; SIDE B

037 I. Swenson — …. of significant interest to them, much more so than the quality of representation in criminal defense cases. We could be looking at additional funding. There are training efforts under way because to some extent it really is a training issue and the philosophy that has prevailed is changing. The amendments to the performance standards attest to that, so that is another forum in which we can make some of these changes. But this Commission may want to direct OPDS to study caseloads, to look at dependency cases separately if we can do that and make some recommendations. Maybe we can't. Maybe it is going to be apples and oranges across the state and there really are no firm limits, but maybe we could propose a set of criteria for analyzing caseloads, looking specifically at the percentage of new cases, what areas of representation are suffering the most, those kinds of things. I certainly wouldn't expect you to make any long-term decisions today about that and we can come back with additional information for you if the Commission is inclined to look at either setting some limit or a series of guidelines for caseloads in this area in particular. We don't hear quite the same concerns in criminal cases. Obviously all public defenders are overworked and our statewide survey certainly supports that, but I think it is more extreme in the juvenile area. We would like to continue working with Jackson Juvenile to look specifically at what they are doing. They sent half of their members to the last juvenile CLE conference sponsored by the Criminal Defense Lawyers in April. They often attend training sessions so they are familiar with the expectations.

067 Chair McCrea — Well, I think we have identified the issues and we are well aware of them and we can try to move forward.

070 I. Swenson — Any other thoughts from other contractors?

070 Chair McCrea — Thoughts from any other Commissioners? I will note that Commission Lazenby slipped in quite a while ago and has been present.

070 C. Lazenby — And quiet.

070 Chair McCrea — That goes without saying because you haven't been on the record yet. Any comments?

072	J. Potter	Ingrid, do you have any sense at all of how long an average dependency case goes on or how long an average delinquency case goes on? I ask that because in one of the models for case counting is adding 70 cases, or adding 80 new cases a year, if the cases go on for more than a year and the cumulative effect is significantly more than the 70 or 80…
078	I. Swenson	I doubt that we have a number. We could tell you a percentage of reviews which tells you what percentage of cases remain in the system, but some of those are multiple reviews in the same case. Some counties have reviews every 30 days, others have them every 90, others every six months, so that varies dramatically. It is not just the absolute number. Commissioner Welch, did you ever find an average in Multnomah County?
085	Hon. Elizabeth Welch	I wouldn't be able to pull anything out. It is certainly different. There are numbers and I am just trying to think of what the source was about the number of cases. How long it takes to set to resolve cases? Within 90 days – not resolve but litigate and actually close cases. There are a lot of dependency cases that get closed in some counties because their screening isn't as good as it is in other counties. In other words, in Portland, I think the screening is pretty good so most of the cases that come in the door are serious - over generalized but to make my point. Then there are cases that come in and wash out – something that I read for today, I think it might have been in one of the eastern Oregon counties said that a lot of them are resolved at shelter. That doesn't happen very much in the metropolitan area. I think that Tim's operation would probably have some data that could be useful.
100	J. Hennings	Ingrid, I was just reviewing the review hearings in our office the other day, ones that were set over the last four months, and we number them sequentially so they are a "J" with a number after them. In the last four months there were probably 40 cases set in two counties, Washington and Multnomah County and the number was in the high teens. That is how many review hearings there are. We also have the date because it is the original number. That includes the year and some of those cases go back to the '90s. They don't close. Some cases do close and get settled, but if there is an ongoing problem as a general rule they don't close. They are not bad enough that they are automatically pushed toward a termination, but they still are reviewing those cases.
112	I. Swenson	It will be interesting to see Jim's numbers and I am familiar with the Judicial Department's data. It may not answer John's question but I will see what I can find.
118	J. Potter	Well, anecdotally you certainly hear from lots of lawyers that we have these juvenile cases forever. It is not forever, but it is a long time.
120	I. Swenson	As Commissioner Welch was saying because of this new, not new, its been here 20 years now, because of the requirements of the federal Adoption and Safe Families Act you have to be moving along and cases that could go on indefinitely in the past can no longer do that. Essentially you are supposed to resolve a case within a year. That is probably rare but it pushes the system to try to do that and some of them are resolved in that period. I will try to get you some more information.
127	Hon. Elizabeth Welch	On a slightly more humorous note, I wondered when you were talking about your discussions with DHS regarding the lawyers, my experience, having done a

lot of training of caseworkers over my career, is that what they are looking for and what you are looking for bear very little connection to each other. Their idea of a good lawyer is somebody who doesn't make trouble and doesn't get in the way. That is a generalization and therefore isn't true all the time, but I would be cautious, personally. I go to do the training and people will say, "How do those lawyers take those stupid positions on behalf of their client?" I have to give them the primer on what a lawyer's job is. The lawyer's job is to represent their client and that is something that even people who know better don't necessarily accept when they are on the receiving end of it.

141 I. Swenson — It is true and, frankly, we do the same with DAs and judges. We understand that they come at it from a different perspective, but that makes it all the more striking when DHS says they are not advocating strongly enough for their clients.

146 Chair McCrea — Okay. Other comments or questions for Ingrid? Thank you. We will take a 10-minute break and come back.

[Break]

Exhibit B

Memo

To: Workload Subcommittee of Contractor Advisory Group

From: Ingrid Swenson

Re: Summary of caseload/workload studies and recommended limits

Date: February 12, 2008 [as edited for distribution to PDSC August, 2008.]

As some of you are aware, workload was identified in the 2007 legislature as an issue that would need to be addressed in future biennia. Legislators were informed that, while the immediate need was to increase compensation sufficiently to sustain our public defense system in the short term, in the longer term attorney's workloads would also have to be addressed.

Although some of those who participated in planning for the 2007 PDSC budget presentation felt that a blue ribbon committee should be appointed by the governor and legislature to undertake this study, the commission determined at its December, 2006 meeting that if such a study were to be undertaken it would certainly come within the scope of the commission's responsibilities.

I think it would be helpful for us to have an initial discussion of some of the studies that have been done in other states, what information we have about the workload of Oregon's public defense providers, what kind of a study would need to be done to determine how much time is currently being spent on various types of cases and how we would measure the amount of time that should be spent on these types of cases.

1. Caseload studies and limits (I have summarized below some of the reports about efforts to control caseloads in other jurisdictions.)

Oregon: OPDS's RFP recommends that applicants propose caseloads that don't exceed: 200 felonies, 400 misdemeanors, 250 juvenile cases or 300 mental commitment cases per attorney per year. In April of 2006 OPDS estimated that it had contracted for 346 cases per FTE attorney per year (averaging all case types). Under national standards it should have been 265. Oregon attorneys were therefore estimated to be carrying caseloads that averaged 30% greater than the national standard. (There are, however, significant differences between how cases are counted under the national standards and how they are counted by OPDS.)

In 2007, **ACCD** found the 1973 National Advisory Commission on Criminal Justice Standards (NAC standards) to be resilient and to provide a foundation from which local defenders and bar association leaders should develop local caseload standards for each practice area. "Case weighting studies must be implemented in a manner which is consistent with accepted performance standards and not simply institutionalize existing substandard practices." NAC standards provided for maximum caseloads of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 mental health cases, or 25 non-capital appeals per attorney per year.

Spokane County, Washington adopted national caseload standards 10/29/07. (These are the same as Washington Defender Association standards and a county must adopt these standards as a condition for receiving more state money.) (150 felonies, 250 juvenile delinquencies, 3-400 misdemeanors.)

Nevada Supreme Court issued an order on Jan. 4, 2008 finding that "by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County and Washoe County" based on recommendations made by the Supreme Court's Indigent Defense Commission. The order noted that public defenders in Clark County carried average caseloads of 364 felony and gross misdemeanor cases per year and in Washoe County defenders carried 327 cases. The court ordered the adoption of performance standards and requested that weighted caseload studies be prepared in both counties. A public hearing is scheduled for September 5, 2008.

In **Michigan** an Ingham County circuit court judge denied a motion to dismiss a lawsuit against the State of Michigan and the governor re the state's constitutional obligation to provide appropriate defense services to indigent defendants. The suit claims that services in three Michigan counties are so under-funded and have so little administrative oversight and attorney training that they don't meet minimum requirements for effective assistance. (Note: the suit against the county was brought by a now exonerated defendant who established that there was no oversight of the training or quality of representation being provided.)

In **Missouri,** as a result of findings of a Spangenberg report, a state bar task force is studying public defender caseloads. A legislative interim committee also studied the state public defender and reported on public defender caseloads, retention, management and office space in Jan. of 2007.

Vermont created a task force to address indigent defense staffing needs statewide.

In **Delaware** a three year integrated study was undertaken in 2006 to determine the appropriate number of judges, deputy district attorneys and public defenders required for each 100 criminal cases filed. Delaware's caseload standard is 150-

180 felony cases, 400 - 500 misdemeanor cases, 200-230 juvenile cases. In order to meet those standards in 2006, however, the public defender's office would have needed to hire 50 additional attorneys.

In **Northern Kentucky**, caseloads of public defenders average 500 per attorney and over 650 in one county per a Department of Public Advocacy report in August of 2007. In July of 2008 the Kentucky state finance cabinet asked for an injunction to block public defenders from withdrawing from cases.

Arizona – on 12/17/07 39 motions to withdraw were granted by Mojave County Superior Court in Kingman and the judge said in his order that the court would rule consistently in any future cases in which similar motions were filed at least until the court is convinced that the reasons for doing so no longer exist. "The question is not how the public defender got to this position but the fact that the public defender cannot currently discharge professional and ethical responsibilities if not allowed to withdraw in these cases."

In **Knox County, Tennessee** the public defender, Mark Stephens, moved to withdraw from all misdemeanor cases in June, 2007. See Tennessee Weighted Caseload Study Update: District Public Defenders (January 2007). Knox County makes up the bulk of a statewide shortage of public defenders; 32 needed there and 123 statewide.

Montana – State's performance standards say it is hard to set rigid numbers. Attorneys should work 2000 hours per year. Created "suggested" caseloads which will be regularly reviewed in Montana. A "case" includes all charges in single information and PVs that are disposed of along with the new charges. At any given time an attorney should not be assigned more than 50 non-capital felony cases, 100 misdemeanor cases, 80 juvenile offender cases, 20 dependent and neglect cases, 30 civil commitment cases, 7 appeals, 7 PCR matters or 4 cert petitions.

In **Virginia** Spangenberg conducted a study of the state system and released its report in February 2004. Attorneys here may be the lowest paid in the country ($245 per case). Caseloads grossly exceed national standards

2. Juvenile Cases

<u>OPDS RFP</u> - **250** juvenile cases per attorney per year (dependency and delinquency)

Child Advocate Attorney Representation and Workload Study – 6/25/07 (Georgia). This study arose out of the <u>Kenny A</u> litigation and was conducted by the Carl Vinson Institute of Government to decide how to appropriately measure the workloads of child advocate attorneys and to recommend appropriate caseloads. The report proposed that each full time attorney have no more than

80 open cases unless recommended internal and external reforms were adopted. If internal reforms were adopted, it recommended 100 open cases and if both internal and external reforms were adopted – 120 open cases. Internal reforms included adoption of a vertical representation model, an increased number of investigators, caseload management improvements, implementation of written standards of practice, specialized training, increased funding, additional use of outside resources. External reforms included receiving better information from the human services agency, changes to court rules, implementation of a One Judge, One Family system, prompt calendaring of motions, and enforcement of the child's right to counsel.

ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006) – "recommended caseload of no more than **50 to 100** cases depending on what the attorney can handle competently and fulfill these standards."

Standards for Legal Representation of Children, Parents and the Child Welfare Agency, US Department of Health & Human Services – "Depending on the level of support, the complexity of the case, and whether or not a lawyer's full-time interest is in child welfare cases, the caseload cap for a staff attorney should be set at **100** children."

Arkansas (current) – **75** dependency cases (a case may include multiple siblings) per full time attorney.

California (2004) – Yet to be implemented maximum standard of **141** clients and optimum standard of **82** dependency clients per full time attorney

Other state standards reported in Bureau of Justice Assistance January, 2001 report (prepared by the Spangenberg Group): (All are for dependency and delinquency cases combined except for Washington State): Colorado 305-310; Florida 250; Georgia 200; Indiana 250; Louisiana 250; Massachusetts 300; Minnesota 175; Missouri 280; Oregon 480[1]; Tennessee 273, Vermont 200; Washington 250.[2]

The Washington State Office of Public Defense Parents' representation pilot program established maximum caseloads of **90** cases per full time attorney, which was then reduced to 80. The program was extended to half of the state in 2007 due to its success in reducing terminations and increasing family placements.

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[1] The source of this information is unknown.

[2] Washington Defender Association Standards for Public Defense (2003) recommended a maximum of 250 juvenile offender cases per attorney per year or **70** juvenile dependency clients per attorney per year.

3. Caseload measurement methodologies

In an **NLADA 1992** paper "Indigent Defense Caseloads and Common Sense: An Update," Chapter IV deals with methodologies for measurement of caseloads/workloads. Three methods are identified: a unit or case-based system (e.g. the NAC standards), a time-based system, or the number of open files standard.

Factors to be considered in a **case-based system** (case =a single charge or set of charges concerning a defendant in one court in one proceeding): mandatory sentencing schemes, charging practices of the prosecutor, percentage of cases tried, availability of investigative and social service resources, the amount of turnover of the staff, the distance from the office to the courts and jail or detention facility, etc. Note that one of the problems with a case-based system is that it does not take account of non case-specific activities such as professional development, administrative work, travel and waiting time. A "workload" analysis would include these things.

Under a **time-based system**, attorneys report the amount of time it takes them to perform specific activities on various kinds of cases from intake to disposition. One the average amount of time it takes to handle a specific case type or activity is determined, a caseload standard can be developed by dividing the number of hours the attorney has available per year to devote to his/her caseload by the average time it takes to handle a case type or activity. A number of states have had these studies done (e.g. Minnesota, Wisconsin and California). The Ohio Public Defender Commission conducted its own study. In Minnesota and NY attorney activity was measured through sample attorneys maintaining contemporaneous time records. Other states used estimates. Minn. Study was done in January 1991. Were 89 full time and 172 part-time attorneys. The study called for a selected group of 60 attorneys throughout the state to keep daily time sheets for each case type for three months. Case types were broadly classified as juvenile, misdemeanor, gross misdemeanor, and felony. Juvenile cases were further sub-classified as child welfare, delinquency and waiver cases. Felony cases were further sub-classified as murder, criminal sexual conduct, three severity levels of non-drug felonies. The state was divided into three regions: urban, suburban and rural. The number of annual billable hours was determined to be 1700 per FTE. Considering all this information plus information from other case weighting studies, national standards, etc., the report recommended following caseloads per FTE attorney per year: Homicides 3, other felonies 100-120, gross misdemeanors 250-300, misdemeanors 400, child welfare 80, other juvenile 175, other cases 200. Also recommended that each district have one FTE attorney for administration and supervision, one FTE trainer attorney, one legal secretary per 4 attorneys, one FTE investigator for 3 attorneys on felonies and six on non-felonies.

New York, Wisconsin, Ohio, California (appellate office) all did similar studies.

Under the **"Number of Open Files"** Standard, the only criterion is the number of open files at any given time. The shortcomings of this approach are: It doesn't tell you about the speed of case disposition, doesn't take into account seriousness of the charge, it provides no means of assessing productivity, and it isn't useful in projecting staffing needs.

New Mexico's study – one example of a caseload study. New Mexico performed a two-year workload measurement study of DAs, judges and PDs that was funded by the state legislature and overseen by the New Mexico Sentencing Commission. The National Center for State Courts and the American Prosecutors Research Institute did the actual data-gathering and report writing. The report was based on actual time spent on actual cases. The group acknowledged that effective use of personnel resources should be tied to workload, not just cases. Different types of cases require different amounts of time and attention from judges, prosecutors, defense attorneys, and their support staff. Phases of the study: project design, time study and analysis, qualitative research, draft and final reports - total time of 17 months. The objectives of the study were to determine current personnel resource needs and to create a model with case weights that would allow the state to forecast staffing needs for each component of the system. Some changes that will affect workload cannot be predicted, however, so the study recommended a systematic review every few years to account for the changing environment. The study concluded that increases in the number of judges, DAs and PDs must be accompanied by proportional increases in staff. It was also determine that there was no clear correlation between the workload of a judge and the workload of a DA or a PD. It was concluded that it would be necessary to standardize each group's case counting system in order to standardize a funding formula that would apply to all three groups.

The core of the workload assessment model was a time study under which judges, lawyers and staff members kept track of the amount of time they spent on various case type categories and on non-case-specific responsibilities such as court or office administration and work-related travel time. The study measured time by case type and event type. They arrived at a preliminary workload standard (time currently taken to perform a particular function in a particular type of case) and then made a quality adjustment. Work study groups recommended changes to current practice to improve performance. The final workload standard was then translated into the number of judges, DAs and PDs needed. The study includes average total in-court and in-office time required to provide effective adjudication and case processing for each case type category. Phases of workload assessment were: determining the actual amount of time spent on each task, determining whether that amount of time was sufficient (this function was performed by quality adjustment focus groups, identifying final case weights and resource estimates (made after extensive review and comment by advisory groups).

November 1985 Case Weighting Systems – NLADA handbook for budget preparation. Types of data collection: "Delphi" method (consensus of attorney opinion about "typical" levels of effort), surveys (based on observation or self-reporting, with a process for controlling error.)

2001 US Dept of Justice, Bureau of Justice Assistance – "Keeping Defender Workloads Manageable." (Attached to cover e-mail.)

Specific Standards for Representation in *Juvenile Dependency* Cases

This chapter pertains to representation of children and parents in juvenile dependency cases. These cases are primarily civil in nature and procedure, but are often referred to as *quasi-criminal* because of the significance of the rights and deprivations involved. At stake for children are their liberty, their right to membership in their family of origin, and their right to be safe, healthy, and protected. At stake for parents is their right to raise their children as they think best without state interference and, ultimately, the absolute and final termination of their parental rights.

Practice in juvenile dependency cases is unique and challenging, requiring continual training to assure the best legal representation of clients. Juvenile dependency cases may be as different and varied as the children and families involved in them. These training and practice standards are intended to help lawyers better meet the needs of their clients in juvenile dependency cases, and to improve the level of practice in these cases. The participation of a lawyer on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings. These Standards recognize the importance of independent representation for children in juvenile dependency cases, and recommend that the lawyer represent the child's articulated position in all but the exceptional case.

STANDARD 3.1
Prerequisites for Representation

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, experience, thoroughness, training, and preparation reasonably necessary for the representation.

Implementation

1. Every dependency case is different, and varied approaches may be required in the legal representation of a child or parent. Effective legal practice in dependency cases requires a wide variety of skills unique to this practice.

2. In addition to meeting the requirements for experience and training contained in Standard 1.1, *supra*, a lawyer for children, parents, or guardians in dependency cases should:

    a. meet the requirements of the *Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense*, Oregon Judicial Department (1990), Standard 3.1 G.;

    b. for all cases, have knowledge of juvenile justice statutes, relevant rules, case law, standards, and procedures; have observed at least one contested juvenile court case; be generally familiar with services available to children and parents in the juvenile system; and have reviewed and is familiar with the materials listed below:

    (1) Oregon Revised Statutes chapters 419A, 419B, and 419C, Oregon Juvenile Code.

(2) Oregon Revised Statutes chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.

(3) Oregon Revised Statutes chapter 418, Child Welfare Services.

(4) Oregon Revised Statutes chapter 420, Youth Correction Facilities; Youth Care Centers; and chapter 420A, Oregon Youth Authority; Youth correction Facilities; and applicable Oregon Administrative Rules.

(5) JUVENILE LAW (Oregon CLE 1995 & Supp 2000).

(6) Public Law No. 105-89, Adoption and Safe Families Act of 1997.

(7) Public Law No. 95-608, Indian Child Welfare Act of 1978, 25 USC §§1901–1963 (1982), and the Refugee Child Act, ORS 418.925–418.945.

(8) Public Law No. 105-17, Individuals with Disabilities Education Act.

(9) Public Law No. 93-112, Title V, §504, Rehabilitation Act of 1973, as amended, 29 USC §794 (1982).

(10) Article 1, Sections 42 and 43 of the Oregon Constitution and statutory provisions regarding the rights of victims.

c. be familiar with:

(1) the causes and available treatment for child abuse and neglect;

(2) the child welfare and family preservation services available through Department of Human Services–Child Welfare (formerly State Offices for Services to Children and Families (SOSCF) referred to hereinafter as DHS-CW) and available in the community and the problems they are designed to address; and

(3) the basic structure and functioning of DHS-CW and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs.

3. A lawyer new to dependency cases is encouraged to work with a mentor for the first three months and at a minimum should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan before accepting appointments.

4. In termination-of-parental-rights cases, a lawyer for children or parents must meet the standards for dependency cases and have handled dependency cases for a minimum of six months as a full-time juvenile defender or must have handled at least 25 juvenile dependency cases that have gone past the jurisdictional phase.

5. A lawyer should develop a basic knowledge of child development and adequate communication skills to communicate with child clients and witnesses.

a. Interviewing techniques should be age-appropriate and conducted in private, confidential, and age- appropriate settings.

b. Communicating with a child client, especially with regard to legal matters, may require efforts beyond those normally required for effective communications with adult clients. A lawyer for children should therefore be especially sensitive to the child's stage of development, including:

(1) cognitive, emotional, and social growth stages;

(2) level of education;

(3) cultural context; and

(4) degree of language acquisition.

c. As with any client, a lawyer may advise the child client about his or her position in the case, but a lawyer should recognize that the child client may be more susceptible to intimidation and manipulation, and should ensure that the client's ultimate decision actually reflects the client's actual desires.

6. A lawyer for children, parents, or guardians in dependency cases should also visit at least two of the following:

   a. a shelter home or facility;

   b. a foster home;

   c. a group home;

   d. a residential treatment facility;

   e. the Oregon State Hospital Child or Adolescent Psychiatric Ward; or

   f. an outpatient treatment facility for children.

7. All lawyers representing children, parents, or guardians in dependency cases should average at least 15 hours of continuing legal education (CLE) each year, at least 8 hours of which should relate to the practice of juvenile law.

   a. A lawyer is encouraged to seek training in the subject areas listed in Implementation 2, 3, 4, 5, and 6, *supra*.

   b. A lawyer is also encouraged to seek training in the following areas:

      (1) child abuse reporting;

      (2) substance abuse and resources for substance abusing families;

      (3) cultural and ethnic differences as they relate to child-rearing;

      (4) government benefits available in dependency cases, such as Social Security payments including non-needy relative grants, AFDC, and AFDC-FC, adoption assistance programs, and crime victims programs;

      (5) transition plans and independent living programs;

      (6) emancipation laws and programs;

      (7) family preservation services;

      (8) resources for the diagnosis and treatment of sexual abuse, physical abuse, and emotional abuse;

      (9) patterns of child growth as related to neglect;

      (10) resources for the treatment and recognition of non-organic failure to thrive;

(11) educational, mental health, and other resources for special needs children;

(12) the use and appropriateness of psychotropic drugs for children;

(13) domestic violence, its effect on parents, children, and families and appropriate resources;

(14) immigration law issues in juvenile court;

(15) transitional aspects of placement and the child's return home;

(16) the importance of placing siblings together when appropriate;

(17) the appropriateness of various types of placement;

(18) the efforts that should be made to ensure a smooth, timely transition;

(19) the effect of the placement on visitation by parents, siblings, and other relatives;

(20) the effect of the placement on the service needs of the child;

(21) the transracial, transcultural, and language aspects of the placement;

(22) risk assessment prior to reunification;

(23) the basics of case planning;

(24) accessing private insurance for services;

(25) consolidated cases in the family court;

(26) the Indian Child Welfare Act, Native American families, and appropriate resources;

(27) the Refugee Children's Act;

(28) the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA);

(29) the Parental Kidnapping Prevention Act;

(30) the Interstate Compact for the Placement of Children;

(31) the Interstate Compact on Juveniles;

(32) guardianships; and

(33) adoption placement preferences;

(34) the rights a client might have as a result of being the victim of a crime.

STANDARD 3.2

Special Considerations for the Client Who Is a Citizen of Another Country or Has Ties to Other Jurisdictions

A lawyer should be aware of the impact on the lawyer's clients, who are citizens of other countries, of various state and federal laws, including treaties that are applicable in the juvenile court setting.

Implementation

1. A lawyer should be familiar with the requirements and effect of the following laws:

a. ORS 419B.851(3), statutory implementation of the Vienna Convention on Consular Relations, April 24, 1963, Article 36, regarding service of process, and 8 CFR §236.1.

b. The Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.704--109.990.

c. The Parental Kidnapping Protection Act (PKPA), 28 USC §1738A, giving Full Faith and Credit to judgments of sister states, and the corresponding Federal Fugitive Felon Act.

d. The International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 USC §1204 (1993).

e. The Hague Convention on the International Aspects of Child Abduction, implemented by ICARA, 42 USC §11603 et seq.

f. The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

g. Refugee Children's Act, ORS 418.925.

h. The Missing Children's Act of 1982, 28 USC §534(a).

i. The National Child Search Assistance Act of 1990, 42 USC §5780.

j. The Missing Children's Assistance Act, 42 USC §5771 et seq., and the establishment of the National Center for Missing and Exploited Children(NCMEC).

2. A lawyer should be aware of the type of services that may be available and how to contact the consulate and website of the embassy of the client's country of citizenship.

3. A lawyer should know how to contact and access the services of an immigration specialist.

4. A lawyer should know how to access the U.S. Department of State website (travel.state.gov).

5. A lawyer should know about the availability of protections against international abduction afforded parties in consolidated custody cases pursuant to ORS 109.035.

STANDARD 3.3
General Duties and Responsibilities of a Lawyer to Client; Avoiding Conflicts of Interest; Professionalism and Zealous Representation

A lawyer or a lawyer associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or closely related matters unless it is clear there is no conflict of interest between the parties as defined by the Oregon Rules of Professional Conduct (ORPC). Lawyers should also follow ORPC 1.8--1.13 relating to conflicts of interests and duties to former clients. A lawyer should act in a professional manner in zealously advocating the client's position.

Implementation

1. A lawyer should comply with Standard 1.2, Implementation 5, *supra*. A lawyer should be especially cautious when accepting representation of more than one parent, guardian, or child. A lawyer should avoid representing both parents in dependency cases and should never represent both parents in cases that involve allegations of sexual, physical, or emotional abuse, or when the interests of the parents may be adverse. A lawyer should avoid representing multiple siblings when their interests may be adverse and should never represent siblings when it is alleged that one sibling has physically or sexually abused another sibling. Child clients may not be capable of consenting to multiple representations even after full disclosure. For a child client not capable of

considered judgment or unable to execute any written consent to continued representation in a case of waivable conflict of interest, the lawyer should seek appointment of an alternate lawyer to determine whether a waiver of the conflict is in the best interests of the child.

2. A lawyer should preserve the attorney-client privilege and not disclose, without the client's permission or as otherwise provided by law, confidential information. A lawyer should try to avoid publicity connected with the case, that is adverse to the client's interests. A lawyer should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings, and the privacy needs of the client. A lawyer should protect the client's privacy interests, including by asking for closed proceedings when appropriate.

3. A lawyer should initiate and answer all correspondence and telephone calls that are necessary to the effective representation of the client.

4. A lawyer should not engage in ex parte communication regarding pending cases with the judicial officer before whom the case is pending.

5. A lawyer should maintain professional decorum when appearing before the juvenile court. A lawyer should identify for the record any person who is present in the courtroom on behalf of a client.

6. A lawyer may not contact represented parties without the consent of their counsel.

7. A lawyer should attend all court appearances and be prompt and prepared for such appearances. A lawyer should avoid sending substitutes to court appearances.

8. A lawyer should make informed decisions about whether to participate and, if so, whether to appear personally or through a representative at administrative proceedings including Citizen Review Board hearings and meetings outside of court hearings involving the client's case. A lawyer should also request to be notified of such proceedings and meetings.

9. If a lawyer, in the course of representation of a client under the age of 18, becomes aware that the client has a possible claim for damages that the client cannot pursue because of his or her civil disability, the lawyer should consider asking the court that has jurisdiction over the child to either appoint a guardian ad litem for the child to investigate and take action on the possible claim or issue an order permitting access to juvenile court records by a practitioner who can advise the court whether to seek appointment of a guardian ad litem to pursue a possible claim.

STANDARD 3.4
Role of a Lawyer

When representing parents and children capable of considered judgment, the lawyer should follow ORPC 1.2 in determining the scope of the lawyer's representation and the allocation of authority between a client and a lawyer.

When a client's capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment, or for some other reason, in compliance with ORPC 1.14, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

It is the duty of the lawyer for a child to determine whether the child is capable of considered judgment. If the lawyer determines that the child is not capable of considered judgment, counsel should advocate for what is in the client's best interests.

If a parent, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceeding or give direction and assistance to the parent's lawyer, a guardian ad litem may be appointed. If a guardian ad litem is appointed, a lawyer for the parent should (1) consult with the guardian ad litem, (2) accept direction from the guardian ad litem on the decisions that would ordinarily be made by the parent, and (3) inquire at every critical stage in the proceeding about whether the parent's competence has changed and, if appropriate, request removal of the guardian ad litem.

Implementation

1. When representing parents who have not had a guardian ad litem appointed, and children capable of considered judgment, decisions that are ultimately the client's to make include whether to:
    a. admit the allegations of the petition;
    b. agree to jurisdiction, wardship, and temporary commitment to DHS-CW;
    c. accept a conditional postponement; or
    d. agree to specific services or placements.
2. A lawyer should advise the client concerning the probable success and consequences of adopting any posture in the proceedings. It is the duty of a lawyer to give the client the information necessary to make an informed decision, including advice and guidance, but to not overbear the will of the client. A lawyer may not advocate a position contrary to the client's expressed position unless directed to do so by the client's guardian ad litem.
3. When representing parents who have not had a guardian ad litem appointed, and children capable of considered judgment, a lawyer is bound by and should advocate for the client's definition of his or her interests, and may not substitute counsel's judgment for the client's, nor ignore the client's wishes because they are perceived not to be in the best interests of the child.
4. In determining whether a child is capable of considered judgment, a lawyer should consider:
    a. the child's chronological and intellectual age and assume that an
    b. average and normal child of seven is presumably capable of considered judgment.
    c. the child's developmental stage;
    d. the child's sophistication and experience;
    e. whether the child is articulating a position concerning the issues of the case; and
    f. the presence of undue influence.
5. Whether a child is capable of considered judgment and able to contribute to a determination of his or her position in the case depends on the context and circumstances at the time the position must be determined. A child may be able to determine some positions in the case but not others.
6. When a child has been injured or suffers from a disability or congenital condition that results in the child having a progressive illness that will be fatal and is in an advanced stage, being in a coma, persistent vegetative state, or suffering brain death, the lawyer for the child should consult with the parent if appropriate and consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment, and the execution of an advanced health directive pursuant to ORS 127.505 et seq.

7. If a child client is not capable of considered judgment, a lawyer should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best interests with respect to the proceeding. After consultation with the child, the parents through their counsel if any (not appear to conflict), the caseworker, the CASA, or foster parent and any other family members or interested persons, such as the child's therapist, a lawyer shall advocate what the lawyer determines to be the best interests of the child.

8. When there is a conflict between what the lawyer has determined would be in the best interests of a child who is not capable of considered judgment, and the child's stated desires, the lawyer must to the greatest extent possible resolve the conflict by working with the young client, although this sensitive issue cannot always be avoided or completely resolved. If unable to resolve the conflict, the lawyer should communicate the child's wishes to the court but advocate for what the lawyer determines to be the best interests of the child.

9. When a parent client's ability to make adequately considered decisions in connection with the representation is impaired, because of mental or physical disability of other reason, the lawyer shall, as far as reasonably possible maintain a normal attorney-client relationship. It is, however, a violation of due process to fail to appoint a guardian ad litem for a parent who, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceeding or give direction and assistance to the lawyer. Requests for appointment of a guardian ad litem must only be made when parents truly lack substantial capacity, because it is also a violation of due process to unnecessarily deprive a parent of control of the litigation in a dependency or termination-of-parental-rights case if the parent does not meet the standard for appointment of a guardian ad litem. A lawyer should only request appointment of a guardian ad litem for a client when the client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client be able to retain the requisite mental capacity to assist in the proceedings in a reasonable time. *See* OSB Formal Op. No. 2000-159 (2000), "Zealous Representation: Requesting a Guardian ad Litem in a Juvenile Dependency Case."

10. If a lawyer serves as a guardian ad litem, the lawyer should be aware of the distinct fiduciary duties, obligations, and powers of a guardian ad litem and how those differ from the ethical duties, obligations and powers of the lawyer in an attorney-client relationship.

11. The parent's lawyer should consult with a guardian ad litem and may generally be directed by the guardian ad litem in the decisions that would ordinarily be made by the parent in the litigation. The parent's lawyer, however, has an ongoing obligation to the client to assure that the guardian ad litem is adequately asserting the parent's interests in the case and to seek removal of a guardian ad litem if the parent's situation changes such that the parent no longer requires a guardian ad litem.

12. Unless inconsistent with the client's interests, a lawyer should cooperate with other parties to the case.

13. Assure that necessary interpreter services are provided for all phases of the proceeding.

STANDARD 3.5
Obligations of a Lawyer Regarding Shelter Hearings and Pretrial Placements

When a child has been removed from the parent's home and placed in shelter care, a lawyer should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case a lawyer should advocate for the placement order and other temporary orders that are in the best interests of the child.

Implementation

1. A lawyer should be familiar with statutory and case law that requires DHS-CW to make reasonable efforts or active efforts to prevent removal of a child.

2. A lawyer should be familiar with the types of placements available to children and placement issues, including:

    a. the impact of removal and placement on the child;

    b. the necessity of placement;

    c. specially certified placements for the client;

    d. relative placement;

    e. the importance of placing siblings together when appropriate;

    f. alternatives to placement;

    g. the appropriateness of the placement;

    h. the efforts that can be made to ensure a smooth transition to a new placement;

    i. the effect of the placement on visitation;

    j. the effect of the placement on service needs of the child or family;

    k. the transracial, transcultural, and language aspects of the placement; and

    l. placement preferences under the Indian Child Welfare Act.

3. At the shelter care hearing, a lawyer should:

    a. obtain copies of all relevant documents;

    b. take time to talk to the client, caution the client about self incrimination, and ask for a recess or continuance if necessary;

    c. if appropriate, assert client's Fifth Amendment and other constitutional rights; and

    d. assist the client in exercising his or her right to an evidentiary hearing to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process before adjudication;

    e. when appropriate, present facts and arguments regarding:

        (1) jurisdictional sufficiency of the petition;

        (2) appropriateness of venue;

        (3) adequacy of notice provided to parties, and tribes if applicable, particularly if they are not present;

        (4) the necessity of shelter care;

        (5) why continuation of the child in the home would or would not be contrary to the child's welfare or why it is or is not in the best interests and for the welfare of the child that the child be removed from home or continued in care;

(6) whether reasonable or active efforts were made to prevent removal;

(7) whether reasonable and available services can prevent or eliminate the need to separate the family;

(8) whether the placement proposed by DHS-CW is the least disruptive and most family-like setting that meets the needs of the child;

(9) the possibility of placement with appropriate noncustodial parents and relatives;

(10) a plan for release of the child prior to the jurisdictional hearing;

(11) if the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services, and mediation; and

(12) applicability of the Indian Child Welfare Act and appropriate parties and tribes to receive notice.

f. propose return to parents or placement that is the least restrictive with regard to the client.

4. If a child is returned to parents or placed in shelter care or other state placement, a lawyer for the child should ensure that the child's needs for safety and right to receive treatment are met by the child's caretakers or agencies responsible for the child's care. A lawyer should inform the court, DHS-CW, and the caretakers for the child about any medical, psychiatric, or security needs of the client, if directed by the client.

5. A lawyer should request any temporary orders that the client directs or, if representing a child not capable of considered judgment, that are in the best interests of the child, including:

   a. temporary restraining orders, including orders expelling an allegedly abusive parent from the home;

   b. orders governing future conduct of the parties, i.e., remaining clean and sober while the child is present, etc.;

   c. orders for any services agreed-on before adjudication;

   d. visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation;

   e. orders for the parent or parents to pay child support if appropriate;

   f. orders for DHS-CW to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and

   g. orders for the agency to provide appropriate treatment for the child.

6. A lawyer should consult with the client about transfer of the case to tribal court and take appropriate action as directed by the client.

7. A lawyer should inform the client of the possibility of a review of the referee's or court's order at the shelter care hearing and the possibility of pursuing a writ of habeas corpus.

8. If the court sets conditions of the child's placement, a lawyer should explain to the client and any third party the conditions and potential consequences of violating those conditions. A lawyer should seek review of shelter care decisions as appropriate and advise clients or any third parties of

changes in conditions for pretrial placement that would be likely to get the court to agree with the client's plan.

9. A lawyer should ask the court to inquire of parties concerning the paternity of the child and the applicability of the Indian Child Welfare Act or the Uniform Child Custody Jurisdiction Enforcement Act.

STANDARD 3.6
Initial Client Interview and Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney-client relationship. A lawyer should conduct an initial interview of the client if possible at the initial court hearing or, if the lawyer is not appointed until after the hearing, within 72 hours, and maintain regular contact with the client throughout the case. A lawyer shall keep the client reasonably informed about the status of a matter and promptly comply with all reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Implementation

1. A lawyer should comply with ORPC 1.3 and 1.4 and Standard 1.2, Implementations 1, 2, and 3, and Standard 1.3, *supra*, and. in addition, on being retained or appointed, a lawyer should make an initial contact with the client or the client's caretaker within 24 hours and, when appropriate, conduct an initial interview within 72 hours. At the initial interview, a lawyer should explain to the client in age-appropriate language:

    a. juvenile court and DHS-CW procedures;

    b. the client's rights;

    c. the role and responsibilities of the lawyer;

    d. the role of each player in the system;

    e. alternatives and options available to the client, including referrals to available resources in the community to resolve domestic relations issues;

    f. the consequences of applicable timelines;

    g. the consequences of aggravated circumstances or extreme conduct pleaded in the petition and the consequences of selecting one option over another in light of applicable planning timelines, including the impact of the timelines established by the ASFA;

    h. the impact of the concurrent case planning required under the AFSA on the case and the client's participation in such planning;

    i. the consequences of failing to appear in particular proceedings;

    j. rights under the Indian Child Welfare Act, if applicable; and

    k. rights under the Refugee Children's Act, if applicable.

2. A lawyer should give the client time to ask questions and consider the alternatives. A lawyer should obtain information from the client about:

    a. the client's prior contacts with DHS-CW;

b. the client's knowledge about the allegations of the petition;

c. the accuracy of information provided by the state supporting the petition;

d. alternative or additional allegations that should be added to the petition;

e. services provided before removal or intervention;

f. reasons for removal or intervention;

g. services the client feels would have avoided the need for removal;

h. alternatives to removal, including relative placements, in-home services, or removal of the perpetrator;

i. current efforts to reunify the family;

j. family history, including paternity issues, if any, and identity of prior caretakers of the child;

k. services needed by the child, parents, or guardians;

l. the client's concerns about placement;

m. the client's long- and short-term goals;

n. current visitation and the client's desires concerning visitation;

o. whether the client wishes to attend the hearing and, if the client is a child, whether the client wishes to address the court outside the presence of the other parties;

p. the applicability of the Indian Child Welfare Act, the Refugee Children's Act, and relevant other cultural, religious, social, and sexual preference issues; and

q. any other relevant information.

3. A lawyer representing a child should gather information from the child and the child's caretakers, caseworker, and therapist, if any, to assist in determining whether the child is capable of considered judgment.

4. All child clients should, at a minimum, be personally contacted by a lawyer and/or lawyer's trained and qualified staff to determine the client's wishes, if possible, and to assess the client's well-being. It is important for a lawyer or lawyer's staff to observe the child, the child's interactions with others in the home or foster home, and to assess the severity of the injuries and the child's general health and condition. Children four years of age or old enough to communicate should be personally interviewed in private by a lawyer. If possible, a lawyer should interview child clients in a setting outside of the court.

5. A lawyer should have contact with clients:

a. before court hearings and CRB reviews;

b. in response to contact by the client;

c. when a significant change of circumstances must be discussed with the client;

d. whenever notified that the child's placement is changed; or

e. when a lawyer is apprised of emergencies or significant events impacting the child.

6. For younger children, a lawyer, personally or the lawyer's their staff, is encouraged to have regular face-to-face contact with the client in the child's home or foster home every three months or as needed. Older children could be contacted by phone if not in person, in their homes, at school, or at the lawyer's office with a similar frequency.

7. A lawyer should confer with the client as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information. After a lawyer is fully informed on the facts and the law, the lawyer should advise the client concerning all aspects of the case.

STANDARD 3.7
Independent Investigation

A lawyer should conduct a thorough, continuing, and independent review and investigation of the case, including obtaining information, research, and discovery in order to prepare the case for trial. A lawyer should not rely solely on the report of the DHS-CW caseworker as the investigation of the facts and circumstances underlying the case.

Implementation

1. A lawyer should, when appropriate, conduct an in-depth interview with the client covering:
    a. the events giving rise to the allegations in the petition;
    b. the existence of witnesses or other potential sources of information; and
    c. information about the child's current placement, condition, and needs.
2. A lawyer should be familiar with and, when appropriate, obtain the assistance of, local juvenile and mental health experts who can provide the lawyer with consultation, evaluation of the client or other parties, including parent-child interaction assessments, and testimony on issues in the case.
3. A lawyer should have potential witnesses, including adverse witnesses interviewed and, when appropriate, subpoenaed by an investigator or other appropriately trained person. If a lawyer conducts a witness interview, the lawyer should do so in the presence of a third person who can be available to appear as a witness at trial. Potential witnesses may include:
    a. school personnel;
    b. neighbors;
    c. relatives;
    d. caseworkers;
    e. foster parents and other caretakers;
    f. mental health professionals;
    g. physicians; and
    h. law enforcement personnel.
4. When possible, a lawyer should interview the client in the client's home. When appropriate, a lawyer or lawyer's trained and qualified staff should observe visitations between parent and child.
5. When necessary, a lawyer should conduct or participate in depositions of witnesses.

6. A lawyer should obtain information from representatives of other agencies with whom the family has been involved, either through DHS-CW referral or on the family's own initiative, such as:

    a. community health nurses;

    b. school personnel;

    c. homemaker services;

    d. family counselors;

    e. parenting instructors;

    f. drug or alcohol counselors;

    g. neighbors;

    h. ministers, priests, church members, etc.;

    i. baby-sitters;

    j. other persons who have had significant contact with the child or family and may have relevant information; k. the child's Indian tribe, if applicable; and

    k. the consulate of client's country of citizenship, if applicable.

7. A lawyer should comply with discovery statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations, or other information relevant to the case. A lawyer should obtain and examine all available discovery and other relevant information, including:

    a. the petition and juvenile court legal and social files;

    b. information that is obtained through requests for discovery;

    c. information from the DHS-CW caseworker and from reviewing agency records for information about:

        (1) services provided by the agency in the past;

        (2) visitation arrangements;

        (3) the plan for reunification; and

        (4) current and planned services.

8. A lawyer should obtain records concerning the family from other relevant sources, such as:

    a. schools;

    b. hospitals and other medical records sources;

    c. law enforcement agencies;

    d. treatment agencies, including mental health and drug and alcohol treatment agencies; and

    e. psychiatrists, psychologists, therapists, and counselors.

9. When the client's participation in a psychiatric, medical or other diagnostic treatment program is significant in obtaining the client's desired result, a lawyer should so advise client.

10. A lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the client's case.

11. A lawyer should investigate and consider whether the case is or should be consolidated with any other case.

STANDARD 3.8
Pretrial Motions

A lawyer should research, prepare, file, and argue appropriate pretrial motions or responses with the court whenever there is reason to believe the client is entitled to relief. A lawyer should file briefs or memoranda in support of such motions or responses.

Implementation

1. A lawyer should make appropriate pretrial motions, including:
    a. discovery motions;
    b. motions for medical, psychological, or psychiatric evaluation, parent-child interaction, developmental, or neurological assessment;
    c. motions challenging the constitutionality of statutes and practices;
    d. motions to strike, dismiss, or amend the petition;
    e. motions for transfer; and
    f. evidentiary motions and motions in limine.
2. A lawyer should seek protective orders, make motions for additional shelter hearings, make appropriate motions in limine, and make other evidentiary motions.
3. A lawyer should make motions to meet the client's needs pending trial, including but not limited to:
    a. restraining orders;
    b. orders for family reunification services;
    c. orders for medical or mental health treatment;
    d. orders for change of placement;
    e. motions to increase, decrease, or limit parental or sibling visitation;
    f. motions seeking child support or waiver of obligation to pay child support;
    g. motions seeking contempt for violations of court orders;
    h. if client is indigent, motions for payment of expert witnesses; and
    i. orders to establish or challenge paternity pursuant to ORS chapter 419B.

STANDARD 3.9
Negotiating a Settlement

A lawyer should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client. In appropriate cases, a lawyer should request a judicial settlement conference.

Implementation

1. If a lawyer concludes, after sufficient investigation, that the petition will probably be sustained, the lawyer should so advise the client and request consent to discuss settlement of the case. A lawyer should negotiate admissions to the petition that cast the client in the most favorable light.

2. A lawyer should fully explain to the client the rights that would be waived by a decision to admit to jurisdiction, including the impact of established timelines established by the AFSA, and keep the client fully informed of settlement negotiations. A lawyer must convey to the client any offers made for settlement and the advantages and disadvantages of accepting the offers. A lawyer may not accept any settlement without the client's authorization.

3. A lawyer should be familiar with available mediation services and should consider whether the client's interests could best be served, and whether the case could be more appropriately resolved, by mediation or other settlement meetings.

4. A lawyer should explain to the client the conditions and limits of the settlement, and the effect of the settlement, especially when admissions made to allegations could give rise to a criminal charge or finding of aggravated circumstances or extreme conduct. These admissions could impact future actions such as domestic relations actions, immigration proceedings, criminal actions, or termination-of-parental-rights petitions.

STANDARD 3.10
Jurisdictional Hearings

A lawyer should be prepared to provide quality representation and advocacy for the client.

Implementation

1. In most circumstances, a lawyer should have the client present at significant court hearings and reviews and should especially advise the client of all mandatory appearances and the consequences of failing to appear at hearings.

    a. If a child is not capable of considered judgment, in determining whether to have a child present at a hearing or review, a lawyer should, after consultation with child's therapist, if any, carefully consider the impact of the hearing on the child.

    b. A decision to exclude a young child from a hearing or review is appropriate if the child does not want to attend, is too young to sit through the hearing, would be significantly traumatized by such attendance, or for other good reasons. The lawyer should consider whether concerns about the child being exposed to some of the testimony can be addressed by having the child temporarily excluded from the courtroom during such testimony.

2. If the child is capable of considered judgment, a lawyer is bound by the client's decision concerning testifying or attendance at hearings.

3. A lawyer should avoid unnecessarily requiring young children to testify in dependency adjudication, review, or termination-of-parental-rights hearings. In determining whether to have the child testify, the child's lawyer should consult with the child's therapist, if any.

a. In determining whether to have the child testify, the child's lawyer should consider:

(1) the child's need or desire to testify;

(2) any likely repercussions of testifying;

(3) whether the child is likely to be found competent to testify;

(4) the necessity for the child's direct testimony;

(5) the availability of other evidence that may substitute for the child's testimony; and

(6) the child's developmental ability to testify and withstand cross-examination.

b. If the child's lawyer determines that it is necessary to have the child testify, a lawyer should consider, and agree, to steps to reduce potential harm to the child caused by testifying, such as arranging for the child's testimony to be taken in chambers

4. A lawyer should be familiar with current law and empirical knowledge about children's competency, memory, and suggestibility as they relate to the child's competence to testify or the reliability of testimony or out-of-court statements.

5. A lawyer for the child should prepare the child to testify including:

a. familiarizing the child with the courtroom and court procedures;

b. advising the child what to expect during direct and cross-examination;

c. ensuring that testifying will cause minimum harm to the child by:

(1) seeking modification in the location of the testimony;

(2) limiting who will be present;

(3) restricting the manner and phrasing of questions posed to the child; and

(4) objecting to questions to the child that are not phrased in a syntactically and linguistically appropriate manner.

6. A lawyer for the parent should prepare the parent client to testify. If there is the potential for criminal liability, the lawyer should advise the client whether to answer specific questions or assert the client's Fifth Amendment right not to answer specific questions.

7. At the hearing, a lawyer should be fully prepared by:

a. having all relevant materials available at the trial, including all pleadings, discovery, and investigative reports, as well as, relevant statutes, case law, and the evidence code;

b. having marshaled facts and legal arguments to prove or disprove the allegations of the petition, ensuring that there is factual support for each service element being sought.

c. having a draft or outline of:

(1) opening and closing statements;

(2) direct and cross-examination plans for all witnesses;

(3) amendments to the petition to be requested to conform the petition to the findings; and

(4) findings of fact and conclusions of law to be requested at the conclusion of the hearing.

8. A lawyer should make appropriate motions, present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary. During all hearings, a lawyer should preserve legal issues for appeal, as appropriate.

9. A lawyer should ensure that the client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the client to cooperate with the trial court's orders. A lawyer should also explain the client's rights and possibilities of posttrial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. A lawyer should explain the consequences of violating the trial court's order and the continuing jurisdiction of the court.

10. After the jurisdictional hearing or trial, the lawyer should

    a. carefully review the judgment and advise the client about potential issues for appeal;

    b. advise the client in writing of the timelines for filing a notice of appeal and the lawyer's ability to represent the client on appeal; and,

    c. assist the client in locating an attorney to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment.

11. If a child is found within the jurisdiction of a court following a parent's failure to appear and the lawyer has been relieved as counsel, the lawyer should promptly notify the client of the entry of the judgment and advise them of the steps necessary to set aside the judgment based on excusable neglect. If a lawyer is court-appointed and the client wishes to request that the judgment be set aside, the lawyer should immediately contact the court to request reappointment and thereafter promptly file the necessary pleadings on behalf of the client.

STANDARD 3.11
Disposition

A lawyer should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

Implementation

1. A lawyer should be prepared to participate fully in the dispositional hearing, including filing appropriate motions, which sets a course for the future of the case that will result in either reunification of the family or a severance of family ties. The lawyer should a lawyer the client concerning the disposition prior to the hearing, including explaining to the client the nature of the hearing, the issues involved, and the alternatives open to the court. The lawyer should also explain fully the nature, obligations, and consequences of any proposed dispositional plan.

2. A lawyer should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. A lawyer also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic conditions, and any other information relevant to disposition.

3. When the court has found evidence sufficient to support jurisdiction, a lawyer should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the

ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment, or placement.

4. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the client's needs and desires. Although a child's position may overlap with the position of one or both parents, third-party caretakers, or DHS-CW, the child's lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not be a mere endorsement of another party's position.

5. A lawyer for the child should ensure that the court recognizes the need to speedily promote permanency for the child if so directed by the client or if representing the child's best interests.

6. A lawyer should, when appropriate, examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility, and weight of any reports or other evidence before the court.

7. A lawyer should be prepared to present a disposition plan that will achieve the client's desired ends. A lawyer should be familiar with the dispositional alternatives available to the court and the various agencies that serve children and families that can provide placements, treatment, and other dispositional services and should fully discuss dispositional options, consequences, and procedures with the client.

8. With the client's consent, a lawyer should secure the assistance of psychiatric, psychological, medical, or other experts needed for purposes of evaluation, consultation, or testimony about the dispositional plan. A lawyer should obtain reports or subpoena evaluators or other expert witnesses to testify. A lawyer should prepare the client for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.

9. A lawyer should obtain the written reports of the Juvenile Department, DHS-CW, and the CASA sufficiently in advance of the dispositional hearing to prepare a response. A lawyer should consider submitting a written dispositional report on behalf of the client to set out the client's plan and to counter information provided in other reports received by the court.

10. At the hearing, a lawyer should, when appropriate:

    a. request orders that benefit the client;

    b. be prepared to present evidence on whether the reasonableness or unreasonableness of DHS-CW's efforts and alternative efforts that could have been made, were active, or reasonable;

    c. request that a "no reasonable or active efforts" finding, if applicable, be made by the court;

    d. request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by DHS-CW;

    e. request orders for services or service agreements that include:

        (1) family preservation services;

        (2) medical and mental health care;

        (3) drug and alcohol treatment;

(4) parenting education;

(5) housing;

(6) recreational or social services;

(7) domestic violence counseling;

(8) anger-management counseling;

(9) independent living services;

(10) sex-offender treatment; and

(11) other individualized services.

11. A lawyer should assure that the order includes a description of actions to be taken by parents to correct the identified problems. A lawyer should request that the court include in its order a timetable for accomplishing the changes required. A lawyer should, when appropriate, seek court approval of a written service agreement prepared by the lawyer or DHS-CW.

12. A lawyer should also request specific visitation orders covering visitation between child and parent, between siblings, and between the child and other significant persons.

13. A lawyer should, when appropriate, request that the court appoint counsel, a court-appointed special advocate (CASA) or an educational advocate (surrogate parent) for the child. When appropriate, a lawyer should seek child support orders.

14. A lawyer should seek to ensure continued representation of the client at all further hearings and reviews. A lawyer should request that the court set the next date for the case to be reviewed.

15. A lawyer should assure that the client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. A lawyer should also explain the client's rights and possibilities of posttrial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal. A lawyer should explain the consequences of violating the dispositional order and the continuing jurisdiction of the court.

STANDARD 3.12
Postdisposition

A lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. A lawyer should be prepared to counsel the client and provide or assist the client to secure appropriate legal services in matters arising from the original proceeding.

Implementation

1. A lawyer should counsel the client and file any postdisposition motion or appeal that is needed.

2. A lawyer should review the court's order to insure that it conforms to the findings and disposition.

3. A lawyer should file, litigate, or respond to any motions to reconsider, set aside, or modify the jurisdictional finding or disposition, as well as any appeals of referees' orders. A lawyer should, as directed by the client, also file notice of appeal and either provide representation on appeal or assist the client in referral to other appellate counsel. A lawyer should participate in an appeal filed by another party or assist the client in referral to other appellate counsel.

4. If a lawyer's representation continues after disposition, the lawyer should monitor implementation of the case plan and progress in the case, requesting additional services and seeking review or other relief, such as contempt, as appropriate. A lawyer should be familiar with the procedures available to the client after disposition.

5. A lawyer should monitor the case plan for implementation and maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, when necessary, to counsel the client concerning the dispositional plan.

6. A lawyer should confer periodically with their client and the caseworker to review the service plan and service agreement, the extent of compliance with the plan by both the agency and the client, and the continued appropriateness of the plan. When needed, the lawyer should request additional services for the client or family.

7. In monitoring the provision of dispositional services, a lawyer should request a review or permanent planning hearing if necessary to protect the client's interests. The lawyer should investigate and prepare for review or permanent planning hearings as for adjudicatory hearings to the extent that is necessary. *See* Standards 3.6 and 3.9, *supra*.

8. A lawyer for the child should file a petition for termination of parental rights when necessary or advocate for the district attorney or attorney general to do so.

9. When the representation ends, a lawyer should explain why the representation is ending and how the client can obtain assistance in the future should it become necessary.

STANDARD 3.13
Review Hearings and Citizen Review Board (CRB) Reviews

State and federal law requires that review hearings or CRB reviews occur at regular intervals.

A lawyer's role is critical at review hearings and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties' progress toward achieving the case plan, assesses the adequacy of the services offered to the family, and considers whether jurisdiction should continue. A lawyer should be fully prepared to represent the client at all reviews and CRB reviews.

Implementation

1. Clients are also entitled to request reviews to review issues in the case as they arise. A lawyer should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. A lawyer should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.

2. Whether a review is periodic or at the request of one of the parties, a lawyer should conduct appropriate investigation to prepare for the review, which may include:

    a. reviewing the DHS-CW file and the report prepared for the review and obtaining all relevant discovery;

    b. interviewing the client prior to hearings and obtain supplemental reports and information for client prior to the hearing;

c. interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;

d. contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress by the client;

e. interviewing other potential witness, which may include relatives, neighbors, school personnel, and foster parents;

f. seeking evaluation of the client or other parties; and

g. Subpoenaing needed witnesses and records.

3. At all review hearings and CRB reviews, a lawyer should be prepared to present information supporting the client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. A lawyer should consider submitting a written report on behalf of the client. A lawyer should specifically address:

   a. whether there is a need for continued placement of the child;

   b. reasons the child can or cannot presently be protected from the identified problems in the home even if services are provided;

   c. whether DHS-CW is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;

   d. why services have not been successful to date;

   e. whether the court-approved plan for the child remains the best plan;

   f. whether the case plan or service agreement needs to be clarified or modified;

   g. the client's position on the development of a concurrent case plan;

   h. the appropriateness of the child's placement; and

   i. whether previous court orders regarding visitation, services, and other case related issues should be modified.

4. At all review hearings and CRB reviews, a lawyer should request specific findings and orders that advance the client's case.

5. At all review hearings and CRB reviews, a lawyer should ensure that parents receive a clear and authoritative statement of the court's expectations, the statutory timelines, the possibility of return of the child if sufficient progress is made, and the risk of implementation of the concurrent case plan. A lawyer should ask the court to schedule a subsequent hearing, if needed.

STANDARD 3.14
Permanent Planning Hearings

At permanency hearings, the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship, or other planned permanent living arrangements. A lawyer should take particular care in preparing for a permanency hearing and ensure that the lawyer is well acquainted with the case history and case files. The lawyer should be prepared present favorable evidence and zealously advocate the client's position about the permanent plan.

Implementation

1. The lawyer should consider requesting that the court schedule a permanency hearing in furtherance of the client's goals.

2. A lawyer should conduct a similar investigation as required by Standard 3.13, Implementation 2, *supra*. In addition, a lawyer should be prepared to address what the long-term plan for the child should be, including:

    a. a specific date on which the child is to be returned home, or

    b. a date on which the child will be placed in an alternative permanent placement;

    c. whether the child will remain in substitute care on a permanent or long-term basis; and

    d. whether substitute care will be extended for a specific time, with a continued goal of family reunification.

3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification or implementation of a concurrent plan.

    a. The lawyer should consider whether to request sufficient court time to adequately present the client's position, including live witness testimony.

    b. A lawyer should also consider submitting a written permanency memorandum in support of the client's position.

4. At a permanency hearing, the lawyer should request specific findings and orders that advance the client's position, including but not limited to:

    a. the findings set forth in Standard 3.13, Implementation 3, *supra*;

    b. that a specific extension of time for reunification is appropriate and the specific services and progress required during that time; and

    c. the development and expansion of the case plan or concurrent plan and a court progress report within 10 days of the hearing.

5. The lawyer should carefully review the court order from the permanency hearing with the client and discuss a client's option to seek review, including appellate review of any final orders.

STANDARD 3.15
Termination-of-Parental-Rights Hearings

Because termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership, and only the death penalty is a more severe intrusion into personal liberty, a lawyer should be zealous and meticulous in investigating and preparing for termination-of-parental-rights hearings.

Implementation

1. A lawyer should prepare for and try termination-of–parental-rights cases zealously and meticulously as for adjudicatory hearings. *See* Standards 3.6, 3.7, 3.8, 3.9, and 3.11, *supra*. In addition, a lawyer should:

a. thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations and review the case with the client;

b. completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interests, including:

(1) the child's relationship with his or her parents;

(2) the importance of maintaining a relationship with the child's siblings and other relatives;

(3) the child's ability to bond to an adoptive resource; and

(4) preserving the child's cultural heritage.

c. prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;

d. research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memoranda if necessary;

e. obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;

f. subpoena and carefully prepare witnesses;

g. carefully prepare the client to testify at the termination trial and advise the client of the consequences of failing to appear at a mandatory court appearance in the termination proceeding;

h. evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during the trial;

i. be aware of the heightened standard of proof in termination cases—clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;

j. be prepared to present evidence of or address DHS-CW's failure to adequately assist parents;

k. evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and

l. be aware of alternatives to termination of parental rights, including but not limited guardianship and open adoption to achieve permanency for the child.

2. The lawyer should meet with the client to discuss the termination petition and the consequences of a involuntary judgment of termination of parental rights. The lawyer should also discuss alternatives to trial with the client, including voluntary relinquishment of parental rights, open adoption agreements, postadoption contact agreements; guardianship other planned permanent living agreements, conditional relinquishments, and continuance of the trial. If the client wishes to pursue an alternative to trial, the lawyer should advocate for the client's position.

3. When a parent client fails to appear at a mandatory termination proceeding:

a. a lawyer for the child should be prepared to prosecute or defend the termination petition; and

b. a lawyer for the absent parent should consider the following options:

(1) to seek a continuance in order to allow the client to appear;

(2) to request withdrawal as attorney of record for the absent parent;

(3) to take other action to protect the client's interests.

c. If a judgment of termination is entered as a result of a court proceeding after a parent's failure to appear and the lawyer has been relieved as counsel, the lawyer should promptly notify the client of the entry of the judgment and advise the client of the steps necessary to set aside the judgment based on excusable neglect. If a lawyer is court-appointed and the client wishes to request that the judgment be set aside, the lawyer should immediately contact the court to request reappointment and thereafter promptly file the necessary pleadings on behalf of the client.

4. In preparation for and during the termination trial, the lawyer should be:

a. prepared to submit a trial memorandum in support of client's position;

b. prepared to offer or agree to stipulations regarding the evidence;

c. prepared to offer and stipulate to facts;

d. prepared to examine witnesses both on direct and cross-examination;

e. prepared to lay the proper evidentiary foundations;

f. prepared to make opening and closing statements; and

g. create an adequate record of the case and preserve any issues appropriate for appeal.

STANDARD 3.16

The lawyer's obligation to the client may continue after a judgment of termination of parental rights has been entered.

Implementation

1. After the trial, the trial, the lawyer should:

a. carefully review the judgment and advise the client about potential issues for appeal;

b. advise the client in writing of the timelines for filing a notice of appeal and the lawyer's ability to represent the client on appeal; and

c. assist the client in locating a lawyer to handle an appeal if the lawyer is unable to undertake such representation and take whatever steps necessary to preserve the client's right to appeal.

2. If the lawyer's representation of a parent client continues after the trial, the lawyer should assist the parent in seeking a mediated postadoption contact agreement or open adoption agreement.

3. If the lawyer's representation of a child client continues after trial, the lawyer should assist the child in negotiating a postadoption contact agreement, monitor efforts to finalize the adoption of the child, advocate for the child with respect to selection of the adoptive placement, seek sufficient

adoption subsidy, and seek appropriate services and court reviews pending finalization of the adoption.

(Copy of contents of letter to Bill Taylor re how OPDS would ensure that enhanced legislative funding resulted in improved representation.)

March 6, 2007

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

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

Dear Mr. Taylor:

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

1. Mandatory "Best Practices"

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

A. Meet and communicate regularly with the client[3]
   (1) Describe case procedures and timelines
   (2) Enable parents (and children capable of considered judgment) to candidly communicate

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

[2]Technical Assistance Brief: Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation, National Council of Juvenile and Family Court Judges, 2003.

[3]For child clients not yet capable of considered judgment, meet regularly with the child and the child's care provider to become fully aware of the child's needs and circumstances.

(3) Facilitate agreements by realistically evaluating allegations and evidence with client

B. Ensure client has adequate access to services, including visitation
   (1) Explain the importance of "reasonable/active efforts" services to client
   (2) Develop a thorough knowledge of resources available to clients
   (3) Explore with client ways to effectively participate in services
   (4) Ask client for feedback if obstacles prevent their participation, and follow up with DHS and in court when appropriate

C. Prevent continuances and delays within attorney's control
   (1) Treat dependency and termination cases as the highest priority
   (2) Avoid over-scheduling whenever possible
   (3) Request unavoidable continuances if they are needed for substantive reasons

D. Prepare cases well
   (1) Conduct high-quality, early case investigation
   (2) Use discovery appropriately
   (3) Prepare for and participate in settlement conferences and other resolution opportunities
   (4) Obtain experts and evaluators for cases involving psychological, bonding, or similar issues, when appropriate
   (5) Draft well-researched and written trial memoranda and other documents
   (6) Litigate hearings and trials if no agreement is reached.

E. In addition, Oregon lawyers would be required to:
   (1) Provide representation at or before the initial shelter hearing if possible
   (2) Commit to meeting with the client within the contractual time frames (24 to 72 hours) after appointment
   (3) Thoroughly explain to the client (other than a child who is not yet capable of considered judgment) the nature of the proceedings, the client's rights, the decisions which are the client's to make, the likely result of each possible course of action, the function and obligations of DHS, the need for the client to remain in good contact with the attorney, and the need to notify the attorney if there is a change of circumstance or a need for information or assistance
   (4) Explore possible relative placements at all appropriate stages of the case
   (5) Prepare for and attend all court and Citizen Review Board hearings and any meeting at which the client is present and which is for the purpose of planning services for the client or a change of placement for the child
   (6) Maintain regular communication with DHS, treatment providers, and other parties to the case
   (7) Maintain in each client's file a comprehensive list of events in the case and actions taken by the attorney and the date of each event or action

(8) Initiate contact with the client at least monthly (if the client has not contacted the attorney) to determine whether the case plan is being followed and, if not, why not

2. Caseload Limits, Training and Evaluation

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

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

3. Attorney Resource Center

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

4. Monitoring of Relevant Data

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

A. If Oregon's experience is similar to Washington's, Oregon could expect to see reduced lengths of stay in non-relative foster care, a higher percentage of children in relative foster care, a higher percentage of

reunifications and a reduction in terminations. Data on these measures is available from DHS.

B. If lawyers' caseloads were reduced it is expected that there would be reductions in the number of days to jurisdiction. If lawyers were better prepared and worked more effectively with parent clients there should be fewer contested hearings but the contested hearings that do occur should be longer. Data on the time to jurisdiction and the number and length of court hearings is available from the Judicial Department.

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

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

Sincerely,

Ingrid Swenson
Executive Director

ILS/

(The following information was provided to Mr. Taylor in response to a question from legislative members.)

Some of the things that fall through the cracks when lawyers are overworked: This topic would warrant a lengthy discussion but I will outline some of the concerns that we have learned from our own site evaluations (of 20 juvenile contractors to date).

(1) As you know there are a significant number of counties in which the parents appear for the initial hearing (at which the judge will ordinarily decide whether a child will be removed from the parents or will continue to be placed out of home and, if so, where the child will be pending the next court hearing). Children are also not represented at this hearing in some counties. The court generally appoints an attorney at these hearings but it takes days and sometimes weeks before the attorneys are notified of their appointment and make initial contact with their clients. There are significant logistical problems in some of the less populated counties since the attorneys there often cover multiple counties and may not

be available on 24 hours' notice to attend a shelter hearing. In some counties, however, such as Jackson County, the attorneys cover only one county but both the court and the attorneys have not been able to arrange for attorneys to be present at shelter hearings. We have added a new contractor in that county so that there are now more lawyers available but the problems have not yet been worked out.

(2) Our contract requires attorneys to make contact with their clients within 24 hours of appointment if the client is in custody and with 72 hours if they are not. Some contractors meet this requirement, others don't. Clients may have significant issues which need to be addressed immediately and if the attorney does not initiate contact in a timely way the client's interests may be seriously jeopardized. For example, if a child is removed from a nursing mother, an early return of the child to the mother or at least an arrangement for the mother to provide breast milk to the child needs to be made as soon as possible. In addition, attorneys sometimes become aware of issues and concerns that were not apparent to the DHS worker or the care provider that require immediate attention.
The frequency of contact between attorneys and their clients is also of great importance.

(3) Overworked attorneys do not maintain contact with the client and DHS between court hearings. With parent clients the attorney needs to maintain contact with DHS and the client in order to insure that the agency is offering appropriate services and that the parent is accessing them. In one county our site team reported that attorneys in dependency cases were allowing inadequate DHS casework to continue too long before bringing it to the attention of the court or addressing it through the DHS hierarchy. In one county the court reported that attorneys are often seen interviewing their clients for the first time in the hallway just prior to court. In some counties the court does not schedule any review hearings between mandatory hearings. In others there may be review hearings as often as every six weeks. The more frequent the reviews, the more often issues are addressed in a timely way. If DHS is not providing appropriate services and no action is taken to address the problem, by the time of the next mandatory appearance many months may have passed. Attorneys can ordinarily obtain a court review upon request. It was reported to our site team that attorneys in one county **never** requested such reviews.

(4) Overworked attorneys are not litigating issues that should be litigated. In one county the judges advised our site team that no one was litigating, for example, the issue of what resources needed to be made available while a termination petition is pending. Our site teams are often told that lawyers are not filing motions on behalf of their clients. For example, many of the parents' private medical and mental health records are routinely sought by the state to use against the parents in court. It is rare for attorneys to object even though blanket disclosure of such records is not appropriate in most cases.

(5) Overworked attorneys are not attending important meetings with their clients. DHS convenes family decision meetings and other meetings with the parties. It is common for those present to make decisions about return of children, placement of children, services needed, etc. Skillful advocacy at these meetings is sometimes significantly more effective than waiting for a court hearing and seeking to present the same issues to the judge.

(6) Overworked attorneys are not performing independent investigations or obtaining independent expert opinions. In some counties attorneys for parents who have been subjected to a psychological evaluation by the state routinely seek funds to obtain an independent evaluation if they are concerned with the reliability and objectivity of the state's evaluation. In other counties our site team learned that **no** attorney had sought authorization for an expert in **any** case for a period of three years. In one county it was also determined that no attorney had sought funds for an investigator in a single case for two years. These parents (and children as well) are not receiving the full extent of the representation they are entitled to.

(7) Lack of appropriate training and mentoring are another result of senior attorneys being too busy to provide these things to newer lawyers. Judges reported to a number of our site teams that this is a

significant problem. Even when there are skilled attorneys in the same firm or contract office the newer attorneys are not receiving the appropriate level of supervision and training.

(8) Overworked attorneys interfere with the efficient functioning of the court. In one county it was reported to the site team that attorneys are tardy or absent from court hearings, fail to meet with their clients and are not prepared for hearings because they are generally overextended.

(9) Loss of best attorneys. In a number of counties the attorneys who have been providing the best representation are not able to continue working under the constant pressure of too many cases. In one county the court advised our site team that the attorney at the firm that does the best work in dependency cases in the county are "overtaxed", "grossly overworked", "spread too thin", "worked to death" and "run into the ground." These attorneys find work elsewhere in less stressful environments and must be replaced by less experienced and able lawyers.

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

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Exhibit C

JACKSON JUVENILE CONSORTIUM (JJC)
RESPONSE TO DRAFT REPORT

Unfortunately, all members of JJC are scheduled to be in Juvenile Court on Thursday, May 8, 2008, at the time this is scheduled for hearing. Thursday is our primary date for juvenile court dependency matters. Rest assured that a representative of our group not being there in person is in no way intended to reflect an attitude that we do not believe this is important.

In recent months, JJC has been reexamining its structure and membership. We believe that continuity of representation for individual clients is vital in the juvenile court process, both in dependency and delinquency cases. The stability of our membership has enabled us to provide that continuity of representation. In order to ensure quality of representation, our members have attended CLEs presented by the Oregon State Bar and OCDLA. We intend to implement standards within our organization including establishing minimum objective standards to comply with certain recommendations established by the ABA and/or Oregon State Bar and we intend to establish an internal review process to monitor compliance of the individual attorneys with those standards. In the event new members are added in the future, we will have a mentoring process to allow any new members to become familiar with the proceedings in our Juvenile Court.

The OPDS draft report erroneously indicates review hearings, permanency hearings, and trials occur on Tuesday through Friday. In fact, the vast majority of those take place Wednesday at 1:30 p.m. and Thursday at 9:00 a.m. and 1:30 p.m. Judge Orf generally is not available on Fridays due to her civil docket. Recently, the court did add a short docket on Mondays at 1:30 p.m. to handle a small number of permanency

and/or review hearings.

The OPDS draft report concerning JJC is not completely accurate. During 2007, five attorneys (not four) handled the “cases” set forth in the table found in the report. Although he was generally not taking new clients from the juvenile appointments in 2007, Charles Kochlacs continued to handled review hearings for existing clients he had previously been appointed to represent. Footnote 21 to the report describes the “cases”. These are not individual clients. Mr. Kochlacs stopped taking new appointments in February 2006. Nevertheless, in 2007, he had 245 “cases” as that term in defined by OPDS. The table is also inaccurate in that it fails to include Mr. Kochlacs in the FTE figure.

The section in the report relating to caseloads is significant. JJC acknowledges a heavy caseload. However, it believes the numbers set forth in the table found in the report can be easily misinterpreted. Of the 2, 298 “cases” attributed to JJC, only 375 represented new clients on dependency cases (JDEC + JDEP). Of that total, 348 were handled by the four attorneys who were receiving new appointments in 2007, an average of 87 per attorney. The number of new dependency petitions has declined significantly in recent years, as follows:

2004	408 dependency petitions
2005	471 dependency petitions
2006	416 dependency petitions
2007	321 dependency petitions

These figures were provided to JJC by the Jackson County Trial Court Administrator.

It is important to note that SOPD did not become involved in the Juvenile Court

process until 2006. This means that all dependency appointments, both for parents and children, in 2004 and 2005 went to JJC. Of the 2,298 “cases” attributed to JJC in 2007, 1,592 represented permanency hearings, review hearings, CRBs and other post dispositional matters relating to dependency cases for clients we were already representing. With the decline in the number of new dependency petitions, it appears quite likely that the number of overall “cases” is likely to decline, contrary to the passage found in the report that states “court officials believe that the number of juvenile dependency matters will continue to increase” (Footnote 19).

JJC also takes issue with the position that scheduling of trials has been difficult for sometime and that this difficulty is somehow related to the number of attorneys in our group. Compliance statistics obtained from the Trial Court Administrator indicate that Jackson County has one of the highest, if not the highest, compliance rates for reaching jurisdiction within thirty days of filing a dependency petition, for any county in this state the size of Jackson County or larger.

The actual quality of work of the individual attorneys does not appear to be a significant issue. Rarely do clients seek a change of counsel. There have been no bar complaints regarding the performance of any of our attorneys, to the best of our knowledge. Additionally, there have been no referrals from OPDS regarding complaints. In fact, the harshest criticisms of JJC seem to be coming from someone who apparently has an interest in competing against us at the time of the next contract.

Notwithstanding the foregoing, JJC recognizes the need for improvement and is committed to moving forward as follows:

1. Closely monitoring the number of new appointments that are received

and, if necessary, adding an additional attorney or attorneys in the future. As a reminder, Charles Kochlacs has again started taking new appointments as of February 1, 2008 and we now have five attorneys receiving new cases. In addition, we have a sixth attorney available in the event of conflicts.

2. We intend to amend our operating agreement to implement objective standards that must be met by all members and will follow through to monitor compliance.

3. We will hold monthly consortium meetings to include training, review of any performance issues of individual attorneys, review of recent appellant cases and statutory changes, and any additional business relevant to the Juvenile Court.

4. The desire of having JJC attorneys participate in more Family Decision Meetings will need to be addressed at the time of the next contract renewal. If this is to occur, it will require cooperation and coordination between the Department of Human Services and the courts to make scheduling possible.

Attachment 6

OPDS's Draft Report to the Public Defense Services Commission
Report on Service Delivery in Judicial District No. 14 – Josephine County
(April 2008)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Josephine County and a summary of the testimony presented to PDSC at its April 10, 2008 meeting in Medford. The final report will include a service delivery plan for this county.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

approved by the Commission in June of 2007.

In February of 2008 the Commission began a review of the delivery of public defense services in post-conviction relief cases. That review it ongoing.

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

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

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

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

through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense

services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

   While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of

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

effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

   Consortia offer the advantage of access to experienced attorneys, who

[3] Id.

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

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually

well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District 14 – Josephine County

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

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

On February 20 Commissioner John Potter, OPDS public defense analyst Billy Strehlow and Executive Director Ingrid Swenson visited with stakeholders in Josephine County. In addition to meeting with PDSC's contractors in the district, they also talked with judges, the trial court administrator, the District Attorney, juvenile department staff, representatives of the Citizen Review Board, the Department of Human Services and the Court Appointed Special Advocates. Written responses to questionnaires were also received from the two contractors in the district. Copies of these responses are attached as Exhibits A and B.

The preliminary draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of Josephine County's public defense system and services, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring the delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 14's justice systems could turn out to be the single most important factor contributing to the quality of the final version of

OPDS's report to the Commission and its Service Delivery Plan for Josephine County.

OPDS's Preliminary Findings in Josephine County

The population of Josephine County is 82,390[4]. Grants Pass is the county seat and the largest city in the county. Since 62.4 percent of the land in the county is owned by the federal government the county has relied for seventy years on O&C[5] funds to offset the lack of local tax revenue from this land.[6] When federal O&C funds were terminated the county lost $12 million, or more than 60% of its general fund dollars. After a Criminal Justice Systems Local Option Levy failed in May of 2007 Congress extended O&C funding for an additional year. Unlike Jackson County, which did not restore cut services when O&C funding was restored, Josephine County did restore public safety services. No local option levy has been placed on the May, 2008 ballot and it appears unlikely that O&C funding will be extended again. If additional funds are not forthcoming before July 1, 2008 it may again be necessary for the county to make significant cuts in its public safety budget. Among the proposals that came to OPDS's attention were closing the juvenile detention facility and limiting prosecution to major crimes.

The Circuit Court

There are four circuit court judges in Josephine County and a part time pro tem judge. Judge Lindi Baker is the presiding judge. Most of the judges and the trial court administrator are relatively new to their positions. The court uses a central docketing system for scheduling all matters except for criminal arraignments.[7]

Criminal Court Proceedings

Criminal arraignments are held daily at 1:00 p.m. for both in and out-of-custody defendants. In-custody arraignments are conducted by video. An attorney from either the public defender's office or the consortium is present at arraignments. Status hearings are scheduled for Monday three weeks after arraignment for in-custody cases and four for out-of-custody cases. In the past If cases were resolved at the status hearing they were then scheduled at a later date for sentencing, necessitating another appearance. The court is now attempting to impose the sentence at the time of the plea. Only complex cases are being set over for sentencing at a later date. Matters that are not resolved at the status

[4] Source: Portland State University, 12/15/07 as reported by the Association of Oregon Counties.
[5] The Oregon and California Lands Act, 43 USC 1181(f).
[6] The county's permanent property tax rate as fixed by Measure 50 is .5867%, the lowest in the state.
[7] District Attorney Stephen Campbell credits the central docketing system with eliminating a previous backlog of cases.

hearing are either set for trial or continued. Trials for out-of-custody matters are set for three to four months later.

Trials are generally scheduled for Tuesdays through Thursdays. Docket call for all matters scheduled for trial the following week is held on Wednesday. Two judges are generally assigned to handle trials. Multiple trials are often scheduled for the same time since many are settled on the day of trial. The other two judges hear motions, arraignments and other matters. Status hearings and sentencings occur on Mondays, except for in-custody sentencings, which occur on Thursdays. Although in-custody arraignments are conducted by video, in-custody sentencings are held in a courtroom in the jail. Jury trials may continue into Friday. In addition the drug court and court trials are scheduled for Fridays.

Josephine County Drug Court Program

Josephine County has a well-established drug court program[8] that had graduated 203 clients as of January 1, 2007. The program lasts a minimum of one year, but graduation often does not occur until 15 to 17 months after enrollment. The court recently added a new family treatment component called the PRO team which is directed at families with children and which provides resources such as mentoring, parenting classes, family activities, education and counseling to participants. This new component is funded with a 2006 Byrne Grant and an Enhancement Grant from the Oregon Criminal Justice Commission. Josephine County's presiding judge serves as the drug court judge.

Mental Health Court

A mental health court is currently in the planning stage. Judge Pat Wolke is overseeing planning for the court. There is a large group of interested individuals and agencies who participate in the Oversight Committee. Representatives of both public defense contractors are involved in committees that will be designing and overseeing the work of the new court.

Juvenile Court System

Judge Michael Newman is the designated juvenile court judge. Shelter hearings in in-custody juvenile delinquency matters and in dependency cases are held at 11:30 every day. Attorneys are not present for these initial hearings. Youth who are detained appear with counsel within a day or two following the initial appearance. Out-of-custody youth make their initial appearance on Mondays. "Admit or deny" hearings in dependency cases are set within 30 days after the shelter hearing and trials within 60 days, with a status call hearing before the trial

[8] Although Jackson County is nearly three times the size of Josephine County and at least some Josephine County officials look to the Jackson County court system as a model, it was the Josephine County drug court which served as a model for the more recently created Jackson County drug court.

date. Review hearings are generally heard at 9:00 am and are scheduled with the individual attorney. The court staff has available the vacation and court schedules for each attorney and contacts them by email when there are scheduling choices.[9]

There is an active CASA program in the county.[10]

The county detention center has a capacity of 14 but only six or seven of the beds are usually occupied. The facility does not provide an appropriate meeting space for attorneys and clients. There is a small room with no table that is available.

District Attorney

Stephen Campbell is the District Attorney for Josephine County. Prior to becoming the county's district attorney he served as a deputy district attorney in both Coos and Josephine Counties for more than twenty years. He currently has eight deputies but has found it difficult to retain experienced lawyers, requiring the regular training of new deputies. One deputy district attorney recently resigned to accept other employment in the area. Currently one deputy is assigned to the juvenile court. The office stopped filing misdemeanors in May of 2007 for a period of two weeks when it appeared that funding cuts were imminent. It is not clear what the staffing level will be after June 30, 2008. One option being considered is for the City of Grants Pass to fund a prosecutor position in the district attorneys' office since a high percentage of the cases processed arise within the city and are investigated by the Grants Pass Police Department.

Public Defense Providers

1. Josephine County Defense Lawyers, Inc. (JCDL)[11]

   This nine member consortium handles criminal, juvenile and civil commitment cases. Holly Preslar is the president of the board and the administrator of the consortium. The consortium's board of directors is comprised exclusively of member attorneys. The board meets often to talk about issues such as attorney performance,

[9] Court staff indicate that this scheduling system is working well. Attorneys are very responsive to email communications, often responding on the weekends.

[10] OPDS was advised of friction between some CASA volunteers and some consortium attorneys. The CASA volunteers may need additional training in the role of attorneys but some of the attorneys may act unprofessionally towards CASAs who disagree with the attorney's position. Attorneys don't always return phone calls from CASA volunteers but CASAs are learning that it is best to leave detailed voice messages for attorneys rather than requests for return phone calls. One veteran CASA indicated that most of the attorneys do a good job representing their clients.

[11] The consortium's response to OPDS's questionnaire about consortium structure and practices is attached as Exhibit A.

attorney compensation, case assignment, caseloads and continuing legal education.

Quality assurance is dealt with both in the members' participation agreement and in the bylaws of the corporation. Attorneys agree to provide legal services under the agreement "with the same care as would be provided if the client had been able to privately retain Attorney." The organization's bylaws permit suspension or termination if a member's conduct is not in the best interests of the corporation.

The length of time that each of the members has been part of the consortium ranges from more than twenty years for three members to only two months for the most recently admitted member. All of the members except one currently devote approximately 40-50% of their time to consortium cases. One member handles only public defense cases. Cases are distributed evenly among member attorneys, although the bylaws permit an attorney to deduce their participation under certain circumstances. The consortium provides continuity of representation to clients by assigning a client's new cases to the attorney who has already been appointed to represent the client on another matter or who has represented the client in the past.

Consortium members meet regularly and communicate frequently by email. The consortium maintains a library of CLE materials and state bar publications. It provides Westlaw to all its members as well as access to the Oregon Sate Bar's "BarBooks."

Consortium members participate in many committees, including the Bench-Bar Committee, the Juvenile Agency Committee, the Model Juvenile Court Committee, and the Mental Health Court Committee.

Comments regarding JCDL:

Comments received about the consortium from the persons interviewed indicated that in the past the consortium was not always responsive to complaints and concerns about the conduct of some members, reminding those who complained that each attorney was an independent contractor. Recently, however, the consortium has had to deal with some difficult personnel issues and appears to have managed them successfully, if not as promptly as some would have liked.

Some consortium attorneys were singled out as providing excellent representation and the group on average was said to provide good

quality services. In juvenile cases, consortium attorneys were credited with providing very "active" representation and were said to be better at maintaining contact with clients than their Jackson County counterparts. Although attorneys do not attend shelter hearings they contact clients promptly, especially in delinquency cases.[12] The juvenile system is said to be working smoothly. Attorneys do particularly good work on behalf of parents and youth, but somewhat less good work for children in juvenile dependency cases. Although they provide zealous representation for children, only a couple attorneys are said to meet often with their child clients. Others meet with them and their foster parents only rarely. Indian Child Welfare Act cases arise with some frequency and a DHS representative observed that in a recent case the attorney did an excellent job of holding the agency's "feet to the fire."

2. Southern Oregon Public Defender (SOPD) dba Josephine County Public Defender[13]

SOPD is a private non-profit corporation established in Jackson County in 1985. Bert Putney organized the office and continues to serve as its administrator. Gary Berlant is the senior attorney and manager of the Josephine County office of SOPD. The office has seven attorney positions and five staff positions, including investigators, paralegals, a polygraph operator and a drug court coordinator who staffs the drug court. SOPD handles only criminal cases in Josephine County.

SOPD has a five-member Board of Directors that reviews major actions by the director, makes decisions not appropriate for the administrator to make, and oversees the office's functioning within the local criminal justice system. The office has a written policy manual which is distributed to all employees and which describes procedures for handling personnel matters. The office also provides attorneys with a manual outlining local procedures, forms and expectations. Although the office manager and the administrator oversee the work of the entire staff, training and supervision are principally provided by the attorney or staff person who is assigned to supervise each new employee.

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[12] One juvenile department representative said that attorneys do not challenge youths' ability to aid and assist even when they have well documented cognitive deficits. OPDS was told these youth need someone to fight for them. It was also said that attorneys may not meet with their clients until the day of their court hearing or the day before. It appears that lawyers for youth do provide the same kind or representation to juvenile clients as they do to criminal clients, however, not substituting their own judgment abiut what is in the youth's best interest, which has been an issue in some jurisdictions.

[13] A copy of SOPD's response to OPDS's questionnaire for public defender office administrators is attached as Exhibit B.

SOPD conducts monthly in-house CLEs, sponsors CLE sessions for local attorneys emphasizing issues of particular significance to local practitioners, and sends it attorneys and staff to OCDLA and other CLE trainings in areas of more general interest. SOPD uses an informal evaluation process for attorneys and staff that is based on open and regular communication and feedback. There are plans to initiate a formal evaluation process in the spring of 2008. Underperformance is addressed by consultation, mentoring, establishment of timelines, and when necessary, termination. Excellence is most often rewarded by acknowledgment in the presence of co-workers.

Caseloads of individual attorneys are monitored weekly and monthly.

By its own policy, as well as PDSC's SOPD requires that every in-custody client be seen within one working day.

SOPD has recently implemented a client feed-back process. Clients are given a form to complete at the conclusion of the case which is submitted to the court and then forwarded to SOPD.

SOPD received a 13.48% increase for the 2008-2009 contract period. Recruitment and retention of attorneys has been a challenge for this office where attorney's starting salaries have been significantly lower than the starting salaries of their counterparts in the district attorney's office.[14] Under the new contract the entry level salaries were increased to $45,000. Vacancies can now be filled in a more reasonable time although it has been more difficult to fill vacancies in the Josephine County office than in the Jackson County office. In the past it was not unusual for it to take two to three months to fill a vacancy in either office. Mr. Putney believes that it was equally important to increase salaries for mid-range attorneys in order to increase retention of attorneys with two to four years of experience.

Comments regarding SOPD: Specific comments about the public defender office were that the senior attorneys do really good work and that entry level attorneys get good if they stay. The staff person assigned to the drug court is rated as "fantastic" for her work in the court and for providing trainings to the whole legal community.

[14] The current starting salary in the Josephine County District Attorney's Office is $50,004.

Caseloads

In FYE 2006 there were a total of 4,079 public defense cases[15] in Josephine County. In FYE 2007 there were 4018 cases, which represented a 1.5% decrease. JCDL received a total of 1,778 case credits in FYE 2007, 914 of which were in juvenile cases and the balance, or 864, in civil commitment, criminal or quasi criminal cases. SOPD received 2,210 case credits, all for criminal or quasi-criminal cases. In the 2008-2009 contract, JCDL attorneys have agreed to handle an average of 367 cases per FTE attorney per year. SOPD's seven FTE attorneys have contracted for a caseload of 321 cases each.

OPDS's Recommendations for Further Inquiry at PDSC's April 10, 2008 Meeting in Medford

The public defense delivery system in Josephine County appears to be working well. Although it is a small county is has an established public defender office which is performing the role such an office is expected to perform. While recruitment and retention remain a challenge, experienced attorneys in the office are well regarded and provide mentoring and training to newer attorneys. In addition, the county has a well-established consortium with many very experienced attorneys. After encountering some significant performance issues, in one case due to serious illness, the consortium appears to have developed appropriate mechanisms for addressing such issues in the future.

Although OPDS was informed by more than one interviewee that the relationships within the court system are, and always have been, contentious and adversarial, OPDS did not observe any evidence of unusually adversarial relationships. The two contract offices appear to work effectively together and cases get resolved between the state and the defense.[16] It may be that the adversarial relationships are more often displayed in the courtroom.

The overall quality of representation appears to be very good. There were six Jospehine County respondents to OPDS's 2007 statewide survey. In criminal case both contractors were rated overall as providing "very good" representation. Consortium attorneys were described as "always" possessing the legal knowledge, skill and training necessary for effective representation and SOPD was described as possessing such attributes "most of the time." Caseload levels were not seen as preventing adequate representation by consortium attorneys and were seen as only "sometimes" preventing such representation by SOPD

[15] A "case" is a unit for which OPDS awards a case credit and does not necessarily correspond to a case as defined by the court and other justice system agencies.

[16] The trial rate in Josephine County is only slightly above average for both misdemeanor and felony cases.

attorneys. In juvenile cases the consortium's representation was again rated as "very good" and lawyers were said to possess the legal knowledge, skill and training necessary for effective representation "most of the time" and for having adequate time, despite their caseloads, to devote appropriate time and resources to each of their clients "in most cases." A number of the specific comments noted that the caseloads are high and the pay low and that attorneys cannot afford to work in public defense.

Testimony Received at PDSC's April 10, 2008 Meeting in Medford

Bert Putney is the Administrator of Southern Oregon Public Defender, Inc. SOPD was founded in 1985 in Jackson County and began providing services in Josephine County in 1991. Seven attorneys are currently assigned to the Josephine County office. SOPD provides representation only in criminal cases in the county. Mr. Putney believes that the office is able to achieve administrative efficiencies by providing services in more than one county. Currently a Jackson County attorney is handling a murder case in Josephine County because there are too many murder cases for the Josephine County lawyers to handle. There is a core group of three experienced attorneys in the Josephine County office. It has been difficult to recruit and retain additional attorneys there.

Mr. Putney said that the court system in Josephine County is antiquated, that a costly computer update is needed, and that the trial court administrator has not been given the necessary authority to put the system in order. There has been a history of conflict in relationships between members of the bar in the county and the county's population is generally more litigious.

SOPD has an active board of directors with a very stable membership. Mr. Putney keeps the board informed about developments in the office at meetings that occur at least quarterly.

Mr. Putney has an investigator who is trained to administer polygraph examinations. He would recommend that other offices consider having a staff polygrapher as well.

Mr. Putney also recommended that the Commission consider having a single organization provide services in all of the southwestern counties in the state in order to create administrative efficiencies and improve quality. He described some recent quality control issues in the Medford office and how they were handled and said that he solicits information from the judges about the work of his attorneys on a routine basis.

Presiding Circuit Court Judge Lindi Baker testified that she and the other judges see the public defense attorneys in court regularly and their experience with both defender groups has been very positive. The consortium attorneys are more experienced but the public defender group, although younger and less

experienced, brings a lot of energy and commitment into their representation. In addition, the public defender office has some very experienced lawyers who act as mentors and leaders to help the newer attorneys. If judges had a concern about an attorney they would know to whom to go to with that concern. Holly Preslar would be the contact for the consortium. She believes there is good communication between the parties in criminal cases. Generally speaking the defense bar and the prosecution seem to work together and they are resolving more cases than they did in the past. Despite the uncertainties in county revenue, the district attorney may not need to reduce the number of deputies this year. But, in the long term, if funding issues are not resolved it could be a very different story. The sheriff's patrol might have to be discontinue and it might be necessary to close the jail. Judge Baker described the Josephine County Drug Court, which has been operating for 13 years and is expecting to have it 230th graduate in the near future. She noted that the public defender's office had been a partner in the program since its inception and that a member of the public defender's staff is the coordinator for the court. The three year recidivism rate for graduates if 9.7 percent. Statewide, the recidivism rate for non-drug court clients is 38% and for non-drug court clients in Josephine County, 47%.

Dan Simcoe testified on behalf of the Josephine County Defense Lawyers, Inc. He said the consortium currently has nine members. One attorney recently resigned and another was removed from the group. The group is open to accepting new members and would like to have a total of ten to 12. Consortium members, on average, devote approximately 40-50% of their practice to public defense cases. He explained how the consortium manages performance issues. There is a participation agreement that permits the consortium to suspend and remove members for non-compliance with expectations. The organization has a board of directors comprised of consortium members but may consider adding outside members in the future. Consortium members as well as attorneys with the public defender's office participate in monthly bench/bar meetings. Although the public defender's office may believe it should receive a higher percentage of the cases, Mr. Simcoe thinks the current distribution is working well

PDSC is grateful for the cooperation and hospitality extended to its staff and its members during its visit to Josephine County and the initial investigations made in preparation for that visit. PDSC expresses its sincere appreciation to all the members of the Josephine County criminal and juvenile justice communities for their assistance in informing the commission and helping to guide the creation of this service delivery plan for the County.

A Service Delivery Plan for Josephine County

[This portion of the report will be completed after the PDSC has developed its service delivery plan for this county.]