

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 Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Wednesday, September 12, 2012
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

AGENDA

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| 1. Thank you to Justice De Muniz | Chair Ellis |
| 2. Action Item: Approval of minutes - PDSC meeting on August 16, 2012 (<i>Attachment 1</i>) | Chair Ellis |
| 3. Emergency Board Request – Update (<i>Attachment 2</i>) | Nancy Cozine
Kathryn Aylward |
| 4. Death Penalty Filings & Capital PCR Opinions | Billy Strehlow
Jeffrey Ellis
Paul Levy |
| 5. Action Item: PDSC delegation of authority to OPDS (<i>Attachment 3</i>) | Nancy Cozine
Kathryn Aylward |
| 6. Action Item: PDSC policy regarding disclosure of billing records; ORS 135.055(9) (<i>Attachment 4</i>) | Paul Levy |
| 7. Executive Director Review Process (<i>Attachment 5</i>) | Kathryn Aylward |
| 8. OPDS Monthly Report <ul style="list-style-type: none"> • Clatsop County Peer Review Plans • Appellate Division Update • CBS Update | OPDS Management Team |

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

The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

Next meeting: October 19, 2012, 12:30 p.m. – 4:00 p.m. at the Oregon Gardens, 879 W Main St, Silverton, OR 97381. Meeting dates, times, and locations are subject to change; future meetings are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, August 16, 2012
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch
Chief Justice Thomas Balmer

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Peter Gartlan
Shawn Wiley
Billy Strehlow
Shelley Winn

The meeting was called to order at 10:00 a.m.

Agenda Item No. 1 Approval of Minutes – PDSC meeting on June 14, 2012

After one point of clarification requested by, and provided to, Commissioner Potter, Chair Ellis requested a motion to approve the minutes.

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

Agenda Item No. 2 Discussion and Possible Approval of Douglas County Service Delivery Plan

Nancy Cozine provided a brief overview of the Douglas County Service Delivery Plan, noting that Mr. Dan Bouck, UVPD executive director, was in attendance and available for questions. She also noted that system partners in Douglas County are continuing to discuss how to improve their collaborative working relationships, and that there is an expectation that Criminal Justice Advisory Council meetings will start soon.

Chair Ellis asked about the affidavit issue. Mr. Bouck indicated that there had been a series of meetings with the presiding court judge, and then eventually with the particular judge with whom they've had issues. They identified the real problem, and what cases that it would affect, and agreed to file an affidavit only in those particular case types. They also agreed upon a new process for filing affidavits, with an extended timeline, but they are now having problems finding a method that is allowable under the statute. The agreement had been to

give attorneys two weeks to file the affidavit if the defendant is out of custody, and three days if in custody, but the district attorney objected, noting the applicable statutory timelines. They are also exploring a possible statutory amendment. The Chair encouraged Mr. Bouck to keep talking with others in the county, and noted that he is encouraged that it sounds like Mr. Bouck is communicating in a meaningful way on this. The Chair further noted hope that the matter finds its way to a solution. Mr. Bouck indicated that it would, but also commented that it has been frustrating.

Ms. Cozine shared with the Commission a document submitted to her by Eric Fromdahl, the director of the juvenile department, who did not testify at the Commission hearing, but did this week offer a few suggested edits. The Commission asked that Mr. Fromdahl's suggestions be added to the report. Ms. Cozine noted her recollection that, following the testimony that the Commission heard in Douglas County, Commission members had an opportunity to discuss the situation in Douglas County, in terms of its providers, and that the Commission seemed interested in letting the county continue to develop over the course of the next few years, looking at it again during the next contracting cycle. Chair Ellis noted an issue on the horizon, with two strong private firm providers, both very good, about two years away from retirement. The Chair suggested that the Commission watch this develop, and see what makes the most sense in the future. He suggested the possibility of a consortium with the now associates of the seniors in those firms. Commissioner Potter agreed, also noting that there was discussion of at least two, and possibly three, other lawyers in Douglas County who would be available to pick up, either as a small consortium or in a separate contract. Ms. Aylward reminded Commission members that there was an effort to establish a new consortium during the last contracting cycle, and said that OPDS will try again with the next round of requests for proposals. Chair Ellis also commented upon the concern regarding a majority of the caseload resting with the PD, with conflict cases sometimes being assigned to out of district lawyers, but noted that it appears to be working out.

Chair Ellis requested a motion to approve the Douglas County Service Plan incorporating the proposed changes. **MOTION:** John Potter moved to approve the Douglas County Service Plan; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 3

2013-15 Agency Request Budget

Kathryn Aylward provided a summary of the agency request budget, noting that the documents provided a very high level budget overview, with page one and two providing standard information, with the only unusual piece being mandated caseload, Package 040, which was discussed at the last meeting. On page three, at the bottom after modified current service level, are policy option packages. The Commission discussed at the last meeting the three policy option packages they wanted to pursue. Ms. Aylward explained Package 100 – Juvenile Dependency Caseload Reduction, which was originally designed to reduce the caseload by 20% and has been a policy option package for at least the last two or three budget cycles. She reminded Commission members that, given the current budget environment, they decided to approach it as a three biennium strategy, with this policy option package request including only one third of the total that would be needed. Ms. Aylward went on to provide information regarding Package 101, designed to increase the Appellate Division attorneys' salaries to the same level as the Attorney General's attorney salaries. Again, the figure of \$279,000 represents one-third of the cost. Finally, Package 102 has three components for public defense providers. The first component is an increase for full time public defender salaries to match the deputy district attorneys' salaries in their counties, totaling about \$2.3 million. Second, an increase to the hourly rate paid to attorneys, from \$45 an hour to \$70 an hour would be the full amount of the package, but one third of that yields about \$53 an hour. The full policy package would put death penalty rates from \$60 an hour to \$95 an hour, with a one-third increase yielding about \$72 an hour. The final component is investigator's hourly rates – increasing the current non-capital rates from \$28 per hour to \$35 an hour, with one

third yielding \$30 per hour. For capital cases, an increase from the current rate of \$39 an hour to \$45 with a one-third increase yielding \$41. Ms. Aylward concluded her summary by noting that the total budget request would be \$263.7 million, which is 16.5% above the legislatively approved budget for the current biennium. She reminded the Commission that the legislatively approved budget does not include the actual amount that we need for this biennium, because we had a special purpose appropriation and funds that we know we need that haven't yet been allocated.

Ms. Aylward also provided to the Commission the draft Emergency Board letter, noting that the Emergency Board will have subcommittee meetings September 12th and 13th, with the full committee meeting on September 14th. She explained that OPDS does not know the subcommittee to which it will be assigned, and won't until about a week before the meeting. She offered that the main purpose for doing an emergency board letter now is that the special purpose appropriation technically expires December 1, 2012, and the funds revert to the Emergency Board to allocate however they see fit.

Ms. Aylward introduced Steve Bender, the LFO analyst recently assigned to work with OPDS. Chair Ellis welcomed Mr. Bender. Ms. Aylward noted that it is unlikely that PDSC's Emergency Board request will be granted, because the Emergency Board often defers requests unless the funds are immediately necessary. Ms. Cozine added that discussions have started regarding potential funds for next biennium, and that the danger with a deferral of PDSC's Emergency Board request is that current indications are that next biennium's budget is not going to be favorable enough to absorb too much additional cost rolling forward; it is likely to be current service level minus three to four percent. She reminded the Commission that we have providers who have not had an increase in several cycles, and that PDSC needs to try to give an increase during the next budget cycle. She indicated that OPDS will continue to work with LFO and the Legislature on the Emergency Board request.

Chair Ellis noted that PDSC can't count on a caseload decline every biennium; that it will end at some point. Ms. Cozine concurred, and noted that providers say that as caseloads declined, the case complexity increased, causing increased need for non-routine expenses. Ms. Aylward indicated that caseload is increasing in some counties, but that it will be a few months before we know the impact statewide.

Chief Justice Balmer asked whether PDSC would be returning to the December Emergency Board. Ms. Aylward indicated that the Emergency Board will likely instruct the agency on when to return to request funding. Chair Ellis asked when the agency would exhaust funds if the Legislature did not allocate the \$3.5 million.

Ms. Aylward indicated that the shortfall is projected to be \$4.9 million and OPDS spends about \$9 million a month, which means it is about two week's worth of running money. She noted that the reality learned during the BRAC [Budget Reduction Advisory Committee – established by the Judicial Department to manage funding shortages in 2003] was that PDSC can't just keep going until there is no money. They had to form a kind of glide path. Ms. Aylward stated that, as PDSC members know, when the public defense function was part of the Judicial Department, they had authority to defer arraignments. PDSC, as an agency, doesn't have authority to say to the court, "Sorry. We don't have counsel. Call us in three or four months."

Commissioner McCrea asked what PDSC would do in that instance. Ms. Aylward indicated that payment of bills could be delayed, but that it would be hard to predict when they would need to start. She noted that as providers hear that public defense is running out of money, they will submit all their billing, creating a flood of requests. Ms. Aylward also reiterated the concern that if there isn't enough funding allocated for this biennium, costs end up getting pushed into the next biennium, which is not a good practice. She explained that the BRAC approach effectively pushed costs into the next biennium, but that expenses were mitigated by

cases that were dropped during the delay. Chair Ellis commented that it is a really slippery slope if you keep pushing costs into next biennium, and that it is not sustainable.

Commissioner Potter asked whether there was anything that Commission members should be doing to help educate policy makers. He noted a triple threat: the current shortfall, a current service level budget that really isn't a good place to be, and policy packages which have been made relatively nominal, and a need for all three even to get close to being at a decent level, and all three seem threatened. Ms. Aylward suggested that there was a need to continue communicating with the Legislature, educating newer members as they join. Commissioner Potter wondered whether it would be helpful to have veteran Commission members join for those conversations. Ms. Cozine offered a thought that this might be necessary at some point. She suggested that there is also a need to be working with providers, which was discussed at the Public Defense Advisory Group meeting – providers at the local level need to be talking with their legislative representatives about what they do, what their role is in the community, and why that is very important.

Ms. Aylward suggested that, in our case, what hurts us the most is that when anyone is looking at state agencies' budgets they are looking across the board. She noted that public defense funding started out so far behind other state agencies, and that attorneys do the work because they feel a passion for the work and public service; that if they can afford to do it for very little money, then they really want to, because they care about it. Ms. Aylward said that there are fewer and fewer of those sorts of people – fewer who are able to afford it, no matter how much they want to. People have student loans and family obligations. She notes that this is what the PDSC is up against, and that there is a need to explain that though there have been increases, the reality is that the seemingly large percentage increase is only increasing the hourly amount from \$45 an hour to \$53 an hour, and people pay their plumber \$90. It is an education process.

Agenda Item No. 4

Best Practices for Boards and Commissions

Chair Ellis introduced the next item, best practices for Boards and Commissions, and asked Paul Levy to discuss the Secretary of State audit. Mr. Levy summarized the audit, which was published in June. It was a report to the Governor's office, because the Governor's office is responsible for filling and managing the vast majority of boards and commissions. The report identified three primary concerns: the proliferation of boards and commissions, questionable performance of many of these boards and commissions, and the risk of theft and loss. Mr. Levy summarized the ways in which PDSC is quite different from the majority of boards and commissions. First, PDSC staff has the administrative and technical skills to manage personnel, budget, contracting, and procurement. They also have a legislatively approved budget and the attendant scrutiny involved with that process. Many boards and commissions, at least according to the audit, receive little or no training, are not familiar with their governing statutes, and don't always understand their oversight responsibilities and how to exercise those responsibilities. General Counsel does provide the PDSC with training, and the Commission is very familiar with ORS Chapter 151, the legislation and constitutional provisions that affect its work, and its oversight responsibilities. Additionally, many, if not most, boards and commissions don't have a website or other readily available public information, rarely meet, and don't have strategic plans that are publicly available, and there is no mechanism to receive complaints about board members. Again, PDSC has all of that, and although there is no discrete mechanism for receiving complaints, people do know how to find PDSC members.

Ms. Cozine reminded the Commission that one of PDSC's key performance measures is adherence to the best practices for boards and commissions, and that part of their responsibility was to review the self-assessment criteria for boards and commissions to make sure they are in compliance with the criteria. The Commission reviewed each best practice,

and activities that satisfied each best practice criteria, demonstrating strict adherence to the best practices for boards and commissions.

Agenda Item No. 5

Annual Performance Progress Report

Ms. Aylward reviewed the Annual Performance Progress Report and customer service survey results, which is circulated to all PDSC providers. Chair Ellis offered that it would be logistically complex, but asked whether we have any mechanism of getting feedback from clients. Ms. Aylward explained that some contractors, notably Jim Arneson, have done client surveys, but that OPDS does not have a mechanism for client feedback. Ms. Aylward noted some internal changes that might have accounted for some of the responses. Chair Ellis noted his surprise at the 29% response rate, which seemed low. Chair Ellis also questioned whether there is likely a built-in bias by those who respond, with complainers being most likely to respond because they have something they want to communicate. Ms. Aylward agreed that was a possibility. Commissioner Welch pointed to one comment that indicated an interest in providing favorable responses because “this is the hand that feeds me,” noting that there is that bias too. Ms. Aylward assured Commission members that providers were told that responses were anonymous, and the survey didn’t record IP addresses. Commissioner Welch asked whether there is consistency within the contracts and business services division so that everyone is working off the same set of rules, and providers are receiving the same answers regardless of which analyst is assigned to work with their region. Ms. Aylward explained that there had been some decentralization of non-routine expense review responsibilities, which could have caused some variance. She indicated that the analysts are working on NRE guidelines to ensure consistency.

Ms. Aylward continued with a review of the Annual Performance Progress Report, or APPR, which has three key performance measures. The first key performance measure is reducing the delay in processing appeals (page 7); the goal is 210, and OPDS is now at 234 for fiscal year 2012. Chair Ellis asked about the AG’s time between OPDS submission of an opening brief and AG submission of their answering brief. Mr. Gartlan indicated that up until a couple of years ago they were at about 274, but within the last couple of months, they are filing 210 days after the filing of petitioner’s brief. Mr. Gartlan further explained that the Court of Appeals backlog is increasing because they are docketing about 40 cases per month, and the Appellate Division is filing about 65 to 70 cases per month, so the court is falling behind by about 20 or so cases per month.

Chair Ellis pointed out the significant improvement from ’06, and asked Mr. Gartlan to what he attributed the improvement. Mr. Gartlan suggested that it was the number of lawyers working for the Appellate Division. The division’s workload increased dramatically. Back in about 2003, 2004, the division was filing anywhere from 300 to 350 “merit briefs,” which is when there is an issue that the Court of Appeals has to decide. Now the Appellate Division is filing between 650 and 700 merit briefs a year. The division has almost doubled the output with respect to merit briefs in the Court of Appeals. Chair Ellis asked whether anything could be done to decrease the time of filing. Mr. Gartlan assured the Chair that the division had completed several rounds of training, and that he is hoping the number of days to filing will continue to decline. Chair Ellis asked whether the division made any differentiation between an appeal from a relatively short incarceration versus the long incarceration, in terms of trying really hard to get the appeal process done before it is moot? Mr. Gartlan explained that short-term incarcerations tend to be misdemeanor cases, that by the time they get a transcript at least a month has gone by, and that even if they could file a brief the day that the case comes in, the state’s brief is still going to be seven months after that. Then, with the Court of Appeals, it is going to be six to eight months before it gets on the Court of Appeals docket. Then the Court of Appeals is going to take several months to decide the case. There is then no effective relief for misdemeanants with respect to incarceration unless it is the unusual misdemeanor who might have several sentences run consecutively, but that is the exception.

Ms. Aylward also noted that the fluctuation of cases coming in is tremendous, with a low month of 110, and 179 the next; a 62% increase in workload with the same number of lawyers. She noted that while it is good to keep track of things, it is a snapshot of numbers, and next month it could be 10 more or 10 less.

Commissioner Welch asked whether these numbers included juvenile appeals. Mr. Gartlan explained that the dependency cases have expedited briefing deadlines, set by ORAP rules, so they are addressed and resolved relatively quickly.

Ms. Aylward then noted the second performance measure - the customer service survey – and the third one, which is best practices for boards and commissions, both of which were already discussed.

Agenda Item No. 6

Update Regarding Death Penalty Contractor Review

Mr. Levy provided an overview of the death penalty contractor review process and report. He indicated that, overall, the PDSC has done a good job of managing its responsibilities to provide counsel in capital cases, but that more work was needed to comply with the Commission's direction to adhere to the ABA standards to meaningfully review and monitor the performance of providers. As indicated in the report, OPDS is familiar with these providers, and has daily interactions with some of them, especially when on the verge of or in trial or at a critical stage in their cases. OPDS attends provider meetings, and regularly interacts with the community. OPDS also receives feedback through the annual survey. This review was the first effort to take an in depth look at performance of our capital providers. It was useful because, even though these five contractors are well known, OPDS learned in a structured way, a lot more about them, and the information was generally good.

Mr. Levy indicated that he was not entirely satisfied with the process, which became very long, and was too public. He felt it was a fair and thorough process, but that it could be improved upon. Chair Ellis asked about the work done by Mr. Levy and Dennis Balske, who is a very well regarded and competent person in this area. Mr. Levy explained that he had originally hoped to have a panel review the submissions, but that he was not able to find people who were interested, willing, and available. OPDS contracted with Mr. Balske; he reviewed the information submitted, did some collateral investigation, and provided an opinion or recommendation that is reflected in the report. Chair Ellis asked whether Mr. Levy was able to get input from the federal defenders who have these cases on PCR. Mr. Levy indicated that he did receive some input, but noted that they were not willing to participate in a formal fashion. He is hoping that might change in the future.

Chair Ellis asked what process Mr. Levy proposes going forward. Mr. Levy said that while OPDS is still discussing options, one recommendation is to revamp the certificate process. Currently, it is somewhat cursory - the attorney self-certifies that she or he meets the minimum qualifications to handle particular case types by checking a box on the certification form. There is a supplemental questionnaire, but it does not ask very searching questions. Mr. Levy proposes that the process be revised so that OPDS can make a more meaningful decision about whether a person meets the minimum qualification. The attorney could be asked to list how they satisfy the minimum qualification requirements in a somewhat detailed fashion. Essentially, it would require lawyers to provide the information that was requested from the five attorneys under review. Mr. Levy also noted that it was very helpful when the attorneys, Steve Gorham among them, submitted letters of reference from people. Mr. Levy concluded by saying that he believes OPDS can get helpful information through the certification process, and that in the course of reviewing those certificates, OPDS will be able to get a detailed look at the quality of representation offered by current providers and any prospective providers.

Chair Ellis asked General Counsel Levy to explain how he worked his way through the review process as it related to the lawyers who allowed the client to plead guilty to an aggravated murder charge without any pre-commitment from the prosecution not to request the death penalty. Mr. Levy explained that during a CLE on death penalty representation, an attorney at the federal defender, who is an expert in this field, indicated that to plead a client guilty without an agreement on the death sentence is presumptively ineffective lawyering – however, presumptively a rebuttable presumption. Lawyers who had made this choice were asked to comment on this during the review, but at least one declined, stating that it would involve sharing client confidences. Mr. Levy said that the matter was not resolved in any meaningful way, except that Dennis Balske agreed that there could be a reason. Mr. Balske was satisfied, knowing all of the other things that he knows about the lawyers, that they are both good lawyers and should continue to do the work.

Chair Ellis noted that the review did point out the need to provide one lawyer with assistance from someone who can do high quality legal writing. Mr. Levy acknowledged that the report brought that into sharp focus, and noted that though it would be nice to have an ideal lawyer on these cases - the brilliant trial lawyer – it is hard to find. Chair Ellis emphasized the need for PDSC to do its very best to ensure that the lawyers that represent defendants charged with capital cases be as good as possible, noting the combination of the risk to the client and the horrendous costs from retrials.

Commissioner Welch expressed concern regarding an issue raised during this process, about who says that somebody is doing a good job or not, and questioned whether the PDSC crossed lines of authority during this process. Mr. Levy provided his thoughts regarding the limits: the Commission has obligated OPDS and its providers to comply with the ABA guidelines for the performance of lawyers in death penalty cases. Those guidelines are the black letter law and there is extensive commentary. Those tell OPDS what the attributes of counsel should be, and how counsel should respond to particular circumstances and issues that arise in cases. It is those guidelines that have guided the evaluation of the lawyers. It is those guidelines that informed Dennis Balske in his review of the materials that he received. Mr. Levy further noted that the ABA guidelines are now aging, and that the norms in the profession, and the expectations of counsel in the profession, are evolving. At the OCDLA death penalty seminar last October, a national expert who contributed to the drafting of the guidelines, spoke about what the current thinking is about how to deal with a client who is saying he wants to be executed. It is that type of information that informs OPDS about appropriate expectations of counsel. Mr. Levy concluded by emphasizing that the review was intended to be guided by the requirements of the ABA guidelines.

Judge Welch expressed some concern that the expectations of attorneys, as outlined in the guidelines, are then enhanced by something somebody said at a seminar. Mr. Levy explained that in post conviction litigation, there are two issues: (1) has the attorney complied with the norms of the profession, and (2) was there client prejudice? When the court analyzes performance of counsel, the court considers the guidelines, but also what lawyers are being taught – what is presented at seminars. Mr. Levy acknowledged that though it is a difficult and sensitive area, the review is best done in the context of reviewing detailed submissions of the lawyers in the course of reviewing their certificates of qualifications and reviewing their contract proposals.

Commissioner Potter offered his thoughts, that in certain regards PDSC is not taking much of a role at all, in the sense that the information that is being collected by staff, and decisions are being made by staff. He asked for clarification regarding recommendation number 5, which states: “OPDS believes that it may continue its current practice of utilizing its peer panel to assist in an advisory capacity with the review of non-contract attorney submissions.” Mr. Levy explained that this portion was intended to emphasize the need to try again to get people to serve on a panel to help OPDS review prospective providers. Chair Ellis suggested that the peer panel could include experts who are not providers, perhaps law faculty people, Steve

Kantor, for example, a great trial lawyer when he practiced, and obviously very competent in this area. Mr. Levy agreed to renew the effort to assemble a panel.

Chair Ellis asked OPDS whether the recommendation was to extend the contracts of those that have been reviewed from the one year to the full two. Mr. Levy confirmed that it was. Steve Gorham requested an opportunity to comment. He said that it was very hard to be evaluated, even though everyone knows that evaluations are good. Mr. Gorham took issue with the idea that Mr. Balske and the person who gave the seminar espouse, that definitionally someone seeking execution is mentally ill, stating that he doesn't know if that is always true. Mr. Gorham also asserted that in death penalty post conviction trials, which he has watched often in Marion County, the defense bar is basically eating its young; that very, very good trial attorneys who, when the case gets to the post conviction area, are being attacked. He feels that PCR lawyers are arguing that the trial lawyer was a bad attorney because the person got the death penalty. Mr. Gorham concluded by requesting that the Commission grant him an extension that is longer than one year. Ms. Aylward noted her thoughts that an extension beyond one year was not necessary, noting that Mr. Gorham could simply submit a proposal during the next contract cycle, which would keep everyone's options open. Chair Ellis supported the notion that everyone should be returned to the normal cycle, as originally planned. Commissioner Potter concurred, stating that though he understood Mr. Gorham's point of view, one could argue just the opposite as well - since he has been through the process he has been validated, and is pretty secure. Commissioner Welch asked Mr. Gorham how much time he spent on the review - he indicated that it required all of the administrative time awarded in his contract. He also noted that he feels he should have a longer contract extension because the review process felt punitive, and that he wanted the security of a longer contract.

Chair Ellis requested a motion on the contract extension. MOTION: Commissioner Potter moved to maintain a one year extension and continue with the normal course of action. Commissioner Welch seconded the motion. MOTION: Commissioner McCrea moved to amend the motion to allow extended contracts to the end of 2015 for the providers who were reviewed. Judge Welch seconded the motion. **VOTE 2-4.** The Chair called for a vote on the original motion. **VOTE 6-0.**

Agenda Item No. 7

OPDS Monthly Report

Pete Gartlan started with an appellate division update. OPDS attorneys recently filed a sixth brief in the Supreme Court, concluding their current Supreme Court briefing obligations. The Appellate Division is revising the attorney manual, and is preparing a manual for the juvenile appellate section. Justice Balmer asked whether the Appellate Division had a system in place to provide trial court experience to OPDS appellate lawyers who did not come from the trial bar. He explained that this is a concern regarding appellate lawyers at both OPDS and the AG's office. Mr. Gartlan explained that this is a consideration during the hiring process, though not an overriding factor - they are primarily looking for good writers - it is one factor in the totality of the circumstances. Justice Balmer suggested that it might be helpful to do a rotation with a public defender group or consortium, to build experience. Chair Ellis encouraged Mr. Gartlan to pursue a discussion with Tom Sermak.

Ms. Cozine provided an update regarding waiver of counsel discussions, and indicated that she had continued to meet with Michael Livingston, juvenile law staff counsel for the Oregon Judicial Department. They have been continuing to develop the process for establishing a Chief Justice task force, and have concluded that they need to begin with a survey to discern exactly what is happening in each county. They plan to send out a survey monkey questionnaire, and are hoping to get information from all system partners. She noted that Judge Welch has agreed to participate as a member of the Task Force. Chair Ellis expressed support, as did Chief Justice Balmer. Ms. Cozine expressed appreciation for the Chief's support and leadership in this area.

Ms. Cozine continued with a summary of the last Public Defense Advisory Group meeting. Contractors were asked to weigh in on a variety of topics, and though the meeting was very lengthy, it was productive. Contractors were supportive of a proposed change to OPDS's current bill payment processes, which allow non-attorney providers to submit bills directly to OPDS without attorney review. OPDS will be changing the process so that attorneys also get a copy of the bill, which should ensure that a work product was received for the time billed. Ms. Cozine noted that there haven't been any problems identified, but that the extra step will provide an additional layer of oversight. Commissioner Ozanne expressed support for the change.

Ms. Cozine also noted that planning for the Juvenile Law Training Academy and the Management Conference is almost complete, and that both are shaping up very nicely. Commissioner Potter and Mr. Levy offered further details regarding the program agendas. Ms. Cozine noted the Juvenile Law Training Academy is receiving generous financial support from the Juvenile Court Improvement Project and the Oregon State Bar Juvenile Section, and that the Casey Family Programs is covering all costs for its presenters at the conference.

Mr. Levy provided an update regarding several court matters in which OPDS is involved. Chief Justice Balmer stepped out during the conversation. Mr. Levy described one instance in which OPDS had been asked by an attorney to cover the costs of counsel in order to challenge the Governor's reprieve of the imposition of the death penalty. OPDS denied the request, the trial court denied the request; today the Supreme Court denied counsel's request to issue a writ of mandamus requiring that the trial judge appoint counsel. Mr. Levy clarified that OPDS appeared as an interested party, expressing the position that there is no statutory authority or constitutional authority for the appointment of counsel in a civil action challenging a Governor's reprieve.

Mr. Levy also provided information regarding a subpoena for billing records in a state post conviction case. The request for was billing records of trial counsel in a capital case; the hours and bills of trial counsel, investigators, and experts used in this particular case. In that case, Mr. Levy filed a motion to quash, arguing that the case was not concluded, and that the billing records are therefore protected by statute. He explained that the statute that pertains to the confidentiality of those records says that OPDS must not disclose records until the conclusion of the case. The conclusion of the case is not defined. There has been some appellate litigation on this statute and what it means. There is a case that now says it certainly includes while a case is on direct appeal. There was a case that raised the issue during a post conviction proceeding, but it concluded that if it was error to have released the records in those proceedings, it was harmless, so we won't address the merits. OPDS has taken the position that the issue is unresolved as to whether, when a case is in post conviction relief, we are required to keep those records confidential. The judge ultimately ruled against OPDS's position, but subsequently the Department of Justice withdrew the subpoena. Mr. Levy noted that there is a PDSC policy regarding the definition of the conclusion of a case that needs to be revisited in light of the appellate cases that have issued on this topic in the time after the PDSC adopted its policy. Commission members expressed some concern regarding the policy not being aligned with case law and the position articulated by General Counsel. Mr. Levy assured Commission members that at the next PDSC meeting he would provide them with his memorandum and a bullet point list of what the policy issues are that the Commission ought to consider. Commissioner Ozanne suggested that perhaps OPDS should consult with the Chair on such matters, before filing legal documents. Ms. Cozine indicated that she would provide information in advance if such a circumstance arose in the future.

Mr. Levy offered information regarding one more legal matter involving two death penalty providers who are being charged with contempt of court in relation to actions undertaken while providing representation in court appointed cases. Those providers asked OPDS to provide representation for their defense. OPDS did not provide representation because, as

much as OPDS wants to support the provider community, OPDS just isn't funded to provide representation in such instances.

Mr. Levy concluded with a summary of the next peer review, in Clatsop County at the end of September. The review team includes Jack Morris, who is here, Keith Rogers, Jennifer Kimble, and Jennifer Nash, and the final report will be provided to the Commission. A peer review of criminal providers in Marion County is tentatively scheduled for early 2013.

Ms. Cozine noted that the next service delivery review is scheduled in Linn County in December, and that the September meeting agenda would include a thank you to Chief Justice De Muniz. Commissioner Potter added that OCDLA is giving a Ken Morrow lifetime achievement award to Chief Justice De Muniz on November 30th, at the Benson.

Chair Ellis invited a motion to adjourn.

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

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, August 16, 2012
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch
Chief Justice Thomas Balmer

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Peter Gartlan
Shawn Wiley
Billy Strehlow
Shelley Winn

The meeting was called to order at 10:00 a.m.

Agenda Item No. 1 Approval of Minutes – PDSC meeting on June 14, 2012

2:43 Chair Ellis Are we ready to begin here? The first item is the minutes of June 14, 2012. Are there any additions or corrections to the minutes? If not, I would entertain a motion to approve.

3:01 J. Potter I had a question. On page six, first paragraph, fourth sentence. “Discovery, by and large, is from the district attorney offices and it is the county council that makes the budgetary determination of the amount that a district attorney should charge for provision of discovery.” When you are saying that is that the county commissioners that make the determination?

3:29 K. Aylward Yes. I don’t know whether it is called a “commission” or a “council” but it is county government that determines what the district attorney’s office can and should charge.

3:45 J. Potter Okay. I missed that part of the discussion. Thank you.

3:50 Chair Ellis Any other additions, corrections or questions? Is there a motion to approve?
MOTION: John Potter moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 2 Discussion and Possible Approval of Douglas County Service Delivery Plan

- 4:00 Chair Ellis Next is the Douglas County Service Delivery Plan. Nancy do you want to introduce that?
- 4:07 N. Cozine Certainly. Chair Ellis, members of the Commission, your second attachment is the Douglas County Service Delivery Plan. It includes the materials that were submitted at the time that we went to Douglas County and conducted the service delivery review. It includes the comments that were made during that meeting, as well as updates. In the updates section, since you have heard the other information, the county representatives in that area are working on establishing some collaborative systems. They are looking at the establishment of a criminal justice advisory council. I believe that presiding judge's orders have gone out regarding that. We do have Dan Bouck in the room, who is our UVPD executive director, if you wish to hear from him. My understanding is that the conversations are continuing and that there is an expectation that CJAC meetings will start soon and that an agenda has been created and that there is work toward continuing to collaborate in that county.
- 5:23 Chair Ellis Where are we on the affidavit issue?
- 5:27 D. Bouck I can tell you where we are on that. We have had a series of meetings with the presiding court judge, and then eventually with the judge that we have had issue with. We sort of boiled down what our real problem was, and what cases that it would affect. The problem was the statute for affidaviting said we had to file within 48 hours the assignment to the judge, which for us, they do at arraignment. So Monday morning at 8:30 they are assigned a judge - we would have to decide immediately whether we need the time. It used to be, before our county got bigger, we had more time. We sort of agreed where we want to get to, and we are having problems finding a method that is allowable. Our agreement is that we would have two weeks to file the affidavit if they are out of custody and three days if they are in custody. We thought we had it all resolved, and we presented it. Our presiding judge was on board. We were on board. Everyone liked it, but the DA reviewed it and they objected, saying there was an issue with it. So we are trying to find a new method of coming up with the same solution, although they don't have a problem with the idea of the two weeks. They said we can't do it that way.
- 6:44 Chair Ellis Because the statute has a timeline?
- 6:59 D. Bouck Yeah, and they said they can't bypass that. We have been trying different ways. We tried to alter OJIN, so we just wouldn't announce the name of the judge for two weeks. But they said they can't do that. So we have been going through various ideas. Everyone agrees that two weeks makes sense. So that way we would only be affidaviting the judge on these specific problems. It is just trying to find a mechanism that everyone agrees upon has been difficult. We sort of agreed to do that while we are trying to find a permanent solution. There are actually two permanent solutions. One, we are meeting again here in a few weeks to see a few ideas, and if any of those will work. At the same time I have already met with Bill Markam, a retired legislator down in Roseburg, about what I need to do to get this statute amended, which is really what we need to do.
- 7:45 Chair Ellis I encourage you to keep talking and I am encouraged that it sounds like you are communicating in a meaningful way on this. Let's hope that finds its way to a solution.
- 7:57 D. Bouck It will. It has just been frustrating.
- 8:01 Chair Ellis Okay.

- 8:01 N. Cozine When I sent out the draft final report to the representatives in Douglas County, Eric Fromdahl, the director of the juvenile department who did not testify, did offer a few suggested edits. I did circulate them via email as well, since I received them on Tuesday. I did not have time to add them to the materials. None of them, I think, are terribly earth shattering and I would be happy to incorporate them if that is the Commission's wish. The final section includes the service delivery plan for Douglas County. This Commission, following the testimony that they heard in Douglas County, had an opportunity to discuss where the county was at, in terms of its providers, and my reading of the minutes indicated that the Commission was interested in letting it continue to develop over the course of the next few years, working through the changes that we had, with the elimination of the MASH consortium, and that we would look at it again when we do our contracting in the next cycle.
- 9:12 Chair Ellis It did seem to me like there is an issue on the horizon. You have got two strong private firm providers. They are both very good, but the senior member in each is – I think they told us maybe two years away from retiring. They are going to retire more or less simultaneously. It was not clear to me that the model of private firm contractor will continue because it just depends on what happens when those retirements occur. So, I would watch it from that standpoint, as the retirements occur, let's see what makes the best sense to have continued provision of defense services. It could well be a consortium with the now associates of the seniors in those firms. It would make sense, but it is not something that I feel, at least from what I heard, a need to start doing today because the two seniors are still active and they are there. I don't know how others have reacted to Douglas County on that issue.
- 10:36 J. Potter I agree. I think it may be more than two years for one of the contractors, but nevertheless it will be a fairly short amount of time. There has also been talk that there are at least two, and possibly three, other lawyers in Douglas County that are available – would be available to pick up, either as a small consortium or in a separate contract. I don't know if we have talked to those folks recently or at all.
- 11:03 K. Aylward As I said at the last meeting, we did try to encourage a consortium to form and we were unsuccessful. We will try again with the next round of requests for proposals.
- 11:19 Chair Ellis The other observation – I know there was some concern that because so much of the caseload is with the PD and conflict cases come up, that they are having to use out of district lawyers for some, but it didn't sound to me like that is a lot. Eugene is a big source of lawyers and it is only an hour away. It seems to me that that piece was still working out alright even though you have a higher concentration in the PD than they you do in many other districts. Any other thoughts or observations on Douglas County?
- 12:10 Justice Balmer What is the contracting schedule?
- 12:15 N. Cozine We entered into new contracts at the beginning of this year. So 2012 will run for two years. We will begin the process in the 2013 for contracts starting 2014.
- 12:26 Chair Ellis On the paper you just handed out, this looks to me like the things you wanted to add tended to be just factual and uncontroversial?
- 12:42 N. Cozine That is the way I read it as well.
- 12:52 Chair Ellis Are you okay with these? Is there a motion to approve the Douglas County Service Plan incorporating the proposed changes?
MOTION: John Potter moved to approve the Douglas County Service Plan; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 3 2013-15 Agency Request Budget

13:11 Chair Ellis Kathryn, the 2013-15 Agency Request Budget, attachment 3.

13:19 K. Aylward It is behind the lavender divider. I know this form is not terribly user friendly for people who don't work with budgets.

13:33 S. McCrea We thought you were just trying to confuse us more.

13:35 K. Aylward This is the standard Orbits form that has

13:41 Chair Ellis It gives whole new meaning to concept of opaque.

13:47 K. Aylward No. You just have to get used to it. Some of the documents that Orbits produces... it is interesting that some of them structure things horizontally. Last year's budget, this year's budget, budgets with policy option packages, and yet some of them do it going vertically, and this is an example of the vertical ones. It is our general funds and other funds combined, and all three separate allocations combined. This is just the really high level budget. Page one and two are pretty standard. The only thing that is in there that is unusual for us is the mandated caseload, package 040, which you have heard a lot about. On page three, down at the very bottom after modified current service level, then they add policy option packages. The Commission discussed at the last meeting the policy option packages they wanted to pursue, or include in the budget. It is the three. Package 100 – Juvenile Dependency Caseload Reduction, and what we had talked about doing is reducing the caseload by 20%. That, again, is a standard policy option package for at least the last two or three budget cycles. But we also decided that given the current budget environment that asking for the – I was going to say the whole enchilada, but going completely for the amount of the policy option package was going to be unnecessary and unobtainable, so we decided to look at it as a three biennium strategy. So basically what we are asking, for this biennium and hopefully in the next two, is a third of the total that we would need.

15:36 Chair Ellis That is on policy package 100?

15:38 K. Aylward Yes. So theoretically, if the goal was to reduce the caseload by 20% and we are asking for it in thirds, this would be about a 7% reduction in the caseload which is not huge. Package 101 is the Appellate Division attorneys' salaries being the same as the Attorney General's office salaries. Again, that figure of \$279,000 represents one-third of the cost to do that. Package 102 is the one that has the three components for public defense providers. The first one is to have full time public defender salaries increased to match the deputy district attorneys' salaries in their counties. That came to about \$2.3 million of that total figure. The other component of it was to increase the hourly rate paid to attorneys. To go from \$45 an hour to \$70 an hour would be the full amount of the package, but if we asked for a third of that that gets us to about \$53 an hour.

16:50 Chair Ellis What percent of our trial services are still on an hourly?

16:54 K. Aylward A very small percentage. It is probably 4% hourly paid and the rest are under contract. The full policy package would put death penalty rates from \$60 an hour to \$95 an hour. Of course if we are going to one-third chunks that puts it up to about \$72 an hour. The final component is investigator's hourly rates. We were aiming for \$35 an hour.

17:26 Chair Ellis It is \$25 now?

17:27 K. Aylward Right now it is \$28 for non-capital. We are hoping to get it to \$35. Obviously only going a third of the way only gets us to \$30 an hour from the \$28. For capital cases currently it is \$39 an hour. We were hoping to move it to \$45. This one-third bite would get us to \$41. So that puts our total budget at \$263.7 million, which is 16.5% above the legislatively approved budget for the current biennium, but as you will recall the legislatively approved budget does

not include the actual amount that we need for this biennium because we had a special purpose appropriation and funds that we know we need that haven't yet been allocated. So is that a nice segue to our Emergency Board letter which I handed out. The Emergency Board is meeting – well they have subcommittee meetings September 12th and 13th and then the full committee meets on the 14th. We don't know which subcommittee we are assigned to yet. We won't until about a week before the meeting. The main purpose for doing an emergency board letter now is that that special purpose appropriation technically expires December 1, 2012, and the funds revert to the Emergency Board to allocate however they see fit.

19:02 Chair Ellis

So we kind of lose that special....

19:07 K. Aylward

We lose the “dibs.” Partly this letter is we have to get this in to say, “You know what, don't just let it expire. We are here to notify you that we still need it.” I have run this draft by our LFO analyst, Steve Bender, who is actually here today.

19:30 Chair Ellis

Welcome.

19:30 K. Aylward

This is really traditional with the Emergency Board to say, when you come forward and you present your case and you say we need these funds, they will say, “Well, how about we give you a third of it now and then you come back later when you have better numbers.” Better in the sense that the further through the biennium you move you can zone in on what that final, exact dollar figure is that you need. I suspect this time they will probably say, “You know you have money in the bank. You know you can run until sometime in June before you run dry. So why don't you come back to the next legislative session and then maybe it won't be 3.5. Maybe it will be something less. Maybe it will be something more, but at least we will have a better idea of what the figure is.” I am not terribly hopeful. I would love it if they would just award it because then it is something off your mind. Nobody else is going to eyeball it and we don't have to keep going back to hearings and keep producing reports, but if it is not disloyal to say this, I actually think that is probably a good way to do things. I just worry that we get to the end of the biennium and I say, “Okay, I know exactly how much we need.” And they say, “Well, sorry we have spent it already.” So other than that concern if there is – and I don't think it hurts to keep appearing before emergency boards and keep saying, “Remember us. Here is our story. We can't control our budget. We are watching it. We are keeping you in the loop as to what our needs are.”

21:07 Chair Ellis

If they have a memory as far back as 2003, they will know that they can't ignore that.

21:17 K. Aylward

So this letter is in draft form now if you want to make changes. It is actually due at noon on Monday. Then you have a little sort of soft period. You can technically make changes until Friday. As I said, I don't think this is a \$3.5 million dollar letter. I think they are just going to say, “No, come back and ask again.” While I am on the subject of budget things, we actually have a new budget and management analyst. It is now Kay Erickson, who has taken the Linda Gilbert role; I shared that name with you before, with BAM – Budget and Management. They are sort of the shepherd of all the exec branch agencies. Everything sort of funnels through them and they dictate the forms and the deadlines and the process for information from exec branch to funnel up to the Governor. So they don't play a huge role in judicial branch agencies, but we keep them in the loop and we keep them aware of what we are doing. I haven't met with her yet. We traded voice mails and she will hopefully come by and have an orientation and look around.

22:34 Chair Ellis

Good.

22:34 N. Cozine

Chair Ellis and Commission members, I think the Commission should also hear that discussions have started regarding potential funds for next biennium. I think Kathryn is right - that it sounds like our request is unlikely to be funded at this emergency board. The danger, as we push our costs out into next biennium, is that the message we are now hearing is that it

is likely that next biennium's budget is not going to be favorable enough that we can absorb too much as we roll forward. We are hearing that it is likely to be current service level minus three to four percent. Current service level for us is not a wonderful place to be. We have providers who have not had an increase in several cycles. We need to be trying to protect our ability to give an increase during the next budget cycle.

- 23:40 Chair Ellis You can't count on a caseload decline every biennium. That will end at some point.
- 23:46 N. Cozine Correct. Our providers are telling us that as the caseload has declined the complexity has increased. So, where you may not have as much in the cost arena for attorney fees, you have more in the need for non-routine expense requests.
- 24:03 K. Aylward As far as caseload goes, where it is sort of the early days in this contract cycle, we will do periodic reviews through June 30 and that is when we really finalize the numbers, but we have calls in the first two or three months of a contract cycle where someone says, "Wow, I just started my contract and I am 15% over or 20% where I should be. We need to do something." So certain counties like Jackson County, Multnomah County, I think Washington County, you know there are counties where we are seeing a sort of bounce back of caseloads. It will be a few months before we know the impact statewide. I think things are heating up again.
- 24:48 Chair Ellis Okay. Any questions or comments.
- 24:52 Justice Balmer Kathryn, do you anticipate going back in December to the E-Board? Will they tell you let's worry about it during the session?
- 25:00 K. Aylward I suspect that the Emergency Board or that LFO will make a recommendation to the Emergency Board and that recommendation will likely be – I would assume be return to the full session in 2013. I don't know that between now and December I would have a whole lot better information. As I said in the letter there is a lot fluctuation and if July happens to be a big month then suddenly we need \$7 million. If it is a low month we need \$3.5. I think we can wait.
- 25:35 Chair Ellis When does the wall hit as you now look at it? When would we be back where we were in 03?
- 25:45 K. Aylward Is that with or without the \$3.5 million?
- 25:46 Chair Ellis Without it?
- 25:48 K. Aylward Then we are \$4.9 and we spend about \$9 million a month. So that is about two week's worth of running money. The \$4.9 represents that.
- 26:01 Chair Ellis So we could get to lets say May under the current version?
- 26:08 K. Aylward The reality with the BRAC was that you can't just keep going until there is no money. You have to form a kind of glide path. As this Commission knows when we were part of the Judicial Department and they had authority to defer arraignments, we as an agency don't have authority to say to the court, "Sorry. We don't have counsel. Call us in three or four months." We are facing a situation where there is not a lot of action we can take. Only legislative recommendations of what we should be doing to address any kind of shortfall. Then there are also some kinds of cases where a lot of the costs that have been incurred, we don't see for two or three months. We may decide in May that we had better stop, but who knows how many bills are still going to come in for work that has been performed that we haven't yet received.
- 27:21 S. McCrea So what do we do in that instance? We are going to try to figure out when to set the glide path to coast into the fall?

- 27:30 K. Aylward I think you could do something like that, sort of estimate the daily bills, but what happens is it is a little bit like a run on the banks. As soon as someone hears that public defense is running out of money - I forgot to bill on this case. They suddenly get all caught up on their billing so you get this flood of requests coming in. It is difficult. One of the things with this amount of money, we are into sort of what we call the tail. So in other words for work performed through June 30, we are supposed to use current biennium money and we have a certain amount of time. The last biennium, accounting wise, stays open to pay that bill. So you get a bill in July that says that I did work on June 1, you use the old money to pay for it. The size of our tail is not that large. Generally it is about two or three million. So we know if we don't get the \$4.9 we can't keep going until June 30. If we get some portion of it like the \$3.5 and then we are still \$1.4 short, we can make it to June 30. It is just that we won't have that tail available so by July 5, the money is out and we get a bill for work on June 1. It is like sorry I can't pay that with last biennium's money. All you can do is roll over and start using the new biennium money, which is what Nancy was talking about. It effectively pushes a cost from this biennium into next biennium. It is not a good practice in my view. As an emergency measure, a one time measure, possibly. That is also what BRAC was. BRAC was pushing those cases to the next biennium. The difference with BRAC though, I think, is that some of those pushed cases then got dealt with. Some people never showed up. Some people - it was different but this is actual dollars. On July 5 when I run out of money whatever amount of money that I still need to pay is exactly the amount I need next biennium to top that up. There is a little play in the system but it is not more or less money.
- 29:53 Chair Ellis It is a really slippery slope if you keep pushing this year's costs into next biennium's pay. That just mounts and it is not sustainable.
- 30:11 K. Aylward It is not sustainable but it is 10 months so...I will keep you posted.
- 30:15 Chair Ellis I am guessing you will be back here in December.
- 30:16 J. Potter So besides keeping us posted, is there anything that we should be doing in helping educate policy makers. You have got a triple threat. You have got this current shortfall. Then you have a current service level budget that really isn't a good place to be, as Nancy said, and then we have policy packages. Even the policy packages are relatively nominal. We need all three even to get close to being at a decent level and all three seem threatened. So do you have any thought as to what we might be doing at the Commission level?
- 31:03 K. Aylward I don't know. To me it always seems like it is an education process. It depends on how much turnover there is in the Legislature. It's like, I feel like last time we got to a point where everybody kind of got it. They had been there long enough. They understood the situation. There was a lot of support and understanding for it is what it is. But I think as there is turnover maybe it is just continuing to work those relationships. You know we are here. Do you have any questions? Can I explain to you what it is we do? I don't have suggestions for the Commission members themselves.
- 31:51 J. Potter I know that in the past the staff has done a great job at developing relationships both with legislators and with Legislative Fiscal, but I guess I am wondering if there are situations in which you think you have got a lot of experience on this Commission, the folks that have been around the horn a few times, of dragging us in with you at one point.
- 32:11 N. Cozine I would want to respond to that, Commissioner Potter. I think that there may be times where that may be necessary. I am not sure that we are there yet. Right now we seem to be at a place where it is this statewide fiscal crisis and people understand that we are an exception. That our needs and our requirements are different than other agencies. I haven't heard anyone in our legislative contacts not understanding that message. However, I think it is a very good suggestion that we need to continue to consider. We also need to be working with our

providers, and we had the conversation at the Public Defense Advisory Group meeting. We need our providers at the local levels to be talking with their legislative representatives about what they do, what their role is in the community, and how and why that is very important. One of the challenges that we have with this Emergency Board is that we don't know which subcommittee we are going to be in front of and we won't know until right before. So right now, in the immediate needs category, I don't think we have anything. I foresee in the future that it could be possible.

33:25 K. Aylward

I think in our case what hurts us the most is that when anyone is looking at state agencies' budgets they are looking across the board. They are looking at percentage increases and they are saying, "Oh, three percent, that is fine. Twelve percent; what is going on here?" I think in our case, if you start at something this is unacceptably low and it is a broken system and you are about to reach the point where you can't find anybody to do this work, when it was \$40 an hour, and so saying to them, "How about \$41?" That is not going to make a difference. If they are saying no to \$40, they probably need \$60. If you then put together a budget that says, "You know I have a 25% increase." Everyone says, "Well that is not fair. They only got three. How come you think you need 25%?" That has always been our problem, is that we are putting forward a budget to the Legislature that informs them and clearly outlines our actual needs for the strength and stability of this program. It is like, maybe I can find an attorney today for this case, but what you are doing is setting yourself up for trouble in the future. You need to get the experience and get the people. You need to be able to have continuity in this program. It is a huge significant statewide program that other parts of the system depend on. We put these budgets forward and I say this is what it is going to take. It is always a big increase because we fell. I don't know how it happened or when it happened, but we started out so far behind. My view is there are attorneys who feel this as a passion and a public service and if they can afford to do it for very little money, then they really want to because they care about it. There are fewer and fewer of those sorts of people, and you are less able to afford to, no matter how much you want to. You think, I have my loans and my wife and kids, and I might want to, but they also want new bikes. You can't sustain that. That is what we are up against, is just a plain percentage increase. That is where the education thing comes in again. It looks like a big percentage increase, but do you realize that's only putting it from \$45 an hour to \$53 an hour, and don't you pay your plumber \$90. Then people can sort of get it. It is a struggle.

36:10 Chair Ellis

Any other questions or comments? Thanks.

Agenda Item No. 4

Best Practices for Boards and Commissions

36:27 Chair Ellis

The next item is best practices for Boards and Commissions. The Secretary of State audit report and our compliance therewith.

36:48 P. Levy

This item is part of really sort of a precept to item 5. As part of talking about PDSC compliance with best practices, which was one of our key performance measures, we thought that the Commission would be interested in hearing a little bit about the recent Secretary of State audit of boards and commissions statewide. I will briefly summarize that and then turn the floor over to Nancy. This was an audit published in June. It was a report to the Governor's office, because the Governor's office is responsible for filling and managing the vast majority of boards and commissions. They need to fill something like 1,900 positions on boards and commissions. The report for which we provided you a link, not the report itself, because it is 200 and some pages long, is interesting. Its purpose was to improve the functioning of boards and commissions. They had three primary concerns that they identified. One was the proliferation of boards and commissions. They could find 250 and they think there were more. They just aren't sure where they are.

38:18 Chair Ellis

That is where they recommended a commission on commission proliferation.

- 38:22 P. Levy If you read the report there is an interesting history to the effort to do just that. To reduce the number of boards and commissions but it hasn't gone well.
- 38:33 Chair Ellis Hazelnut didn't want to consolidate with Red Fescue?
- 38:37 P. Levy They are all still there. The report shows that the numbers of boards and commissions has been accelerating and we are going to be over our head. It is just the simple proliferation and then questionable performance of many of these boards and commissions.
- 39:05 J. Stevens She didn't cite any evidence for that. She drew that out of her hat. I'm sorry.
- 39:08 P. Levy Yes. The other main concern was risk of theft and loss. There are certainly instances of that. At the risk of appearing to pat the Commission on the back, and ourselves too, we are quite different from the typical board and commission that this report was concerned about and quickly I will tell you in what ways we are. These are really the ways in which we are arguably doing what we need to do to do a good job. First of all, many boards and commissions have a very small staff. They simply do not have the administrative and technical skills to manage personnel, budget, contracting, and procurement, and they struggle with that. Most boards and commissions do not have a legislatively approved budget and so they are not subjected to the legislative budget process and the scrutiny that that involves. That is because most boards and commissions are not primarily funded from general funds. They are funded from licensing and the like. Many boards and commissions, at least according to this audit, receive little or no training. We do provide the Commission with training and will identify times and dates for that and I am sure you are aware of that. So the problem with that is that apparently many boards and commissions are not familiar with their governing statutes. They are not familiar with the applicable state and federal laws that affect their mission. I think this board is. You know your statute, Chapter 151, and the legislation and constitutional provisions that affect our work primarily are those that concern the right to counsel and we are familiar, very well familiar, with that. And boards and commissions don't understand their oversight responsibilities and how to exercise that. One of the specific criticisms was inadequate oversight of the executive director. I know we feel that we are very well watched after here, and we always welcome more watching. Many, if not most boards and commissions, don't have a website or other readily available public information. They rarely meet. When that is the case it raises the question of why they exist in the first place. They don't have strategic plans that are publicly available, and there is no mechanism to receive complaints about board members. I am not sure what our mechanism is for that. I am not hearing a lot of complaints, but then again we don't have the mechanism to receive them. I am sure if we started a mechanism then we would see them. So the recommendations of the report to the Governor, where they were directed, were better deliberation before you create them and this is called "sunrise" requirements and then "sunset" requirements. Better training and better fiscal and operational review and reports. We have got lots of reports that are available to many folks. That is just a snapshot of the problems with boards and commissions. Most of those we do not suffer from, except we don't know how to receive complaints about you.
- 43:27 S. McCrea Somehow I don't think it would stop anyone if they wanted to complain.
- 43:32 N. Cozine Yes. This Commission is uniquely situated and there are very different circumstances than many of the boards and commissions that were discussed in the report. If the Chair is ready we could move on to the best practices.
- 43:46 Chair Ellis Let's move on.
- 43:47 N. Cozine As this Commission knows, one of our key performance measures is adherence to the best practices for boards and commissions. Attachment no. 4 in your materials is the self-assessment criteria for boards and commissions. I am happy to give you information on how

you have complied with each one, unless you prefer to brainstorm on your own and let me tell you that you are correct.

- 44:20 Chair Ellis So, we would want to go through the 15 and perhaps others, and pat ourselves on the back or self-flagellate as the case may be.
- 44:29 N. Cozine I think that we do. Part of what we need to do every year is to go through the best practices and make sure we are in compliance. If we are not, then fix it. When we submit our annual progress report we need to make sure that we have done our work.
- 44:43 Chair Ellis I remember one year we did this and to make it clear that we weren't just saying yes every time, we did one that was not perfect and it created a firestorm of controversy.
- 44:58 N. Cozine We hope to have you in perfect step this time.
- 45:03 Chair Ellis Go ahead. Why don't you lead the charge here.
- 45:06 N. Cozine Alright. So the first one is the Executive Director's performance expectations are current. This Commission last updated the position description in April of 2011. It is still effective and clearly lays out the expectations of the executive director.
- 45:21 Chair Ellis So give ourselves a yes.
- 45:23 N. Cozine So give yourselves a yes. Number 2 is Executive Director receives annual performance feedback. This Commission reviewed Ingrid Swenson and gave her evaluation in March of 2010. In March of 2011, it was skipped because she had given her resignation notice, and I began this position in September of 2011; my evaluation is scheduled to begin in September of 2012.
- 45:51 Chair Ellis And we did that before being told we should do that. I want the record to be clear on that. Okay. Give ourselves a yes.
- 45:59 N. Cozine Number 3 is the agency's mission and high-level goals are current and applicable. The mission and high-level goals are reviewed annually for the Annual Performance Progress Report. Both the high-level goals and the low-level goals are reviewed and updated at least biannually when we revise the Strategic Plan. We actually began review of the strategic plan in January of this year and the final plan was adopted in May, 2012, after several cycles of review.
- 46:38 Chair Ellis Let's give ourselves a yes.
- 46:31 N. Cozine Number 4. The board reviews the Annual Performance Progress Report. We submitted that to this Commission in October 21, 2011, and we will address it again as our next agenda item.
- 46:51 Chair Ellis Let's give ourselves a yes.
- 46:55 N. Cozine Number 5. The board is appropriately involved in review of agency's key communications.
- 47:03 Chair Ellis I believe Kathryn just handed us a letter to the E-Board and gave us three days to edit. Okay.
- 47:11 N. Cozine And as you know we meet eight to nine times per year and regularly update the Commission on our key communications.
- 47:19 Chair Ellis Let's give ourselves a yes.

47:21 N. Cozine Number 6. The board is appropriately involved in policy-making activities. Again, this Commission meets regularly. We have very full discussions about the policies and objectives of OPDS and the PDSC. We follow those goals and strategies that are outlined in our strategic plan.

47:39 Chair Ellis Let's give ourselves a yes.

47:42 N. Cozine Number 7. The agency's policy option packages are aligned with their mission and goals. PDSC's mission is to establish and maintain a public defense system that ensures a provision of public defense services in the most cost efficient manner consistent with the Oregon Constitution, the United States Constitution, and the Oregon and National Standards of Justice. All of our policy option packages are directed at meeting that goal.

48:03 Chair Ellis Let's give ourselves a yes.

48:04 N. Cozine Number 8. The board reviews all proposed budgets. This Commission reviewed the agency's proposed budget for the next biennium on June 14, 2012. We have just reviewed the additional information following up on the policy option package requests. We will have a final budget narrative at the October 19, 2012, meeting for this Commission's review.

48:30 Chair Ellis Let's give ourselves a yes.

48:32 N. Cozine Number 9. The board periodically reviews key financial information and audit findings. Throughout the course of the year this Commission receives periodic updates on budget developments and expenditures of funds. This agency has also undertaken internal audits when necessary and will continue to do so.

48:50 Chair Ellis Let's give ourselves a yes.

48:52 N. Cozine The board is appropriately accounting for resources. The Commission approves the proposed budget every year or every cycle. The Legislative Assembly ultimately passes the budget for all CBS, Appellate Division, and our trial court services account. The funds are expended in accordance with budget requirements in the biennium and interim reports are prepared to the Emergency Board, Interim Ways & Means Committee, and copies of the documents are always provided to the Commission.

49:21 Chair Ellis Let's give ourselves a yes.

49:23 N. Cozine Number 11. The agency adheres to accounting rules and other relevant financial controls. This agency has been awarded the State Controller's gold star certificate for achieving statewide accounting goals in excellence and financial reporting each fiscal year since the agency was created.

49:36 Chair Ellis Now was that on a horizontal basis or let's give ourselves a yes.

49:44 N. Cozine Number 12. Board members act in accordance with their roles as public representatives.

49:49 J. Stevens You will never know what I do at home.

49:54 Chair Ellis No scandals that I know of, so give ourselves a yes.

49:57 N. Cozine Number 13. The board coordinates with others where responsibilities and interests overlap. We do have joint responsibilities with the judicial branch. We regularly coordinate with the judicial branch on those matters. We also coordinate with OCDLA to advance our training and educate interests.

50:16 Chair Ellis We have done less than I am aware of this year on DA coordination. We might want to revisit that to make sure we are keeping that communication line open, but that is not enough of a negative to deny us a yes.

50:33 N. Cozine Alright. I will let the Commission know that we have reached out to three district attorneys to participate in our Public Defense Management Conference in October.

50:41 Chair Ellis Okay. That is good.

50:41 N. Cozine Number 14. The board members identify and attend appropriate training sessions. The agency's general counsel does provide periodic training and the most recent was on public meetings law where we discussed the *Dumdi* case, and that was March 20th of this year.

51:04 Chair Ellis And this is the one we gave ourselves a qualified yes and the firestorm erupted and general counsel has been on our case ever since. I think now we can give ourselves an unqualified yes on that.

51:18 N. Cozine The board reviews its management practices to ensure best practices are utilized. We are doing that now. Number 16 is others.

51:28 Chair Ellis Wait. We have to give ourselves a yes on no. 15. Okay. Any other thoughts or comments? I am happy to announce the tally. It is 15 yeses and no nos. Excellent outcome. Anything else we need to do on that? Okay. I don't mean to be just funny about it. I recognize this is an important exercise to remind ourselves to keep current and keep doing the key performance measures.

Agenda Item No. 5 Annual Performance Progress Report

52:12 Chair Ellis Kathryn, the annual performance progress report and customer service survey results.

52:21 K. Aylward Behind the green divider we have the results of our annual customer service survey. The first few pages summarize the seven questions, six questions and then a sort of open comment.

52:40 Chair Ellis Who were the customers we survey?

52:44 K. Aylward It is basically providers who have given us an email address for the non-routine expense process. So it is attorneys. It is the actual psychiatrists, psychologists, investigators. It is basically anybody that we had a decent email address for we sent it out.

53:08 Chair Ellis So this doesn't include, for example, trial judges?

53:11 K. Aylward No. It didn't go to judges.

53:15 P. Levy We survey them annually with our annual statewide public defense performance survey in January.

53:25 Chair Ellis And I know this would be logistically complex, but do we have any mechanism of getting feedback from clients?

53:35 K. Aylward We don't have a mechanism. Some of our contractors, notably Jim Arneson, have done client surveys. He has always said that it is very helpful and useful for the attorneys themselves. A lot of it is positive feedback. What we are trying to survey in this is our - how we can improve our business processes of our office. I know that ultimately our mission is provision of adequate representation. So if we are buying those services we need to make sure that those services are provided. It is a little bit difficult to quantify and measure. Something like how quickly you get paid. Or whether you get paid the amount that you billed. Or whether

when you called someone picks up the phone after one or two rings. Or if when you look on their website you can find the information. Those kinds of things are a lot easier for people to reflect on when you are sending out surveys to hundreds and hundreds of people.

54:40 Chair Ellis

I don't mean to be critical with my question. I just want to make sure I understand the customer base here is really our provider community that OPDS interacts with every day.

54:54 K. Aylward

That is correct. I am obviously still happy with the results. It has dropped down a little bit and I think we can point to some of the reasons for that. For example, we used to pay bills as they came in. It would come in on Monday and someone would check it and process it and approve it and it would be paid on Tuesday. But what happens is that it actually costs us – I should have written it down. I think it is a \$1.60 per check, and even if it is a direct deposit, it is about 95 cents, so each one of those that is issued. So if you have an investigator who is working on lots of different cases, on Monday he finished his work on this case and submits a bill. Maybe Wednesday he finishes his work on another case and submits a bill. What we were doing, and it sort of surprised me, was that I would be cutting you a check on Monday and then cutting you a check on Wednesday and cutting you a check on Friday and paying \$1.60 each time we did that. That is crazy. Most people get paid once a month but even getting paid in two weeks is fine, but certainly once a week is fine. So what we decided to do is only pay investigator one day a week. It is Wednesday, so if you submit your bill on Monday you are not going to notice any difference, we will pay you on Wednesday. But if horribly someone submitted a bill on Thursday and said, "Well, I am usually paid by Friday. I expected to have the money." We said, "Sorry. You are not going to get paid until Wednesday." We were too good before and now we are even just a little bit normal and that is like things have certainly slowed down there.

56:44 Chair Ellis

I was surprised at the 29% response rate. That seemed low to me.

56:50 K. Aylward

It is a little bit low. It is lower than the last time we did the survey. We got a little higher response rate.

57:05 Chair Ellis

My question to you is there a likely built-in bias by those who respond? I would think complainers would be most likely to respond because they have something they want to communicate. I don't know how you guys look at it but I had the feeling that we are probably going to get a slight skewing toward the negative by a low response rate.

57:30 K. Aylward

I think that is true. That is why I included this sort of individual specific comments, which is actually entertaining reading until you hit the one that says, "Everyone is great except Aylward." Thank you whoever you are. We look at it in terms of, we like to provide good customer service, but we are also the entity that is tightening the purse strings and having to say, "No. I am sorry." One of the other things that we did that also made people grumble a little bit is that when someone would submit a request for non-routine expenses and they would say, "Here is the service I need and sort of why I need it, or I need it cause just trust me I need it." We would call them up and say this isn't enough information. You need to provide more justification. What do you hope to gain if you expend these funds? Sometimes we would get an answer and sometimes we wouldn't. It would sit on our desk and then we would call back and say we were still waiting. Finally we just thought this is not efficient. So you got one or two calls and if we didn't get an answer within a week, it was denied and sent back. I think that surprised people a little bit. What do you mean denied? Well, you didn't provide enough justification. The limited amount of control that we do have is at least to make sure the attorney has determined that - really we pushed them. You really, really need this and made them justify it. It is more work for them and they don't like it. They are mildly offended that a bean counter might be telling them, an attorney, what they do and don't need. But overall I am pleased. Even when you see the aggregate excellent and good dipping from 99 to 98, I like the answers on the timeliness. It still went up and in the excellent category....I am okay with it.

- 59:51 Chair Ellis Any questions or comments on the survey?
- 59:51 Hon. Elizabeth Welch There was a second bias that I read through this stuff as showing. There was one in here, and I wish I would have marked it. Basically what it says is, I am going to say nice things because this is the hand that feeds me. There is that bias too.
- 1:00:16 K. Aylward We told them that this was anonymous and we set the survey up so we don't even get IP addresses. We couldn't find out who sent this about Aylward if we wanted to.
- 1:00:32 Hon. Elizabeth Welch There is a question raised in my reading of this about whether the people are saying no, or asking for further clarification, are working off the same set of rules. There is an implication there, even though I don't know how a lawyer or PI would know, if they deal with so and so on one thing, and someone else on everything else, because it is geographic. That question is raised here and I wonder how you see that.
- 1:01:12 K. Aylward You are right. That is yet another reason why we might not have had as stellar reviews as in the past. Lorrie Railey, our business services manager, reviews the bulk of these non-routine expense requests. Any that are unusual or more challenging she passes to general counsel, Paul Levy, to review. Lorrie has a lot of experience and because it funneled through one person it was consistent, but Lorrie notified us that she will be retiring, and is in fact, I think, sometime in the next nine months she will be gone. So we started in January of this year, I think, having the analysts, get a little practice, and sort of say, "How about on Monday you take a set of these and do them. Get some experience. Touch base with Lorrie and sort of learn the Lorrie method," so that we didn't have all our eggs in one basket and everyone was learning to do it. Of course there were some teething problems because everybody is slightly different you would end up with some variety. We are working now to pull together a – manual is not quite the right rule - but guidelines for all the different unusual circumstances so that there is consistency across the analysts. We haven't really decided yet what is going to happen when Lorrie retires. We are working on that, but at least we have that basis of all the analysts having had experience reviewing these documents.
- 1:02:55 Chair Ellis Did you want to yeah.
- 1:02:56 G. Hazarabedian And I would say in defense of the agency, those who claim not to understand what the criteria is or what is being looked for have really made an affirmative effort to not attend a lot of meetings where Paul has explained this. Both at OCDLA functions and Commission meetings and it is in writing. I mean it has been out there a lot, so to really come in at this point and say, "Oh, I didn't understand" betrays almost an affirmative ignorance.
- 1:03:34 K. Aylward Following the comments in the customer service survey is the actual Annual Performance Progress Report, the APPR. It says on the cover page submission date August 8. That is actually the date that I printed it. I haven't submitted it yet. It used to always be due September 1. I have to check my due dates. It goes in your budget binder so it is presented to the Legislature and LFO and BAM as a component of your budget binder. I think they put it on a web page so they take it in isolation. So we have three key performance measures. On page 5 at the bottom it says 5 of 16. It is showing that we are 66% green and 33% yellow. Yellow is when you are within 6 to 15 percent of your target. The first of our key performance measures is reducing the delay in processing appeals. I am on page 7 now. It shows a bar chart of where we have been in terms of the median number of days from record settlement to filing the opening brief. Our goal, our target, has always been for some time 210. It is now at 234 for fiscal year 2012. If we can get it to 222, then that is within the 5% of 210 and we will pop green on that. Then we will be completely green.

1:05:26 Chair Ellis Do we keep any data on the AG's time between our submission of an opening brief and their submission of their answering brief?

1:05:38 K. Aylward We had that data. It is in our database because we record the date that the reply brief is filed and we can do that calculation. I know that we did look at this two years ago because we thought this question would come up. We can find it out.

1:06:03 Chair Ellis I am interested in trends, as I am in absolute number. Are they improving, losing ground, or are they like we are the last three periods, kind of flat.

1:06:15 P. Gartlan Up until a couple of years ago they were about 274. The last we looked, within the last couple of months, lately they are filing at 210.

1:06:26 Justice Balmer Pete, that is 210 from your brief to their brief?

1:06:32 Chair Ellis That just feels like a long time to me.

1:06:37 P. Gartlan And the Court of Appeals' backlog is increasing because they're scheduling, they're docketing 40 cases per month and we are really filing about 65 to 70 cases per month, so they are falling behind by about 20 or so cases per month.

1:07:01 Chair Ellis Now there was an obviously significant improvement from where we were in '06 to where we have been the last several years. To what do you attribute that? Is that just number of lawyers or your excellent management?

1:07:18 P. Gartlan It is the number of lawyers. There was more work than we could handle with the lawyers we had. We received more lawyers a couple of biennia ago and that is why our numbers have increased. To give you an idea historically about what we are producing, back about 2003, 2004, we were filing anywhere from 300 to 350 what I would call "merit briefs," which is when the Court of Appeals actually has to address – there is an issue that the Court of Appeals has to decide, and now we are filing between like 650 and 700 merit briefs a year. So we have pretty much almost doubled our output with respect to merit briefs in the Court of Appeals. That is what is creating a backlog in the Court of Appeals and that is one of the primary reasons why the Court of Appeals has gone to the Legislature and obtained a fourth panel.

1:08:25 Chair Ellis Anything you see we can do to keep pushing the lapse of time down?

1:08:34 P. Gartlan We went through several rounds of training and everybody in the office is now trained. I am hoping that this will continue to decline, this number. The last training ended in June. Everybody who is here now in the office is kind been acclimated and knows the system.

1:09:03 Chair Ellis Do we make any differentiation between an appeal from a relatively short incarceration versus, obviously, the long incarceration in terms of trying really hard to get the appeal process done before it is moot?

1:09:22 P. Gartlan I can't say that we do because the short-term incarcerations tend to be the misdemeanors. By the time we get a transcript at least a month has gone by. If we filed a brief the day that the case comes in, the state's brief is still going to be seven months after that. Then with the Court of Appeals it is going to be six to eight months before it gets on the Court of Appeals' docket. Then the Court of Appeals is going to take several months to decide the case. So there is no effective relief for misdemeanants with respect to incarceration. Unless you have the unusual misdemeanor who might have several sentences run consecutively but that is the exception.

1:10:23 Chair Ellis Alright. Well at least we held the line when we got it down to the 220 level.

1:10:37 K. Aylward Can I make a couple of more comments on these figures? We are counting the median number of days from record settlement. Record settlement is when the transcript has been filed and 15 days has passed and nobody has objected to that as being the record. Okay. Now the record is established. Sometimes there is what we call a “second record settlement date” where even though the record settled when somebody comes to look at they realize they need another hearing to be transcribed. Or this all says, “Inaudible” and it needs to be done over again. Something like that. There will be additional portions of the transcript filed and record will settle again, or the record will be supplemented. We decided way back when, for our key performance measure, that we were going to count from the first record settlement even though it wasn’t really our fault or our doing necessarily, we were trying to say what is it like for the client. What is our piece of this segment? So if we ran these stats again and did it not from the first record settlement but from the final record settlement, then we would actually be around the 210 mark. It is kind of like not our fault but statistically you had to keep them consistent.

1:11:58 Chair Ellis I am glad to hear you are doing it the conservative way.

1:12:03 K. Aylward And one other thing that I have no idea why, but the fluctuation of cases coming in is tremendous. We can have a low month of 110 and then the next month is 179. That is a 62% increase in your workload and when you have got the kind of system and it is not like we have a conveyor belt of widgets or chocolates, if an attorney can only file three or four briefs a month, three or four cases a month, then suddenly having an extra 69 come in the door, that is months and months of work for the number of attorneys we have. It is good to keep track of things, but I wouldn’t put too much store in a particular snapshot of numbers because next month it could be 10 more or 10 less.

1:13:00 Chair Ellis Do we keep data on reply brief timing?

1:13:08 P. Gartlan The timing?

1:13:08 Chair Ellis Yeah. So our reply brief. I don’t think I have ever seen a chart that tracks the time between receipt of the answering brief and our reply brief.

1:13:21 P. Gartlan That is set by rule. I think it is 35 days by court rule. If you want to file a reply brief you have to move.

1:13:29 Chair Ellis So that just happens.

1:13:34 P. Gartlan It is not automatic. You have to move the Court of Appeals for leave to file a reply brief.

1:13:45 Hon. Elizabeth Welch I have sort of an informational question. This is all kinds of questions not just criminal appeals, right?

1:13:59 K. Aylward These statistics in our key performance measure only include the criminal cases not the juvenile cases.

1:14:08 Hon. Elizabeth Welch I am particularly interested in termination of parental rights cases and supposedly, and I don’t know Chief Justice, I haven’t seen anything on this subject in a long time, but the Court of Appeals supposedly has imposed some rules on itself regarding that. I am just curious kind of how that works across the system. Talk about people who have a lot at stake. I am not talking about the parents. I am talking about the children.

- 1:14:48 P. Gartlan All the dependency cases are expedited briefing set by ORAP rules. There is a limit and I don't know exactly what it is. I think it is 35 and - no it is 28 plus 14 for each side. They are addressed and resolved relatively quickly.
- 1:15:17 Hon. Elizabeth Welch So they are enforced. Thank you.
- 1:15:20 Chair Ellis Any others?
- 1:15:22 K. Aylward The second one is the customer service one which we already went through. The third one is the best practices for boards and commissions which you just got your 100% on, which is a good thing because in this draft I said you did. It will be in the minutes of the next meeting. The minutes of this meeting will be in the September 12 materials and that is our record of how we did it.
- 1:15:60 Chair Ellis I haven't been kicked in my shin from the left yet, but I ...
- 1:16:03 J. Stevens If my foot were long enough to get over there you would be kicked.
- 1:16:04 Chair Ellis Let's take not to exceed 10 minutes recess.

(Recess)

Agenda Item No. 6 Update Regarding Death Penalty Contractor Review

- 1:16:19 Chair Ellis The next item on the agenda is the death penalty contractor review. Paul, do you want to walk us through the process?
- 1:16:36 P. Levy I would be happy to. John would you close that door.
- 1:16:48 Chair Ellis It was too cool in here. We need to close the door.
- 1:16:50 P. Levy I think Steve Gorham was here for this. I don't know if he is here now. I am not going to repeat what I wrote in the report. I want to highlight a few things. First of all, I think we have done, overall, a good job of managing our responsibilities to provide counsel in capital cases. One of the things that we have not done especially well is to discharge our obligation that the Commission has imposed on us by adopting the ABA standards to meaningfully review and monitor the performance of our providers. As I said in the report we are pretty familiar with these folks and we have daily interactions with some of them, especially when on the verge of or in trial or at a critical stage in their cases. We go to meetings. We interact with the community a lot. We get feedback through our annual survey. But, we have not done an in depth look at performance of our capital providers. This was an effort to do that, starting with a small portion of our 30 some attorneys that do this work. It was useful. It was useful because we found out, even though we know these five contractors very well, we found out in a structured way, a lot more about them. What we found out generally was good and that was good to know. I am not entirely satisfied, as I doubt anybody is, with the process that was used and how it worked out. It was a long process. We started in September and here we are just finishing this first phase now. I don't think some of the hiccups along the way are likely to be repeated. I don't think the way we did it is the best to do this review because it is too public. If there are major criticisms and problems with contractors, we don't want to necessarily embarrassment them. We don't want to necessarily air them in this setting. The fact that that might occur could even serve as a disincentive for the kind of searching review that we need to perform. I think the review we performed in this instance was a good one. It was fair, thorough, and I am satisfied with where we have ended up. As we looked at how we are going to do this and look at the rest of our providers, I think that we will find a better way.

1:20:19 Chair Ellis The process you followed. You were the sort of focal point of gathering information. I know Dennis Balske, who is a very well regarded person and very competent in this area, acted as kind of a consultant.

1:20:40 P. Levy We always expected that there would be a body that would serve as advisory or expert consultant to look at the information that we gathered. We thought that body would be a group, a panel. It turned out to be one body, one person. We, in fact, tried to assemble a panel of experts who did not have an interest in the outcome of our review. In other words who were not current contractors. We are not able to do that. It frankly surprised me and frustrated me a little bit. I think we still need to do that. We contracted with Dennis Balske to assist in this review. We paid him.

1:21:44 Chair Ellis That is fine. I have a high regard for him. I think his experience in the field is way up there.

1:21:55 P. Levy So as I described in the report, I solicited, gathered information from contractors, provided it to him. Either he, or I, did some collateral interviews and followed up and ultimately – this was explained in the letter to Dennis Balske. He then provided an opinion or recommendation to me and that is reflected in the report here.

1:22:32 Chair Ellis How much, if at all, were you able to get input from the federal defenders who have these cases on PCR?

1:22:44 P. Levy I got some input. They were not willing to participate in a formal fashion as being part of an advisory team that I could consult with. I am hoping that might change in the future. But when there was a question about an attorney’s performance on a post conviction matter, the relevant attorneys there did speak with me.

1:23:22 Chair Ellis So let me see if I understand. That is an Oregon attorney that we compensated handling the state PCR phase before it reaches the federal PCR phase?

1:23:34 P. Levy Yeah. There are a couple of cases that have reached federal habeas where they have looked at the work the attorney we have assigned to handle the capital PCR. I solicited their input about that attorney.

1:23:55 Chair Ellis I was thinking one step earlier. Do they ever look at the performance of the trial lawyer?

1:24:05 P. Levy I don’t think they had looked at the performance of the group of lawyers. In federal habeas they had not looked at the group of lawyers that were under review with this review.

1:24:26 Chair Ellis You indicated you are not entirely happy with the process. What do you propose going forward?

1:24:36 P. Levy We are still talking about the best way to do it. One of the things that I have recommended here is that we revamp our certificate process. I describe what it is like now and it is somewhat cursory in that the form and the process envisions an attorney self-certifying that I meet the minimum qualifications to handle these cases and checking a box indicating what case he or she is qualified to handle. It could be lead counsel in aggravated murder. Then there is a supplemental questionnaire that does not ask very searching questions about that person. I am proposing that we redo this process so that we can really make the decision more meaningfully about whether a person meets the minimum qualification, with a form that sets out what those qualifications are. They are well known. They are published, but then ask that the attorney list how they satisfy these requirements in a somewhat detailed fashion. Essentially what I am asking is that a lawyer provides us with the information that I asked that the five attorneys, under review this time, provide. I set out in a footnote the attributes of counsel in capital cases that I asked these five lawyers to describe how they met those attributes. The form I am envisioning would ask the same question in addition to detailed

questions about training and experience. Also, one of the things I think we learned from this exercise, phase one of this review, is what was very helpful was the couple of attorneys, Steve among them, who solicited letters of reference from people. We don't have the staff or the time to solicit that information. We can follow up and we do that. There have been incidences where we follow up on the information provided and the certificates, but it is very helpful when we receive letters, as we did. I described one for Mark Rader for instance. From judges, prosecutors, other defense attorneys, investigators, and these were meaningful letters that we received. They are not just "I think he does a great job. You should keep using his services." What I think we can do is through the certification process and we need to require new certificates of attorney qualifications from all of our capital providers and actually from everybody, but it is a phase, a process, and in the course of reviewing those certificates we will be able to do a detailed look at the type of representation that our current providers and any prospective providers are providing.

- 1:28:23 Chair Ellis So one issue I know you had raised, and I think it was actually kind of a trigger to this whole process, was the two lawyers. One of whom is in the group under review who had represented a client that pleaded to an aggravated murder charge without any pre-commitment from the prosecution on DP or not, and I know that troubled you. I noticed that the lawyer that was part of that declined to respond to that question. How did you work your way through that?
- 1:29:03 P. Levy I would say it troubled me, and it wasn't a personal troublement, it was that we were told that to do that, and we were told this by an attorney at the federal defender who is an expert in this field, that to plead a client guilty without an agreement on the death sentence is presumptively ineffective lawyering. But presumptively, a rebuttable presumption. We asked the lawyers to talk about that. Ken Hadley said he wouldn't because it would involve sharing client confidences and he didn't think he needed to, or should do that. It was not resolved in any meaningful way except that Dennis Balske said there could be a reason, and they should have provided a reason. He was satisfied knowing all of the other things that he knows about Ken Hadley and about Steve Krasik that they are both good lawyers and should continue to do the work.
- 1:30:35 Chair Ellis Although he qualified it by saying at least Mr. Hadley should have a qualified
- 1:30:47 P. Levy Somebody who can do high quality legal writing. That is something that this review has also disclosed. I think we knew it, but it has put it in sharp focus. It would be nice to have an ideal lawyer on these cases. The brilliant trial lawyer.
- 1:31:11 Chair Ellis Who also can write. Haven't met that person yet.
- 1:31:15 P. Levy Skilled with clients. Skilled with juries and who can write and do good oral advocacy on written motions. We have a couple of those, but not very many. It is the case that people need to associate on their cases in expert services.
- 1:31:41 Chair Ellis The reality is I think it is 100% of these cases will go through a PCR process. Reality is competence of counsel is almost always going to be part of that both the state and the federal PCR process. I know there are a lot of mixed feelings about a lot of this, but in my mind I think it is absolutely right that we do our very best to ensure that the lawyers that represent defendants charged with capital be just as good as we can good. A combination of the risk of the client and the horrendous costs from retrials is obvious.
- 1:32:33 P. Levy I absolutely agree. I think overall we have actually done a good job of ending up with a very strong core of lawyers handling these cases under contract. There are some lawyers we no longer contract with. There are lawyers who have sought contracts that we do not contract with. We have done a good job....

1:33:00 Chair Ellis One of the group is dropping out.

1:33:06 P. Levy Of this group?

1:33:05 Chair Ellis Right.

1:33:06 P. Levy Yes. Not because there was scrutiny of his work. He wants to retire and he gets to do that. He is still regarded as an absolutely superb, topnotch trial lawyer in capital cases.

1:33:29 Hon. Elizabeth Welch I don't know if I can't read well anymore or what, but I am concerned, and the discussion here today makes me more concerned, about some really fundamental issues here. As the chair was suggesting, a good trial lawyer is not necessarily a great memo writer or brief writer. That raises for me what the issue is and that is, says who? What are the principles and who says? The reality is that most of the people involved in this process are criminal lawyers and the rest of the world wouldn't even recognize that as an issue. That applies to some other things. This whole issue about – I thought Steve Gorham's letter was very interesting. Again, there is this issue about who says that somebody is doing a good job or not. More importantly for us is how far should this process go. What is the limit of our authority? I know that that is an issue for you because you have made it very clear in a nice kind of crisp way in your report. What is this Commission's role in telling people how to practice law? I think there are some lines here that are being crossed.

1:35:00 P. Levy If I understand your concern we are – the Commission has obligated us and our providers to comply with the ABA guidelines for the performance of lawyers in death penalty cases. Those guidelines are the black letter law and there is extensive commentary. Those tell us what the attributes of counsel should be. Those tell us how counsel should respond to particular circumstances and issues that arise in cases. It is those guidelines that have really guided our evaluation of the lawyers here. It is those guidelines that informed Dennis Balske in his review of the materials that he received. I had said, for instance, with the issue of, what do you do with a client who says I want to be executed? That is addressed by the ABA guidelines. The guidelines now are aging. It is a subject - what the norms in the profession and what the expectations of counsel in the profession, that is evolving. At the OCDLA death penalty seminar last October a national expert who, in fact, contributed the drafting of the guidelines, spoke about what the current thinking is about how to deal with a client who is saying he wants to be executed. It is that type of information that informs us about what our expectations are of counsel. It isn't just we want to say we like you or we don't like you. It is not a political choice as some of this has been labeled. I don't think you have failed to read the report well. It may not have been articulated well, but what we have sought to do is be guided by the requirements of the ABA guidelines.

1:37:27 Hon. Elizabeth Welch Enhanced by something somebody said at a seminar.

1:37:33 P. Levy Well, yes. The norms and expectations of counsel evolve. In fact, when you get to post conviction litigation and the issue is, has the attorney complied with the norms of the profession, which is one-half of the analysis with ineffective assistance of counsel, or inadequate assistance of counsel, and the other half is client prejudice. When you look at the question of what is expected in the death penalty community for the performance of counsel. It is the guidelines, but it is also what are lawyers being taught and how are their obligations being described. It is often an issue in the PCR trials. What was presented at the seminars? Who talked about what at the seminars? The standards and the norms evolve. I don't think we have crossed lines. It is a difficult and sensitive area. That is why I think, quite frankly, the review is best done in the context of reviewing detailed submissions of the lawyers in the course of reviewing their certificates of qualifications and reviewing their contract proposals.

1:39:08 Chair Ellis If I understand it the recommendation is to now extend the contracts of those that have been reviewed from the one year to the full two. Correct?

1:39:24 P. Levy Yes.

1:39:29 P. Levy That is as I described in the report. It is for four of the five.

1:39:43 J. Potter Before you move on, Mr. Chair, I want to go back to the judge's comment a bit. Whether or not we are crossing lines and what the role of the Commission is in this process. In certain regards we are not taking much of a role at all, in the sense that the information that is being collected by staff, and decisions are being made by staff. As I read through the report, which I thought was a fairly well articulated report. Where it got a little fuzzy for me was, under the further contractor review process in number 5, and where you are saying that OPDS believes that it may continue to assist in the advisory capacity. I was hoping to get some more definition so I could feel more comfortable. I am clearly not in a position to make any judgments about whether or not somebody is a good lawyer in a death penalty case or not, for a number of reasons. We do rely on the staff. You make a recommendation and we end up approving a contract just like we do with all the contracts that come before us. So, in some sense, our role is taking the report that we get from staff, however it is compiled, and saying we trust you.

1:41:03 P. Levy I will say on that sort of vague language that you just read, I think that, as I have sort of indicated earlier, that I need to try again to get people to agree to serve on a panel to help us review these. It is not our peer panel that we have because those are contractors. That contractor is reviewing other prospective contractors. That is what Louisiana does. Other states have this mechanism of an advisory panel. I absolutely agree that you are not in a position to assess or evaluate the attorney performance. You are not that type of commission. If you look at the Secretary of State's audit of boards and commission you see the types of commissions that are out there. You are not adjudicative commission. We don't want you to be. We ask you to follow the reasoned recommendations of staff.

1:42:25 Chair Ellis But there are people other than contractors you could go too.

1:42:29 P. Levy Yes there are.

1:42:31 Chair Ellis I am thinking of some law faculty people that are very interested in this area that might be willing to help.

1:42:40 P. Levy There are people, and some of whom I think if I approached them again, they might reconsider. The law faculty is a possibility. They tend to be fairly far removed from actual practice in the death penalty field. That is not a bad thing if we have one of those.

1:43:09 Chair Ellis Someone like Steve Kantor. He was great trial lawyer when he practiced and he is obviously very competent in this area.

1:43:22 P. Levy I am going to renew the effort to assemble a panel. Dennis Balske may well agree to be on that as well.

1:43:32 Chair Ellis Okay. Steve Gorham.

1:43:33 S. Gorham I want to make just a couple of comments. It is very hard, obviously, to be evaluated. We all know that evaluations are good, though. Even I think an evaluation is good. Obviously, I maybe got either paranoid or defensive, and maybe my responses showed some of that. In regard to the standards and in regard to the persons especially seeking execution which was one of the issues that came, I guess I do see it somewhat as a political thing. We are told to follow the guidelines, yet the guidelines didn't do what Mr. Balske recommended. Yes, there

is maybe evolving change of opinion in regard to that. I guess I think that, personally, that is probably again a grossly political decision more than anything else and are not the standards. I think that Paul's final letter, I think, shows that. Getting a pre-commitment to something that is not the standard is not a good idea and Paul recognized that.

- 1:45:01 P. Ozanne Would philosophical work as political? The term ...
- 1:45:07 S. Gorham I think it could, sure. Maybe I am saying political and maybe it is philosophical.
- 1:45:14 P. Ozanne There is lots of it in the death penalty.
- 1:45:20 S. Gorham You are probably right. What Mr. Balske and the person who gave the seminar said is basically definitionally someone seeking execution is mentally ill. Yes, if that is what you believe. Sure that is fine. I don't know if that is always true. You have to look at it individually, and, like anything when you are representing an individual. I guess the last thing that I really wanted to say, unless other people have questions, is – well there are two things that I want to say. As a trial attorney in this area especially, and then I am now doing death penalty post conviction, and I have watched probably more death penalty post convictions than anybody in this room has because they are all in Marion County, and the opportunity to go and watch how they are handled. We are basically eating our young, if you will. We are having some very, very good trial attorneys who, when it gets to the post conviction area, we are just attacking them. I am not sure how to really deal with that. The reason we are doing that is clearly to save somebody life's. Maybe that is appropriate. I would think there has got to be a better way than just immediately being critical and saying you are a bad trial attorney. Maybe that is not being said, but that is really what is coming out. Everybody makes mistakes and those mistakes need to be corrected. It is a lot different than just going after the trial attorney just to go after the trial attorney. Look for the mistakes and try to match the law to their mistakes. Just automatically saying they are a bad attorney because the person got the death penalty. I frankly think that is the way these post convictions seem to be going. I am not sure that is the way we want them to go. That is my idea about that. Then, before you voted on the one year extension, you saw that I asked for a longer extension. Kathryn and I had a discussion about that yesterday. Her position is basically no; just a one year extension. I will let her tell the nuances to this.
- 1:48:12 K. Aylward When we originally looked at this sort of process, the question was extend or don't extend. The recommendation is extend. But what we really hadn't thought about was the point that Steve Gorham brings up, in terms of "look, now that you have basically put to bed whether or not I am adequate and you want to contract with me, why not lock me in for three more years instead of just one more year?" I mean that is reasonable. Why not? It saves a little trouble. The only issue is, is there a difference in rate in the second year and how do you know what it might be compared to other contractors. You could build something in that says, "Just give him what you give everybody else." I could go either way. But I think ultimately for the agency the benefit for us is very small. It is one less set of documents to draft. I am pretty sure, if Steve is still there, he would still be interested and he would still want a two year contract at the end of a one year extension. We would still have him. It keeps our options open in case we have a flood of Steve Houze's applying and we have enough people. Maybe the death penalty goes away and now all we are doing is finishing up some PCR cases. Who knows what could happen. It keeps our options open. I said I would not necessarily recommend it, but that I would tell the Commission that we had that discussion. If the Commission sees it differently it is not a big deal either way.
- 1:49:47 Chair Ellis I thought the aberration was to single out the five for one year and use the year to review them. That has been done. I think based on the recommendation we are prepared to return them to the normal cycle. I find myself resisting changing what is the normal cycle.

1:50:09 K. Aylward Unless the recommendation – if the Commission thought the recommendation that the request for proposal process sort of mimics the information that was obtained. If the next RFP is putting them through the same thing they just went through, then I don't know that we need to ask them to do it again in a year. We used to have four year contracts for death penalty.

1:50:39 Hon. Elizabeth Welch I am curious, Mr. Gorham, how much time did you spend dealing with this?

1:50:46 S. Gorham Quite a bit. We were allowed to charge for that time, which was very nice. Under our contracts we have administrative time and I used it all.

1:51:05 P. Levy And arguably because as he said he may have been paranoid, he may have provided way more information than was necessary, and way more than others did as well. It was a very impressive submission.

1:51:29 Chair Ellis Do we need a motion?

1:51:35 K. Aylward Sure. It wouldn't hurt. We didn't list it as an action item. You can just tell me to do it and I will do it.

1:51:42 Chair Ellis I am inclined, if the Commission is so inclined, to have a motion.

1:51:48 J. Potter And I am inclined to keep on the path that we were on. We have, as Kathryn mentioned before, had four year contracts. We have had staggered contracts at different times of the year. We made a conscious effort to get it onto a biennial fiscal year cycle. I understand Steve's point that he doesn't necessarily want to resend all that stuff. On the other hand he has kind of got it so it wouldn't take too much as this point.

1:52:20 S. Gorham If I could just make a quick comment about it. I want a two or three year contract for security reasons. My own security reasons. I think it has been somewhat proved, and I hate to be egotistical about it, but I do at least an adequate job if not a good job. I will tell you that I saw the fact that we were only given a one year contract as a punitive thing. No one has been – we are not going to do the two years because we are now evaluating you five but for everybody else we are doing it. Maybe I am using the wrong word, but I saw that as somewhat punitive. If no one else of however many other death penalty contracts has had to be through that process. You are not going to get another year if you don't measure up. I can see there are other reasons, at least for me, to do a longer contract.

1:53:23 J. Potter I understand your point of view. I would think that you could argue just the opposite as well. Since you have been through it and you have been validated that you are pretty secure.

1:53:32 Chair Ellis Is that a motion?

1:53:37 J. Potter It is a motion that we maintain that we have a one year extension and we continue with our normal course of action.

1:53:47 Chair Ellis For the four or five?

1:53:49 J. Potter The four. Hon. Elizabeth Welch seconded the motion; hearing no objection...

1:53:56 S. McCrea Wait. We haven't had further discussion yet. I just want to say that I support extending the contract for the four people to the end of 2015. I absolutely reject the rationale that we want to keep our options open. I think that that sends a wrong message. I think that extending the contract would send a message to the other death penalty contractors who will be reviewed in the future. That even though it is a tough thing, as Steven says, to have a one year contract and to feel like you are sort of hanging under the threat of being threatened despite your best

efforts that there is sort of a carrot that once you go through this process and prove yourself that you have got a little more security. I just want you to know that I oppose the motion.

- 1:54:44 Chair Ellis Hang on now. Procedurally I think your move is to move to amend the motion to extend it to 2015.
- 1:54:52 S. McCrea I am willing to do that.
- 1:54:53 Chair Ellis Are you making a motion to do that?
- 1:54:55 S. McCrea Yes. I will move to do that.
- 1:54:56 Chair Ellis Is there a second.
- 1:54:58 Hon. Elizabeth Welch There is.
- 1:55:00 Chair Ellis Okay. We will now call for a vote on the motion to amend. Those in favor of amending the motion to make it 2015 say aye. **VOTE 2-4.**
- 1:55:20 Chair Ellis Now we go back to the original motion. Mr. Potter has moved and Janet has seconded the motion. Is there further discussion?
- 1:55:37 J. Potter I would like to just comment about the motion. In the future, I would probably be suggesting that when we do further reviews of contractors in death penalty that we have two year contracts with them and then we do a review. We don't just have a one year carve out for those folks. We would contract for a two year process and identify the next five or six or whatever.
- 1:56:05 P. Levy Can I add. I am sorry. I may be out of order. I am actually hoping that we will be looking at, if not the balance, most of the rest of the contractors during this current contracting cycle.
- 1:56:21 Chair Ellis That would help. Okay. There is a motion and a second. I see no further discussion. All those in favor say aye. **VOTE 6-0.**
- Agenda Item No. 7 OPDS Monthly Report**
- 1:56:32 Chair Ellis Okay. Are we ready for the OPDS report?
- 1:56:37 N. Cozine We can. The lunches here if you want them?
- 1:56:45 Chair Ellis What is the pleasure? We can walk and chew gum simultaneously or not? Let's get lunches and you can all watch us eat.
- 2:00:57 Chair Ellis Shall we go ahead, and Nancy do you want to start with management team report?
- 2:01:05 N. Cozine Yes. Thank you. We have the appellate division listed first this time because for some reason we always end up having it last.
- 2:01:24 P. Gartlan Good afternoon, and bon appetite.
- 2:01:37 Chair Ellis This time you don't have a green light in front of you.
- 2:01:42 P. Gartlan In preparing for this I realized happily that there is not that much to report on. It is not like in the past where there were a lot of fires put out. Last week we filed our sixth and final brief in the Supreme Court. That means that summer can begin for several of the attorneys in the

office. It began last Thursday and other than that, we are really doing kind of mundane and pedestrian everyday things. We are revising the attorney manual. We are preparing a manual for the juvenile appellate section.

- 2:02:18 Chair Ellis Okay. That was an excellent report.
- 2:02:19 Justice Balmer Can I ask Peter a question? This is sort of off point, but one of all the comments that was included said well the appellate attorneys don't know enough about trial practice, and it would be great if they did. A number of us have concerns about that at the AG's office, and also at your office, that you have these bright young lawyers doing what they did in law school, but you ask them a question about well why didn't you ask for jury instructions on this and they have no clue because they have never tried a criminal case, and the same in the AG's office. It is a very common career path. What are you doing, or what might you do differently, if anything, to help the younger lawyers get some more exposure to what happens in the trial courts? Or do you not see that as being an issue?
- 2:03:32 P. Gartlan When we hire we do pay attention to whether or not somebody has had practice in the trial court. That is a factor and something that we look at. I can't say it is the overriding factor. We are really looking for good writers for the most part. It is one factor in the totality of the circumstances.
- 2:03:59 Justice Balmer Is there a way to get them into the trial court to do a rotation with a public defender group, consortium or somebody, just so they have some experience doing that. Chief Justice De Muniz was probably harder on the defense lawyers than he is on the AGs, but get in conference and, gosh, why didn't they understand what happened at trial. Why the trial lawyer would make the choices they made. Just a thought.
- 2:04:40 Chair Ellis In my prior life I use to advocate that trial lawyers become involved on appeals so they would recognize that one of the things you need to do at the trial level is be thinking about the appeal. I think what the Chief is maybe suggesting is the reverse is also true, so I am going to suggest that you and Mr. Sermak have a discussion. There may be some way to go both ways. Get some of your lawyers with some exposure to what it is like on the firing line to actually make choices and sometimes there is a good reason you don't do something, and maybe the other way around too. I am sure there are young defense lawyers who don't have a clue what the appeal process is about, but we can't solve all that right here. Chat with him. Anything else?
- 2:05:52 N. Cozine So also on our list of updates, we have waiver of counsel. I met again this week with Michael Livingston, who is the juvenile law staff counsel for the Oregon Judicial Department. We continued to develop the process for establishing a task force which I believe the Chief Justice, once we have it fully structured, is willing to implement. We wanted to begin with a survey because we feel like it has been too long since we had detailed information about exactly what is happening in each county. So we will do a survey monkey that goes out to each county. We are hoping that we will be able to get information from all system partners. The district attorney, the judges, the juvenile departments, and the defense attorneys, so that we can build a picture of what the practice is in each county, both with regard to application of the ACP program and with regard to practices of appointment of counsel. So once we have that developed, which hopefully will be in the next month, we will convene the group. We would like to provide them with the survey results before we actually begin the meeting process.
- 2:07:08 Chair Ellis I am really encouraged. This is a topic we talked about. It is really important but has been somewhat of an orphan. I am very happy to see the follow through that is happening.
- 2:07:19 N. Cozine I am hoping that it will effective. It is interesting because, I think because of the way our statutes are drafted, there are some potential – I don't want to say pitfalls, but I think it will be

a conversation that we will be having with the individuals who are on the task force. Judge Welch has agreed to help with it and be a participant. I think that will be a very wonderful asset for the task force. We will keep working on it. We will keep you updated. I hope at the September meeting, maybe October, to have the full set of documentation. Our goal is to meet six times with it ending at the end of 2013. It is a little longer than we were originally hoping for, but we think in order to get the data and do the outreach we need to do, we need a little more time.

2:08:07 Chair Ellis

That is great.

2:08:09 Justice Balmer

It is an important issue and Judge Welch really – I think at the first meeting I came to here you were talking about this and discussed with Chief Justice De Muniz. I think it is something we need to do.

2:08:22 N. Cozine

Thank you, Chief. It is really helpful to have the Judicial Department's support and leadership in this area. We also had a convening of the Public Defense Advisory Group. I will remind the Commission that this is the group that is now the combination of what use to be the Quality Assurance Task Force and the Contractor Advisory Group. I already told this Commission but I will say it again, when I arrived it was pointed out to me that those two groups were the same but for two people. They met on different dates, and so we wanted to try bringing them together into one group with all the items on the agenda and a longer meeting. At this meeting, we had just that. It was quite a long meeting. We discussed the 2013 legislative session. We discussed non-routine expense requests. We talked about application of research data and analysis and contractor communications as well as the Quality Assurance Task Force items. It was a lengthy meeting. We also discussed the management conference and what contractors would like to hear at the management conference. It was a very fruitful meeting. The contractors that we have – everyone in this room knows it, but the individuals on this advisory group are long time contractors who are so committed to public defense, and to the work that they do. It was really nice to have all of them in one room sharing ideas. Generating conversation about where we need to go next. As we continue to meet, I think we will really be able to develop some great ideas about how we want to proceed, and recommendations for this Commission on how we want proceed. We had nuts and bolts discussions on the non-routine expense requests. We are continuing to respond to the comments about people being somewhat unaware of how to proceed on these. We have included an update in the most recent OCDLA newsletter, reviewing again what needs to be in the request. We are revisiting the peer review process that is incorporated into the non-routine expense request at the public defender offices where a supervisor is actually reviewing the attorney's request before submission to OPDS. Then building a feedback loop so that the supervisor, if it is returned, gets copied on that return. We think this will help ease some of the challenges for newer lawyers who aren't as aware of the process. We also discussed attorney review of billing statements. Right now when our investigators submit a bill to OPDS we pay that bill. The attorney may or may not receive a copy of that bill. If the investigator separately sends it then they will. We are building in a process so that the attorneys will actually be reviewing the billing statement. We think that is important because when an investigator submits a bill for a list of activities, we want to be sure the attorney has a product for all of those activities. We think this is an important fiscal control that should help. We don't think we are way off the mark; it is important, and it is done this way in the federal system.

2:11:52 P. Ozanne

Maybe things have changed since I was in your position, but I was always concerned that there was kind of a delegation without collaboration between attorneys and investigators. In the private sector where you hire somebody you want to watch their bill. You also get a better understanding of who does what rather than just off loading it on somebody. I really support it for that quality of practice issue too.

- 2:12:20 N. Cozine Thank you. Our contractors are very supportive as well. We were concerned that they might feel that it was yet another burden on the contractor. It is quite the reverse. They appreciated the opportunity to view those billing records. The management conference is well under way in terms of its planning. I think it is penciling out to be a very good conference. Commissioner Potter.
- 2:12:53 Chair Ellis John.
- 2:12:54 J. Potter I think we only have two people that are not confirmed for that program at this point. As you mentioned before we have two confirmed DAs. I guess one of them isn't confirmed yet, but as potential panel members. We don't have confirmed Jeff Adachi, the San Francisco Public Defender, but he is a potential speaker which would bring a much different perspective to Oregon to listen to what an elected public defender from San Francisco has to say. They are doing some pretty innovative things. Then we have two legislators that are confirmed. Senator Prozanski and Representative Olsen. It is going to be a strong program.
- 2:13:46 N. Cozine Then we also have Craig Prins, and hopefully Peter Ozanne and Judge Collins, to provide the defense bar with some information about the evidence based sentencing and evidence based practices and a lot of the conversation that is happening around the Commission on public safety, which is focusing on that sort of risk based sentencing area.
- 2:14:16 P. Levy We also heard at the PDAG, the Public Defense Advisory Group, is that they really wanted to know more about the affordable care act, so we have Dr. Bruce Goldberg coming to talk to us about that.
- 2:14:37 N. Cozine Very exciting. That is the Public Defense Advisory Group meeting. Oh, we also went ahead and scheduled our dates through 2013, so we have set meeting times, and are really looking forward to moving forward with that group. I also wanted to talk about the Juvenile Law Training Academy which is scheduled for October. This is the eighth year of the Juvenile Law Training Academy. This was something started by, as I recall, Ingrid when she was in this position. I am very excited about it. It is the front half of the week where we have the management conference on the back half. We have Dr. Don Duquette coming from the University of Michigan. He founded the first child advocacy center in the country. He will be the key note speaker and the moderator, and has a strong focus on quality dependency representation by all parties - parent's attorney, children's attorney and state's attorneys. We are also focusing on best practices in juvenile dependency law. This conference will focus exclusively on the dependency area. Not delinquency, because we covered that pretty thoroughly in the last OCDLA conference. The Oregon State Bar is in the process of revising the performance standards in dependency law, so those will be available to the panelists and the participants, in draft form, for discussion. We are also having speakers from the Casey Family Foundation who will talk about ICWA compliance. It is a pretty remarkable process that they have developed, with the Minneapolis American Indian Law Center. They have something of a checklist to ensure compliance with ICWA. The idea is to catch these cases at the front end so they don't end up on appeal later on down the line. We have one of those cases right now in our office, where ICWA, it was not in compliance with early on. Then we also will start the day Tuesday with Dr. Phil Fisher, from the Oregon Social Learning Center, who has done research into the brain development of children in foster care. So, all of it ties together very nicely in a discussion about how everyone, if they are engaged in their practices, providing the best representation possible, can help reunify these families quickly.
- 2:17:02 P. Levy I would like to add that Nancy stepped into Ingrid's shoes as far as shepherding this entire planning process. She has taken charge and is really responsible for the program coming together as it is.
- 2:17:21 J. Potter And like Ingrid is all inclusive. Last I saw we had about 23 speakers and counting.

2:17:30 P. Levy No expenses spared.

2:17:31 N. Cozine However, we are also actively seeking donations. It is fairly exciting. We have the JCIP Program donating \$5,000. We have the Oregon State Bar, Juvenile Law Section, donating \$1,500, and we have the Casey Family Programs actually coming out and covering all their own expenses so we don't have to pay for any of their contribution, which is pretty remarkable. I think it will be an exciting program.

2:17:59 Chair Ellis So, then there is a topic here that I hope we never see again called OPDS litigation.

2:18:08 P. Levy Right. That is a report from your legal department. We saved that for last because on one of these topics I kind of want to get into weeds.

2:18:21 Justice Balmer I am happy to step out.

2:18:24 P. Levy I wanted to give the Chief Justice time to eat his lunch.

2:18:29 Justice Balmer No, no, I will step out. I am going to stick around because I am going to come back later.

2:18:29 P. Levy I hope I won't be long.

2:18:35 Chair Ellis So if we have his coat we will get him back. We have already spent a lot of time on these issues.

2:18:44 K. Aylward Do we redact the minutes if we send him out?

2:18:53 P. Levy We have been busy in the legal department. A couple of these I can talk on pretty quickly. The mandamus was just decided today. Because there is a 14 day reconsideration period I didn't want to talk about it with the Chief Justice here. Harry Latto is an attorney in Portland who has been representing Mr. Haugen in his effort to challenge the Governor's reprieve of his death sentence. He filed what has now been termed as being treated as a declaratory judgment action. Ask the trial court to appoint them as counsel at state expense to pay for his services that he has been providing pro bono. We filed a memorandum in opposition to that in the trial court. The trial judge denied Mr. Latto's motion. Mr. Latto filed a mandamus in the Oregon Supreme Court seeking to compel the trial judge to appoint him as counsel and ordering us to pay. We filed a memorandum in opposition in the Supreme Court. Today they denied that mandamus.

2:20:21 Chair Ellis So did we represent the trial judge in the Supreme Court? I always like that.

2:20:19 P. Levy No. We were actually appearing as an interested party on our own behalf. The position, of course, is that there is no statutory authority. There is no constitutional authority for the appointment of counsel in a civil action challenging a Governor's reprieve. Now there is probably not a great deal of precedent for that type of action. The Legislature might not have thought about it, but if we can't identify a constitutional or statutory basis to pay somebody we want people to know that we don't want to pay. That is what we did there. This motion to quash is an issue that I do want to describe in a little bit of detail. We received a subpoena for billing records in a post conviction case. The billing records of trial counsel. The hours and bills of trial counsel, investigators, and experts used in this particular case. This happened to be a capital case and co-defendant of Mr. Haugen. Our statute....

2:21:44 Chair Ellis Capital case on PCR?

2:21:47 P. Levy On PCR.

2:21:48 Chair Ellis On the state PCR?

- 2:21:51 P. Levy On state PCR. The defendant in that case, the warden represented by the Department of Justice, served a subpoena on our agency to obtain these records. The statute that pertains to the confidentiality of those records says that we are not to disclose to them until the conclusion of the case. The conclusion of the case is not defined. There has been some appellate litigation on this statute and what that means. There is a case that now says it certainly includes while a case is on direct appeal. There was a case that raised the issue in the context of while the case was in post conviction proceeding. They said there if it is error to have released the records in those proceedings, it is harmless so we won't address the merits. We have taken the position that the issue is unresolved whether when a case is in post conviction relief we are required to keep those records confidential. So when we received the subpoena we filed an objection in the trial court and informed the judge that we did not want to decide for ourselves when the case concluded. We thought there was good reason which we set out in a memorandum for believing that the case had not concluded. The judge ultimately ruled against our position, but subsequently the Department of Justice said we have some concerns about the legal basis for the court's decision and we are going to withdraw the subpoena. The reason I provided a little bit more detail about this is there is a problem, as far as my articulation of our position, and that is the position the Commission adopted, I think in 2004, maybe it was 2005, a confidentiality policy that defines, in the absence of definitive case law, defines when a case concludes. I think it is fair to say that the Commission's policy says that the case concludes when the direct appeal process is over. The position I was articulating is contrary to what the Commission's policy is because I felt I had to adhere to the statute and what the statutes and the cases say. I was troubled by that. By the fact that the Commission's articulation of when a case is concludes was different from the position I was articulating. I think the
- 2:25:22 J. Potter The position you were articulating was a statutorily based position, right? So our position was not.
- 2:25:33 Chair Ellis It may have been because we so construed the statute.
- 2:25:34 P. Levy Yes. That is what you did. You construed the statute and I think what you did is got ahead of curve. Where the question is unresolved is it is not defined by statute and it is unresolved by the case law. I won't say ossified it but you defined it in a way that perhaps it was your best reading of where the courts might go, but I think it is an unnecessary definition and unhelpful at this point. I think that we should leave it to the courts to decide when a case concludes. It is my recommendation that we actually amend our confidentiality policy to remove the definition of when a case concludes and leave to litigation to resolve.
- 2:26:33 J. Potter Weren't we responding at the time to requests from the state and the prosecutor to get bills and invoices and statements? We were trying to protect against requests at the trial level and into the appellate level.
- 2:26:52 P. Levy That may be. The case law though is good now. Certainly while a case remains pending on direct appeal the record should be treated as confidential. This doesn't just concern subpoenas. It also concerns public record requests. It may be that an appellate court will agree with the ruling that Judge Hart made provisionally and is now moot. Part of the reason the Department of Justice withdrew their subpoena was because of the promise that the petitioner's counsel in that PCR action was going to file a mandamus. They thought they would not be able to defend.
- 2:27:55 Chair Ellis It seems to me it is like on constitutional issues, I think Congress has a responsibility to think for themselves as to whether what they are doing is, or is not, consistent with their understanding of the Constitution. Secondly, I think there is a chevron defense here. It seems to me we are probably more qualified than courts to decide the policy question of when is it appropriate to allow billing information out. I could accept the notion that we ought to visit

that at our next meeting, and think through, are we still comfortable with the line that was drawn, but I really don't like the idea that oh well, let the courts decide. I think we have a responsibility and we bring a little different perspective possibly than they do.

- 2:28:55 P. Levy That is a good point. What you are doing here is defining a term that is used in statute.
- 2:29:06 Chair Ellis Which agencies do all the time.
- 2:29:08 P. Levy What I would then like to propose is that at a future meeting that I provide the Commission with the memorandum that I provided to the court. You may be, just as Judge Hart was, not impressed. Let's say hopefully you will have read it.
- 2:29:40 Chair Ellis I think I detect a snipe there.
- 2:29:45 P. Levy That is what I will do.
- 2:29:51 Chair Ellis Don't only send us that memo. Do a bullet point as to what you think the policy issues are that we ought to consider.
- 2:30:01 P. Levy Those are addressed in the memo as well.
- 2:30:05 P. Ozanne I was going to ask a more general question about litigation. Communication about litigation to the Commission. This is OPDS litigation but involving – should the Chair be advised as to this litigation in advance?
- 2:30:24 Chair Ellis I think so. We have had this a couple of times before. Yeah.
- 2:30:35 P. Levy I end up in court often - not often but occasionally defending our actions on non-routine expense requests. We interact with courts all the time. Occasionally we have to tell them, “no there isn't a right to appointed counsel here.” We are not going to pay for it. If you want to have a lawyer, pay for it yourself. If that push comes to shove then it needs to go somewhere and it is usually into a courtroom. I think most of what we do when we interact with courts is to try
- 2:31:22 Chair Ellis Those I don't think you need to talk with anyone on the Commission. The one where it sounds a little bit like you took it on yourself to disregard a policy we had adopted. That troubles me.
- 2:31:38 P. Levy Yes. I am duly informing you about that as well.
- 2:31:46 Chair Ellis After the fact.
- 2:31:46 P. Levy I thought the obligation was to follow the law.
- 3:32:00 N. Cozine Chair Ellis, we would be happy to advise you in advance.
- 2:32:04 Chair Ellis It is a judgment call. But when you get to a question that is a policy issue, and particularly one where we have told you what our policy is and you chose to ignore it that troubles me.
- 2:32:20 S. Gorham One thing that you might also think about is whether you want to give guidance to contractors. This is primarily going to come up in death penalty cases or where there is an hourly rate. Under the case count system it is pretty obvious what somebody is getting paid. Where there is an hourly rate the subpoenas might also go through the contractors. Either the individual lawyers, or in this particular case it was a potential to subpoena old MCAD records because they were under the hourly rate. I don't know what the difference might be between what a contractor, or just the attorney, might be willing to do versus what the Commission

would advise you all to do. You might want to develop a policy that makes those match. I don't know if there is a policy that makes those match. You might want to think about it.

- 2:33:18 Chair Ellis Our general counsel is going to provide us with the information we need to revisit, and consider whether our long-standing policy continues to be correct.
- 2:33:35 P. Levy That is all, finally, from me.
- 2:33:37 Chair Ellis Are we ready to let the Chief back in?
- 2:33:40 P. Levy Yes.
- 2:33:40 N. Cozine Are we?
- 2:33:41 P. Levy No. I am sorry. One last think under the litigation. This is not actually our litigation. By now most of you probably are aware that two of our death penalty contractors are being prosecuted in Marion County for filing a mandamus of a judge's ruling without her permission. The judge's permission.
- 2:34:06 Chair Ellis The paper had it that they promised they wouldn't and then they did.
- 2:34:16 S. McCrea That is the issue.
- 2:34:16 P. Levy I don't think that is the issue, at least not according to the charging document. It is not that they broke a promise. They were told not to do it without permission of the court and they did it.
- 2:34:30 J. Stevens Just sort of like you.
- 2:34:31 P. Levy So the point of why this is on here, and maybe it is one that I should be concerned about, is the lawyers asked that we pay for their defense. We told them no. I think for good reasons. This is not the first time we have been asked to pay for the legal costs of our providers. In recent memory we have been asked to pay for the cost of counsel in a bar disciplinary proceeding. The argument to us being, "Hey I am doing this work at your request and for your agency. You should pay my costs when I get into trouble." Our response is that we are not funded to do that. Although it is infrequent it does happen that lawyers are prosecuted criminally and also face bar disciplinary matters arising from their work in public defense. It would require us to be making judgments about the merits of the case, which we don't want to be making. As much as we want to support our provider community, we just don't exist to pay for what we have considered to be part of the cost of doing business that is included in what we pay them.
- 2:36:23 Chair Ellis We don't pay their bar dues.
- 2:36:34 P. Levy I think our position was understood, if not really appreciated. In one of the instances I think the lawyer for the lawyers is being paid by his PLF. The other lawyer is in a more difficult position because his office is out of state and the PLF doesn't cover out-of-state.
- 2:37:00 J. Stevens Paul, I apologize, by the way, for making a nasty comment to you about that.
- 2:37:10 P. Levy No. It was funny. The point is, when I am prosecuted for disobeying your orders, I will not ask that my expenses be paid.
- 2:37:22 Chair Ellis Okay to bring the Chief back in?

- 2:37:38 P. Levy The last thing for me is as part of our PDAG meeting we have gotten our peer review process underway again. We have a team put together. Jack Morris, who is here, is on that team along with Keith Rogers and Jennifer Kimble and Jennifer Nash. We will be going to Clatsop County to look at our two providers there. The way we have restructured the peer reviews are that we have modified the confidentiality provisions. There was a great deal of debate about this before we proceeded in this fashion. These reports will now be public records. We don't expect widespread distribution, but we do not want to build into the process providing the Commission with the report. After we finalize the report and deal with the providers on any recommended changes. We have the Clatsop County review coming up at the end of September. Then we are planning to look early next year at the criminal providers in Marion County.
- 2:39:09 N. Cozine On that note, our next service delivery review is scheduled in Linn County in December. That is our next Commission out of town meeting, other than the conference. One other quick matter is that when former Chief Justice De Muniz was leaving I made contact with Linda Kinney about a time to thank him. September is the meeting that worked into his schedule. I just wanted to let you all know that we will be building that into the agenda at the next meeting. I know he would appreciate having all of you here. I would appreciate having all of you here and we will be able to thank him for his time on the Commission.
- 2:39:53 Chair Ellis Sounds good.
- 2:30:55 J. Potter In no relation to that but OCDLA is having a Ken Morrow lifetime achievement award going to Chief Justice De Muniz. That is November 30th at the Benson.
- 2:04:07 Chair Ellis Any other business for the good of the order. If not, I would entertain a motion to adjourn.
MOTION: Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **Vote 6-0.**

Meeting adjourned.

Attachment 2

Members

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

**Ex-Officio Member**

Chief Justice Thomas A. Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

August 20, 2012

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Bruce Hanna, Co-Chair
The Honorable Representative Arnie Roblan, Co-Chair
State Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairpersons:

Nature of the Request

The Public Defense Services Commission (PDSC) requests that the Emergency Board allocate the \$3.5 million special purpose appropriation to the Emergency Board to the 2011-2013 Public Defense Services Commission for costs associated with providing public defense services.

Background

The 2011-13 Legislatively Adopted Budget for PDSC included the 3.5% reduction package applied to all agencies (Package 819 – Supplemental Statewide Ending Balance). This reduction was applied equally across the agency's three budgetary divisions.

The agency was instructed to return to the Legislature during the 2012 session to provide updated expenditure figures and to seek restoration of some or all of the 3.5% amount held back (\$8.1 million).

In February 2012, the agency anticipated being able to absorb \$3.2 million of the held back amount through a combination of savings in its two operating divisions and due to the continued leveling off of caseload. Furthermore, the Legislature approved an agency proposal to use \$1.4 million in other funds collected from public defense recipients under the Application Contribution Program to offset a portion of the required funding. This reduced the general fund requirement to \$3.5 million, which the Legislature placed in a special purpose appropriation for public defense services.

Agency Action

Since the provision of public defense is mandated by the US and Oregon Constitutions and Oregon statutes, the agency has no ability to control the public defense caseload and only a very limited ability to control expenditures associated with the caseload.

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Bruce Hanna, Co-Chair
The Honorable Representative Arnie Roblan, Co-Chair
Page 2
August 20, 2012

Based on actual expenditures for the twelve-month period through July 31, 2012, PDSC projects total expenditures for trial-level public defense for the 2011-13 biennium to be \$214.6 million. This exceeds current available revenue by \$4.9 million. The projection is a straight-line projection with no adjustments made for potential increases or decreases in costs due to caseload changes. Nearly 75% of the expenditures are contractually established making the projection fairly stable. The variable portion of monthly expenditures fluctuates based on the complexity and number of cases that are represented by hourly paid attorneys; the number of cases that go to trial in a given month; and the number of pending aggravated murder cases.

Allocation of the entire special purpose appropriation of \$3.5 million would still leave a projected deficit of \$1.4 million. Although this is a significant potential deficit, monthly expenditures have varied from a low of \$8.3 million to a high of \$10.6 million, so it is possible that some or all of this amount may not be required.

The agency will continue to monitor expenditures and will report to the Legislature during the 2013 session.

Action Requested

The PDSC respectfully requests that the Emergency Board allocate \$3.5 million to PDSC from the special purpose appropriation to the Emergency Board to pay the cost of public defense services through June 30, 2013.

Senate Bill 5701 (2012), which established the special purpose appropriation, states that any moneys not allocated by the Emergency Board prior to December 1, 2012, become available for any purpose for which the Emergency Board may allocate funds. The agency currently has sufficient resources to cover expenditures and continue operations until the last few weeks of the current biennium. The agency is submitting this request at the September meeting of the Emergency Board to notify the Board that the funds will still be required during the 2011-13 biennium even if funds are not allocated prior to the expiration of the special purpose appropriation.

Legislation Affected

Allocation of the \$3.5 million from the special purpose appropriation to the Emergency Board established in Oregon Laws 2012, chapter 110, section 4(1) to supplement the General Fund appropriation made to the Public Defense Services Commission by Oregon Laws 2011, chapter 636, section 1(2), for the biennium beginning July 1, 2011.

Sincerely,

Nancy Cozine, Executive Director
Public Defense Services Commission

Attachment 3

Proposed Delegation of Authority
9/12/12

The Public Defense Services Commission delegates to the Executive Director of the Office of Public Defense Services the authority to adopt interim changes to the OPDS Personnel Rules or Payment Policies that are necessary to comply with statutory or regulatory provisions of state or federal law or to improve the cost-efficient operation of OPDS. The Executive Director shall submit such interim changes to the PDSC for review and approval at the next regularly scheduled meeting of the PDSC following adoption of the interim changes.

Attachment 4

5. CONFIDENTIALITY OF BILLING AND NON-ROUTINE EXPENSE INFORMATION

Statutes ~~effectively~~ prohibit OPDS from disclosing itemized information regarding the ~~cost of~~ cost of representation of a client or requests for non-routine expenses to the district attorney before the case concludes. ~~See, e.g.,~~ ORS 135.055(9).

Notwithstanding this prohibition, statute permits disclosure of the total amount of money determined to be necessary and reasonable for nonroutine fees and expenses at the conclusion of proceedings in the circuit court. ORS 135.055(10).

It is the ~~refore the~~ policy of the Public Defense Services Commission ~~OPDS~~ that ~~OPDS's~~ staff will keep confidential all information regarding the cost of representation of a client and non-routine expense requests for a particular case until the case concludes, except that OPDS staff may disclose the total amounts determined to be necessary and reasonable for nonroutine fees and expenses at the conclusion of proceedings in the circuit court. For purposes of this section, a case has not concludeds_ when: while litigation contesting the validity of the person's conviction or sentence is pending or permitted under applicable statutes or court rule describing statutes of limitation or other time limitations for filing such litigation.

- ~~a) — it is dismissed with prejudice and no appeal is filed;~~
- ~~b) — it is dismissed without prejudice and not refiled within one (1) year, except those cases where there is no statute of limitation;~~
- ~~c) — the defendant is acquitted;~~
- ~~d) — the time for filing a notice of appeal has run and no appeal has been filed;~~
- ~~e) — the appellate judgment is final and the case is not remanded for further proceedings from which the client may appeal; or~~
- ~~f) — the court unseals the records by written order.~~

OPDS will release confidential information on a client's defense costs before the case concludes only:

- a) to appointed counsel or appointed counsel's client on written request;
- b) upon the written consent of appointed counsel or appointed counsel's client; or
- cb) pursuant to written court order.

This policy does not prohibit OPDS from disclosing statistical information that cannot be identified to any particular case.

During an audit by the Secretary of State's Audit Division, the auditors may need to review confidential information to ensure that the funds have been disbursed lawfully. OPDS will inform the auditors that the information is confidential.

Section 135.055 Compensation and expenses of appointed counsel

(1) Counsel appointed pursuant to ORS 135.045 or 135.050 shall be paid fair compensation for representation in the case:

(a) By the county, subject to the approval of the governing body of the county, in a proceeding in a county or justice court.

(b) By the public defense services executive director from funds available for the purpose, in a proceeding in a circuit court.

(2) Except for counsel appointed pursuant to contracts or counsel employed by the public defense services executive director, compensation payable to appointed counsel under subsection (1) of this section:

(a) In a proceeding in a county or justice court may not be less than \$30 per hour.

(b) In a proceeding in a circuit court is subject to the applicable compensation established under ORS 151.216.

(3)(a) A person determined to be eligible for appointed counsel is entitled to necessary and reasonable fees and expenses for investigation, preparation and presentation of the case for trial, negotiation and sentencing. The person or the counsel for the person shall upon written request secure preauthorization to incur fees and expenses that are not routine to representation but are necessary and reasonable in the investigation, preparation and presentation of the case, including but not limited to nonroutine travel, photocopying or other reproduction of nonroutine documents, necessary costs associated with obtaining the attendance of witnesses for the defense, investigator fees and expenses, expert witness fees and expenses and fees for interpreters and assistive communication devices necessary for the purpose of communication between counsel and a client or witness in the case. Preauthorization to incur a fee or expense does not guarantee that a fee or expense incurred pursuant to the preauthorization will be determined to be necessary or reasonable when the fee or expense is submitted for payment.

(b) In a county or justice court, the request must be in the form of a motion to the court. The motion must be accompanied by a supporting affidavit that sets out in detail the purpose of the requested expenditure, the name of the service provider or other recipient of the funds, the dollar amount of the requested expenditure that may not be exceeded without additional authorization and the date or dates during which the service will be rendered or events will occur for which the expenditure is requested.

(c) In a circuit court, the request must be in the form and contain the information that is required by the policies, procedures, standards and guidelines of the Public Defense Services Commission. If the public defense services executive director denies a request for preauthorization to incur nonroutine fees and expenses, the person making the request may appeal the decision to the presiding judge of the circuit court.

The presiding judge has final authority to preauthorize incurring nonroutine fees and expenses under this paragraph.

(d) Entitlement under subsection (7) of this section to payment for fees and expenses in circuit court is subject to the policies, procedures, standards and guidelines adopted under ORS 151.216. Entitlement to payment of nonroutine fees and expenses is dependent upon obtaining preauthorization from the court, if the case is in county or justice court, or from the public defense services executive director, if the case is in circuit court, except as otherwise provided in paragraph (c) of this subsection and in the policies, procedures, standards and guidelines adopted under ORS 151.216. Fees and expenses shall be paid:

(A) By the county, in respect to a proceeding in a county or justice court.

(B) By the public defense services executive director from funds available for the purpose, in respect to a proceeding in a circuit court.

(C) By the city, in respect to a proceeding in municipal court.

(4) Upon completion of all services by the counsel of a person determined to be eligible for appointed counsel, the counsel shall submit a statement of all necessary and reasonable fees and expenses of investigation, preparation and presentation and, if counsel was appointed by the court, a statement of all necessary and reasonable fees and expenses for legal representation, supported by appropriate receipts or vouchers and certified by the counsel to be true and accurate.

(5) In a county or justice court, the total fees and expenses payable under this section must be submitted to the court by counsel or other providers and are subject to the review of the court. The court shall certify that such amount is fair reimbursement for fees and expenses for representation in the case as provided in subsection (6) of this section. Upon certification and any verification as provided under subsection (6) of this section, the amount of the fees and expenses approved by the court and not already paid shall be paid by the county.

(6) In a county or justice court, the court shall certify to the administrative authority responsible for paying fees and expenses under this section that the amount for payment is reasonable and that the amount is properly payable out of public funds.

(7) In a circuit court, the total fees and expenses payable under this section must be submitted to and are subject to review by the public defense services executive director. The public defense services executive director shall determine whether the amount is necessary, reasonable and properly payable from public funds for fees and expenses for representation in the case as provided by the policies, procedures, standards and guidelines of the Public Defense Services Commission. The public defense services executive director shall pay the amount of the fees and expenses determined necessary, reasonable and properly payable out of public funds. The court shall provide any information identified and requested by the public defense services executive director as needed for audit, statistical or any other purpose pertinent to

ensure the proper disbursement of state funds or pertinent to the provision of appointed counsel compensated at state expense.

(8) If the public defense services executive director denies, in whole or in part, fees and expenses submitted for review and payment, the person who submitted the payment request may appeal the decision to the presiding judge of the circuit court. The presiding judge or the designee of the presiding judge shall review the public defense services executive director's decision for abuse of discretion. The decision of the presiding judge or the designee of the presiding judge is final.

(9) The following may not be disclosed to the district attorney prior to the conclusion of a case:

(a) Requests and administrative or court orders for preauthorization to incur nonroutine fees and expenses in the investigation, preparation and presentation of the case; and

(b) Billings for such fees and expenses submitted by counsel or other providers.

(10) Notwithstanding subsection (9) of this section, the total amount of moneys determined to be necessary and reasonable for nonroutine fees and expenses may be disclosed to the district attorney at the conclusion of the trial in the circuit court.

(11) As used in this section unless the context requires otherwise, "counsel" includes a legal advisor appointed under ORS 135.045. [Formerly 135.330; 1979 c.867 §1; 1981 s.s . c.3 §§122,123; 1985 c.502 §19; 1985 c.710 §2; 1987 c.606 §4; 1987 c.803 §§14,14a; 1989 c.1053 §2; 1991 c.724 §25; 1991 c.750 §8; 1993 c.33 §297; 1995 c.677 §1; 1995 c.781 §39; 1997 c.761 §9; 1999 c.163 §8; 1999 c.583 §1; 2001 c.962 §§26,107; 2003 c.449 §§5,43]

1 CERTIFICATE OF FILING AND SERVICE

2
3 I hereby certify that on July 19, 2012 I directed the original of the foregoing OBJECTION TO
4 SUBPOENA to be filed in person with the Marion County Circuit Court, at 100 High Street N.E.,
5 Salem, Oregon 97301 on July 19, 2012. I further certify that on July 19, 2012, I directed that a
6 complete and accurate copy of the OBJECTION TO SUBPOENA be served upon the parties
7 named below by mailing with the United States Postal Service, with postage prepaid, in envelopes
8 addressed to:
9

10 Kathleen Cegla
11 Assistant Attorney General
12 1162 Court Street NE
13 Salem, Oregon 97301
14 Tel. (503) 378-4402
15 Email: kathleen.cegla@state.or.us
16 Attorneys for Defendant-Superintendent

17 Michael Curtis
18 Attorney at Law
19 4300 NE Fremont St No. 230
20 Portland, Oregon 97213
21 Tel. (503) 284-0763
22 Email: curtismichael@qwestoffice.net
23 Attorneys for Petitioner

24 /s/ Paul Levy

25

Paul E. Levy, OSB #87285
26 General Counsel for OPDS
Office of Public Defense Services
1175 Court Street NE
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1 the public generally, because a contrary reading would allow district attorneys ready access
2 through other members of the public, thus vitiating the exemption.” Oregon Attorney General
3 Letter Opinion, *Re Petition for Public Records Disclosure Order; State Court Administrator*
4 *Records* (June 14, 1991) (Attachment A).¹ Thus, if the provisions of ORS 135.055(9) apply to the
5 records sought by the instant subpoena, the statute would require withholding them in this case
6 absent an order from the court compelling disclosure.
7

8 Interestingly, the Attorney General *Order* referenced above interpreted the restriction on
9 disclosure “prior to the conclusion of the case,” in *former* ORS 135.055(3), to expire at the end of
10 any proceedings in the original trial court criminal matter. This position, and the reasoning behind
11 it, was specifically repudiated in *State v. Cunningham*, 161 Or App 345, 985 P2d 827 (1999),
12 where the issue was whether indigent defense billing records in the possession of the State Court
13 Administrator should be protected from disclosure, under *former* 135.055(3), after the criminal
14 trial in a case had concluded but while the matter remained pending on direct appeal. The court
15 noted that “[t]he term ‘case’ has many meanings, most of which are broad and most of which are
16 inapplicable to the legal context [but] even within the legal context, though, the meaning of the
17 word is not narrow[.]” *Id.* at 350, 985 P2d 831. In concluding that the term “case” included, at
18 least, while a matter remained pending upon appeal, the court observed that “[a]ccess to indigent
19 defense records could provide a prosecutor a significant tactical advantage if a defendant’s
20 conviction is reversed on appeal and he is subjected to a retrial.” *Id.* Thus, while a retrial
21 remained a possibility, a substantial right of the defendant was involved because “[f]rom such
22 records, the prosecutor could determine what defenses had been explored, why they had not been
23

24
25 _____
26 ¹ Because the Attorney General Letter Opinion and Order is not published, as far as counsel can determine, a copy is attached to this memorandum.

1 pursued, and similar things.”

2 The court in *Cunningham* did not have occasion to decide whether “the case” referred to
3 in *former* ORS 135.055(3) included other proceedings that could result in a retrial of a defendant
4 on the original charges, such as post-conviction relief litigation. That issue was encountered,
5 however, in *Petersen v. Palmateer*, 172 Or App 537, 19 P3d 364, in which a post-conviction
6 relief petitioner argued, among other things, that *former* ORS 135.055(3) prohibited the court
7 from admitting into evidence indigent defense billing records in his post-conviction relief trial. In
8 *Petersen*, the state argued that *former* ORS 135.055(3) did not apply in post-conviction
9 proceedings. However, in admitting the records into evidence, the post-conviction trial court
10 specified that it was not relying upon the records in its ruling denying post-conviction relief.
11 Thus, the *Petersen* court did not resolve the legal question of admissibility, concluding that “*if* the
12 court erred in admitting the records, the error was harmless.” *Id.*, at 545, 19 P3d 368 [emphasis in
13 original].
14
15

16 The question remains open, therefore, whether the prohibition on disclosure of billing
17 records and related documents by OPDS under ORS 135.055(9) applies while a case is in post-
18 conviction proceedings. There are reasons to conclude, though, that the prohibition does apply.
19 First, the rationale for protecting the records articulated in *Cunningham* applies with equal force
20 while a case is in post-conviction proceedings, where the possibility remains that the petitioner’s
21 case may be remanded for a retrial at which a prosecutor should not benefit from access to
22 confidential and privileged information concerning the preparation and investigation of the case.
23 And there is also reason to conclude that OPDS should seek to maintain the confidentiality of the
24 billing records at issue in this case absent a court finding that the protections of the attorney-client
25
26

PAGE 3 – MEMORANDUM IN SUPPORT OF OBJECTION TO SUBPOENA

1 evidentiary privilege, under which expenditure authorization was originally sought, no longer
2 apply.

3 In 2005, the Oregon Legislature made clear that the attorney-client privilege applies to
4 communications made to OPDS for the purpose of obtaining fees and expenses under ORS
5 135.055, which entitles a person eligible for appointed counsel to necessary and reasonable fees
6 and expenses for the preparation and presentation of a case. Senate Bill (SB) 371 (2005) amended
7 the attorney-client privilege sections of the Oregon Evidence Code by providing:
8

9 Notwithstanding ORS 40.280 [the waiver provisions applicable to all privileges], *a*
10 *privilege is maintained* under this section for a communication made to the office of
11 public defense services established under ORS 151.216 for the purpose of seeking
12 preauthorization for or payment of nonroutine fees or expenses under ORS 135.055.

13 [Emphasis added.]
14
15

16 In testimony before the Senate Judiciary Committee considering SB 371, then-General
17 Counsel for OPDS, Ingrid Swenson, explained that OPDS often requires attorneys to submit
18 confidential and privileged information in support of requests for fees and expenses under ORS
19 135.055. She said the purpose of the bill was to preserve the attorney-client privilege despite
20 disclosures of client communications to OPDS. Testimony, Senate Judiciary, SB 371, February 9,
21 2005.² Similarly, the Senate Judiciary Staff Measure Summary noted that “[w]hile OPDS keeps
22 submissions for extraordinary expenses confidential, there is no express provision of law that
23
24
25

26 ² The testimony was accessed as archived audio at <http://www.leg.state.or.us/listn/>.

1 preserves attorney client privilege for such communications between the attorney and OPDS.”³ In
2 short, legislative history of SB 371 demonstrates an intention to maintain the confidentiality of
3 communications to OPDS for the purpose of obtaining fees and expenses in public defense cases.

4 IN CONCLUSION, OPDS objects to the subpoena seeking confidential records of fees
5 and expenses that are protected from disclosure because the matter concerns a case that is
6 properly understood as not concluded under ORS 135.055(9), and in which there has been no
7 judicial finding of a waiver of the attorney-client privilege.
8

9 DATED this 19th day of July, 2012.

10 Respectfully submitted,

11 /s/ Paul Levy
12 _____
13 Paul E. Levy, OSB #872852
14 General Counsel for OPDS
15 (503) 378-2486
16 Paul.Levy@opds.state.or.us
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26 ³ The Staff Measure Summary was accessed at <http://www.leg.state.or.us/comm/sms/SMS05Frameset.html>.

1 CERTIFICATE OF FILING AND SERVICE

2
3 I hereby certify that on July 19, 2012 I directed the original of the foregoing MEMORANDUM
4 IN SUPPORT OF OBJECTION TO SUBPOENA to be filed in person with the Marion County
5 Circuit Court, at 100 High Street N.E., Salem, Oregon 97301 on July 19, 2012. I further certify
6 that on July 19, 2012, I directed that a complete and accurate copy of the MEMORANDUM IN
7 SUPPORT OF OBJECTION TO SUBPOENA be served upon the parties named below by
8 mailing with the United States Postal Service, with postage prepaid, in envelopes addressed to:
9

10 Kathleen Cegla
11 Assistant Attorney General
12 1162 Court Street NE
13 Salem, Oregon 97301
14 Tel. (503) 378-4402
15 Email: kathleen.cegla@state.or.us
16 Attorneys for Defendant-Superintendent

17 Michael Curtis
18 Attorney at Law
19 4300 NE Fremont St No. 230
20 Portland, Oregon 97213
21 Tel. (503) 284-0763
22 Email: curtismichael@qwestoffice.net
23 Attorneys for Petitioner

24 /s/ Paul Levy

25

Paul E. Levy, OSB #87285
26 General Counsel for OPDS
Office of Public Defense Services
1175 Court Street NE
Salem, Oregon 97301
Tel: (503) 378-2486
Paul.Levy@opds.state.or.us

Attachment 5

Paul E Levy/OPDS
02/09/2010 10:48 AM

To OPDS Special
cc
bcc
Subject PDSC Performance Review of Ingrid Swenson

To all OPDS staff:

At its next meeting on March 4, 2010, the Public Defense Services Commission will hold an executive (closed) session to receive input for its periodic performance review of the OPDS executive director. The Commission is interested in receiving any input that employees of OPDS may wish to provide concerning Ingrid Swenson's performance as executive director. There are two ways in which you may provide input. You may send an email with your comments to Barnes Ellis, the chairperson of the PDSC. The Commission will treat any email submissions as confidential but, of course, emails cannot be submitted anonymously. If you would like to submit comments anonymously, I have provided a link to SurveyMonkey, where you can write a comment without submitting your name (there is an option to provide your name, if you wish). Please let me know if you have any questions. Thanks. Paul

The SurveyMonkey link is: <http://www.surveymonkey.com/s/9CKZSPM>

The email address for Barnes Ellis is: BHELLIS@stoel.com

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1. Anonymous Survey

The Public Defense Services Commission conducts periodic evaluations of the Executive Director of the Office of Public Defense Services. At its March 2010 meeting, the Commission will receive input on the performance of Ingrid Swenson, and would like to receive any comments on that topic that employees of OPDS may wish to make. If you would like to share any observations, opinions, experiences or other comments on how Ingrid performs her duties as Executive Director, you may do so ANONYMOUSLY through this survey. All comments received will be provided to the PDSC during the course of an executive (closed) session concerning the evaluation of the Executive Director. If you wish to provide your name, there is an option to do so.

1. Please provide any comments that you wish to make concerning the performance of Ingrid Swenson as Executive Director of the Office of Public Defense Services.

2. Your name (OPTIONAL):