

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, September 15, 2011
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's July 28, 2011 Meeting (*Attachment 1*) Barnes Ellis
2. Update and Further Discussion of Lincoln County Service Delivery (*Attachment 2*) Barnes Ellis
Guy Greco
3. Staff Recommendations to Approve Contracts Pursuant to Statewide Contracting Plan (*Attachment 3*) Kathryn Aylward
4. Public Comment on Staff Recommendations to Approve Contracts Barnes Ellis
5. Request to Submit Post Deadline Response to RFP Randall Vogt
6. **Action Item:** Approval of Contracts Barnes Ellis
7. PDSC Schedule for 2011 – Meetings And Possible Topics (*Attachment 4*) Nancy Cozine
Commissioners
8. OPDS Monthly Report OPDS Management Team
9. **Executive Session*** Review of Contracting Plan for Capital Contracts Commissioners
OPDS Staff
10. **Action Item:** Approval of Contracting Plan for Capital Contracts Barnes Ellis

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

****The Executive Session will be held at approximately 1:00 p.m. pursuant to ORS 192.660(2)(f).***

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

Next meeting: The next meeting of the Commission is scheduled for October 21, 2011 from 12:30pm to 4pm at the Wildhorse Resort & Casino in Pendleton.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION
Official Minutes

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

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

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

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

Agenda Item No. 1 Approval of the Minutes of PDSC's June 16, 2011 Meeting

MOTION: John Potter moved to approve the minutes, Janet Stevens seconded the motion; without objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 4 PDSC Schedule for 2011- Meetings and Possible Topics

Chair Ellis made a correction to the list of PDSC meetings and topics in Attachment 3, noting that the commission did not select a new ED at its July 13 meeting. He said a July 21 meeting should be added at which PDSC conducted supplemental interviews and discussion of ED candidates during executive session, announcing the selection of Nancy Cozine as executive director in public meeting and setting her salary at Step 8 of the ED compensation schedule. The chair said that he would produce minutes of the three executive sessions conducted in the ED selection process showing who was present and the general topic of discussion.

John Potter said he had a conflict with the next commission meeting tentatively scheduled in Tillamook for September 15-16. Ingrid Swenson said that the service

delivery review and retreat planned for that meeting would need to be postponed, but that the contract approval scheduled for the September 15 meeting should take place in Salem. Chair Ellis confirmed that the September 15 meeting will be in Salem.

Agenda Item No. 7

Request to Submit Post Deadline Response to RFP

Ingrid Swenson introduced the next topic by explaining that copies of the RFP handed out to commissioners highlighted the filing deadline. She also reminded commissioners that the deadline topic was discussed at its May 5 meeting, at which the Chair told the administrator of the Lincoln County consortium that it should not count on an extension of the deadline being granted, and Kathryn Aylward said that she preferred some response to the RFP to be submitted by the deadline with any deficiencies to be remedied later. Ingrid Swenson noted that Joe Rieke's circumstances were different from what the commission had previously contemplated.

Joe Rieke acknowledged that he had screwed up, and that there had been no failure to provide him with notice of the RFP requirements. But he explained that his IT person, who happens to be his son, has set up an aggressive junk mail filter that he had not been checking, and that this filter placed the RFP notice in his email trash. He had not thought to check for the notice since he thought the RFP process didn't ordinarily begin until after the legislature adjourned. He commended OPDS for dealing with the legislature and issuing the RFP simultaneously.

Chair Ellis asked Mr. Rieke what standard the commission should apply in reviewing his request to submit a late response to the RFP, noting that reopening the contract to everyone would be unworkable. Joe Rieke responded that he was asking for an exception for his own circumstances because he has contracted for public defense for some time and that very little was actually required for responses from current contractors. But he said it would be fine if the wish is to get rid of him as a contractor. Chair Ellis said that was not the issue under consideration.

Chair Ellis asked again what standard should be applied to Mr. Rieke's request. Joe Rieke said he can only explain why the oversight on his part happened. Chair Ellis noted there will always be some explanation for missing a deadline. He also said that he reads the RFP to require submission of a request for late filing of a response prior to the deadline, as the Lincoln County discussion illustrated.

John Potter commented that he also had the experienced of an important document ending up in the email junk filter, and that a person needs to periodically check that folder. He asked if any proposals had been received that were competitive to Mr. Rieke. He also asked about the possibility of reopening the submission of death penalty contract proposals for anybody for one month. Ingrid Swenson asked that Kathryn Aylward describe the circumstances of other late submissions.

Kathryn Aylward said other contract proposers have submitted late responses and been informed that they missed the deadline. Shaun McCrea asked how many people had submitted or asked to submit late proposals. Kathryn Aylward described three instances of late submissions. Shaun McCrea then asked about the number of proposals submitted in competition with Mr. Rieke. Kathryn Aylward explained that eight new death penalty proposals had been received from persons with whom PDSC does not presently contract but that death penalty contracts are considered statewide so a person does not compete for another person's case or cases. Judge Welch asked about the impact on quality of representation if the RFP deadline were strictly enforced. Kathryn Aylward said we now have enough capacity and it had been over a year since we had used a non-contract attorney in death penalty cases. She explained that she would probably recommend extending Mr. Rieke's current contract so that he can complete work on the cases

presently assigned to him. Mr. Rieke said he has two cases now scheduled for trial, one this year and another early next year.

Chair Ellis asked general counsel to address what standard should apply to commission review of late proposals and whether he read the RFP to require seeking authorization to submit late proposals prior to the submission deadline. Paul Levy responded that even though the language of the RFP didn't explicitly require seeking such authorization prior to the deadline such a requirement is fairly understood from the context of the RFP. He said he hadn't formed an opinion on what standard should apply.

Janet Stevens said it didn't pass the smell test to allow a late submission when other proposers had already been considered. Shaun McCrae said she disagreed. She said this was an exceptional circumstance where the contracting timetable had changed and a quality contractor admitted to having screwed up. The commission should be able to consider late submissions as part of its charge to provide the best quality at the most reasonable price. She also disagreed with the Chair and general counsel's reading of the RFP deadline provision. She reads the plain language to envision consideration of requests for late submission when proposals are submitted after the deadline. She would make an exception in this case for good cause on an ad hoc basis this one time. A general policy could be formulated later if necessary.

Paul Levy noted that the process articulated by Commissioner McCrea would require either an assumption of or inquiry into the quality of a late proposer. The Chair also clarified that the matter should be decided on principle and not because of views about the quality of the late proposer. Shaun McCrae responded that even without consideration of quality, she believes that commission has the discretion to permit late filing and she would do so in this case. Judge Welch agreed with Commissioner McCrea. She also asked whether it were possible to contact the other proposers who had submitted late responses to reopen the process for them as well. Kathryn Aylward said her staff may not have a record of persons who inquired about the process and were told about the deadline.

John Potter clarified with Kathryn Aylward that were the commission to allow late submission in this instance it was not deciding that a contract should be award to Mr. Reike and that the commission would separately receive recommendations regarding death penalty contracts even with Mr. Reike in the mix. The Chair raised the concern about fairness requiring reopening all types of contracts and not just those for death penalty cases.

The Chair then called the question, and Shaun McCrae moved to allow the late submission by Mr. Reike, which motion was seconded by Judge Welch. The motion carried 3-2, with Chair Ellis and Commissioner Stevens voting against. Shaun McCrae then agreed with Ingrid Swenson when she clarified that the commissioner's action applied only to Mr. Rieke's request. Commissioner Welch applauded the discussion, fairness and even handedness of the Commission's deliberation on the issue.

Agenda Item No. 3

PDSC 2011-13 Budget Update

Ingrid Swenson told the Commission that agency management was still analyzing how to approach the legislature's cuts to the agency budget. Regarding personnel costs, Kathryn Aylward explained that the practice has been to look at what the unions negotiate and what the Judicial Department does. She said one union, SEIU, was still negotiating and explained what had been agreed to in negotiations with ASFME, including a 5% employee contribution to costs of medical benefits, a \$30 subsidy for employees earning less than \$2,696 a month, a cost of living adjustment this December 1 of 1.5%, and a cost of living adjustment next year of 1.45%, and 14 furlough days during the biennium.

Regarding the 3.5% held back from the agency budget, Ingrid Swenson explained that agencies have been authorized to spend 54% of their approved budget with the expectation that the cut will be restored in the second year of the biennium. John Borden said the legislature will look at agency needs and revenues in the February 2012 session to make decisions on restoring the held back funds.

Agenda Item No. 4 PDSC Schedule for 2011 – Meetings and Possible Topics

Chair Ellis said the discussion of future meetings and topics should be deferred to the September 15 meeting in fairness to the new executive director and to give commissioners a chance to think about what they want to address in the coming year.

Agenda Item No. 5 Presentation of Dependency Report

Ingrid Swenson summarized her report on dependency issues and Commission efforts undertaken concerning juvenile dependency representation, which the Commission reviewed in 2006, focusing on efforts to reduce caseloads and the success of the pilot project in the state of Washington to better fund representation of parents. She also provided commissioners with a booklet produced by the PDSC-funded Juvenile Resource Center that explains the child welfare system to children and parents and makes them knowledgeable about what they should expect from their lawyers.

Judge Welch said she found the dependency report concerning, observing that there has been too much reliance on anecdotal information and not enough hard data. Ingrid Swenson observed that the Washington pilot project integrated data collection into their program. Judge Welch pointed to the dramatic differential in reports on caseloads as an example of the need to better define and examine the problems with dependency representation. With respect to caseloads, she questioned how many cases might be open only because a parent cannot get a legal custody order. Chair Ellis observed that in the non-profit world anecdotal evidence is not nearly as significant as measurable data.

Agenda Item No. 6 OPDS Monthly Staff Report

Ingrid Swenson reported that the John R. Justice Act was finally funded, with Oregon getting a \$100,000 grant, administered by the Criminal Justice Commission. She said half of the money was given to prosecutors and the other half to defenders, including one attorney in the OPDS Appellate Division. She also reported that she had begun meeting with Nancy Cozine and had informed legislators and their staff of Nancy Cozine's appointment as the new executive director.

Pete Gartlan reported on new AD hires Laura Coffin, Liz Dailey, Erin Snyder, and Lindsey Burrows. He also reported that the Oregon Supreme Court had granted review in five AD cases, to be handled by the five different attorneys assigned to those matters. He outlined the issues in each of those cases, which address matters involving the suppression of evidence for violation of a requirement under the DUII laws, suggestive police identification procedures, the evidentiary use of prior bad acts by the defendant, exigent circumstances and the state wiretap law, and the circumstances under which police may obtain consent to search following an unlawful stop by the police.

Agenda Item No. 2 Approval of Service Delivery Plan for Deschutes County

Ingrid Swenson presented the Deschutes County service delivery plan for approval. She explained that the handling of the Early Disposition Program, which had been a focus of Commission concern in the county, was no longer a factor since the program has essentially ceased to function because so few cases now would be assigned to it. Judge Welch asked whether the Commission should take a position on the practices that had

been noted the county's EDP. Ingrid Swenson noted that the Commission has adopted guidelines on the appropriate structure and operation of an EDP.

John Potter moved the approval of the plan, seconded by Janet Stevens. The motion carried 5-0.

Agenda Item No. 8 Executive Session

The Chair announced that the Commission would go into executive session, pursuant to ORS 192.660(2)(f), for purposes of discussing PDSC staff recommendations with respect to contract proposals to provide legal services beginning January 1, 2012, which documents are exempt by law from public inspection until a decision is made to award contracts. The Chair invited designated staff and news media to remain in the room, with the latter directed not to report on any deliberations except the general subject of the meeting previously announced. He said no decision would be made in executive session, and that the audience would be invited back into the room and the commission would return to open session later in the afternoon.

Agenda Item No. 9 Approval of Statewide Service Delivery Plan

Back in open session, the Chair noted that the Commission had spent the last approximately three hours hearing staff review its proposals with respect to the responses received to the RFP for non-death penalty legal services. The Chair asked commissioners if they were satisfied that staff was proceeding consistent with past guidance from the Commission. Commissioner Potter said he believed the commissioners were satisfied, and Shaun McCrea agreed. Commissioner Welch also agreed and added that the staff presentation was wonderful and made her feel that she is actually participating in the administration of public defense.

Chair Ellis also noted that there may be circumstances where the Commission would expect staff to contact contractor boards of directors where complaints and concerns arise concerning the contract administrators.

Janet Stevens noted that some of the issues that arose concerning the contracting plan might be appropriate for a commission retreat. Chair Ellis agreed.

Meeting Adjourned

Shaun McCrea moved to adjourn the meeting, seconded by John Potter. The motion carried 5-0.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

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

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

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

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

0:03 Chair Ellis We will call the meeting to order. Before we get to the business this is a very important meeting for two reasons. One is it is Ingrid's last and it is Nancy's first. Somewhere out there between them is a baton and it is being past. Ingrid, you get to be your usual in charge self today. Then that comes to an end. Obviously there is just a wealth of good feeling on both pieces of that. Ingrid has been just a wonderful ED to work with. I think everybody in the room knows what a marvelous job she has done, and Nancy we are very much looking forward to working with you and things look pretty good right now. Thank you both.

Agenda Item No. 1 Approval of the Minutes of PDSC's June 16, 2011 Meeting

1:04 Chair Ellis The first item is the minutes. Are there any additions or corrections to the minutes for the June 16, 2011 meeting? I would entertain a motion.
MOTION: John Potter moved to approve the minutes, Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 4 PDSC Schedule for 2011- Meetings and Possible Topics

1:37 Chair Ellis I am trying to find the page that had the list of meetings.

1:45 I. Swenson It is Attachment 3.

1:50 Chair Ellis We do need to change that because under July 13, it correctly reflects that there was a telephone conference, but it incorrectly states that that lead to selection of the ED. Somebody wrote this with optimism. There should be added a July 21 meeting. I would suggest that be described as PDSC supplemental interviews and discussion of ED candidates. That was in the executive session part and then there was a public

meeting and the selection of Nancy Cozine as executive director was affirmed. The setting of her salary at Step 8 of the ED comp schedule was affirmed. If you need more formal minutes of June 30 and July 8 and July 13 meetings, I will try to do those up. It will just show who was present and the general topic.

- 3:04 I. Swenson I think that would be appropriate, Mr. Chair, if you would.
- 3:09 Chair Ellis Okay. I will do that.
- 3:17 J. Potter Are you moving to a discussion of this meeting schedule, Mr. Chair?
- 3:21 Chair Ellis We can do that.
- 3:21 J. Potter I note that there is a question mark on September 15-16 in Tillamook. I can be there on the 15th but OCDLA has a seminar in Newport on the 16th and 17th, and I have a board meeting on the 16th.
- 3:44 I. Swenson Mr. Chair and Commissioner Potter, yes, when I put this together the question mark was there because it was just a suggestion as to a possible series of events. It does not now appear that we could actually do all the preliminary work in a timely way to get that done especially with our new director just coming on board. I had thought about using it for that purpose partly so that you could have a retreat, but it is too soon probably to do that as well. I think we will have to rework this schedule. Tillamook is definitely on your agenda at some point, but it is not urgent at all.
- 4:17 Chair Ellis So is your thought to do Tillamook but to do it sometime other than those dates and before October 21, or just do it at some point?
- 4:29 I. Swenson That is about a month before the October 21 and that date is firm. It may be best not to try to do that and then if you feel like you need to meet again before the end of the year besides that December meeting, something could be scheduled. Now the contract approval is scheduled for September 15. I think you should do at least that portion in September in Salem rather than Tillamook.
- 4:56 S. McCrea I just want to say that I will not be available on the 15th. You will be but I won't.
- 5:08 Chair Ellis I think we will hold the 15th and meet in Salem. I know the contract approval piece doesn't have a lot of flexibility.
- 5:19 I. Swenson It has been in our schedule for some time. It is probably something that we shouldn't move.

Agenda Item No. 7 Request to Submit Post Deadline Response to RFP

- 5:28 Chair Ellis Okay. This isn't quite the order that shows on the agenda but Joe is here and we might as well address that issue.
- 5:38 I. Swenson Mr. Chair, if I could just make a couple of introductory remarks. You have some materials that were just passed out to you. One of them is a copy of the request for proposals. I provided that to you so that you could see the references in there to the filing deadline. I have asked our staff to highlight those for you. So there are a number of references in the document to the filing deadline. The only other thing that I thought I would bring to your attention was the last discussion that we had about that deadline was on May 5, when you were hearing about the Lincoln County service delivery plan. Guy Greco was testifying about the plans for the new consortium. I think it was Commissioner Potter who asked him if he knew how soon the deadline was for filing. He said that he didn't but he hoped that he could get an extension. There was some discussion at that meeting about the availability of extensions. I recall, Mr. Chair, you advised him not to count on an extension and what Kathryn said on the record was what we normally do is we would rather have

someone submit something by the deadline and if the application is not complete then we would review it and we say, "Where is this, this and this?" The approach that her staff has taken is that if you are not able to meet that deadline, you simply need to submit something in writing and talk about the fact that you planned to do that. The circumstances here with Joe Rieke and his contract are different from those you contemplated before, and I know he has provided some materials which were presented to you with the packet for today and a letter as well.

- 7:30 J. Rieke Thank you. Thank you for listening to this. I apologize to you all. Obviously I have screwed up and there is no question about that. This is not about something that the notice failed me in some way or some other thing that is not about my office. The problem simply was that I have a developing, computerized network in my office. My son, who is an IT specialist at the ski headquarters called Mt. Hood Meadows, has been my primary support system. He is a guy who, in this case, was doing what I asked him to do. I would yell at him except he is about to have my first grandchild, so I am being careful and not chewing each other out.
- 8:23 Chair Ellis I am missing a piece here. He is a relative?
- 8:28 J. Rieke Abe is my son.
- 8:29 Chair Ellis And he is also your IT?
- 8:31 J. Rieke He is also my IT guy.
- 8:34 Chair Ellis That was your first mistake.
- 8:35 J. Rieke My business life is like that. I don't have a vast collection of experts. What he has got in place for me is a system that has the ability for the people who are working on the teams that I create to work on the cases you assign. They can reach into my computer system and draw out a number of things. Their own reports go in and they can access them through a program. Other members of the team can all access them as well. We have a system installed further to take all of the discovery from our cases and put those into a program that they can access from their own computers. Obviously all of those things that you do have to be protected and secured and have to have a method by which they can find their way in without getting themselves hung up on interconnected issues. But it does work and for the most part we had made real progress. What we were attempting to do this spring was an effort to try to bring ourselves back into the ability to do a meaningful job of screening our emails coming in so that we didn't have to spend an hour a day cleaning out nonsense. What he has come up with is a program that works most of the time. Unfortunately it worked too well in this case. The way that I discovered this thing was that I expected the normal timing of this contract to happen, which was that we usually had waited for sine die of the legislature and then the RFP process started. This year you are well in advance of that to the credit of your administrators. I don't know how they did that and the legislature too, but they did. What happened was the notice simply didn't get through to me. I found that out when I called Billy to ask about whether there was a problem with my closing an office that I had been maintaining in Multnomah County because that was the county that I was assigned to initially as a contractor.
- 10:50 Chair Ellis We did get that in your written materials.
- 10:51 J. Rieke You picked that up. I am wasting your time. You would like me to move on. The point was, I think, best explained by my son, who finally last night delivered a message to me that is the letter how this went wrong. Basically what was happening was that pieces were being pulled out of the system and put into the trash in my computer system when they should not have been. I was supposed to be doing a job and looking at the trash to make sure that I didn't have important memos that got pushed into the trash. That miscommunication is why I was late.

11:36 Chair Ellis I have a few questions if others don't.

11:36 J. Rieke Never known you not to Barnes.

11:40 Chair Ellis I have known you a long time and there are good feelings. Here is the problem as I see it. We are not sitting here just as friends and all that, we are sitting here as a public agency that does public contracting. My question is what standard are we to apply, and if we make an exception for you under circumstances where – I think you have been very forthcoming on it. You are not saying there was some screw up by OPDS or that the notice wasn't sent in a timely and proper way, etc. So my problem is what standard do we apply that says an exception for you that doesn't lead us, as a matter of fairness and public contracting principles, to reopen for everybody. I think reopening for everybody presents problems that are just much too complicated to consider that.

13:07 J. Rieke I completely agree. When I first discovered this I asked Billy and Kathryn and everybody answers the same. They can't change this technology that you use and be safe in the future from the criticism that you don't want any part of. I agree that you have a problem. The other thing that I say to you is this is what I do for a living and have for 35 years, is to point out to judges the exception that was my client despite what he did. I want you to know that exceptions are just the story of my life. I don't want you to lose the context of my asking. I often ask hopelessly for a break. To do this exactly as you have outlined it. It is appropriate. It is the way it should work and I am not arguing that. There are two things that are different about my situation, maybe. One of them is you have contracted with me to do this particular kind of contracting for some time, and shortened significantly the amount of material that we put in when we apply to be re-upped, I guess. So if there was a current here that it was time to get rid of Rieke that is fine.

14:28 Chair Ellis That issue or thought is not before us.

14:27 J. Rieke If that is not the problem then the question is how do you re-up the people you have been using for years? This is, I think, the fourth one of these contracts that I was applying for. It is a different situation, apparently, because pretty much a known quantity. The question was how you should re-up and should there be a RPF process the same as everybody else. It is getting you current on who we are and where we are. Basically on this particular case the reason I called Billy was I trying to point out was what he had done was to take me out of Multnomah County and given me cases elsewhere.

15:08 Chair Ellis I am looking for an answer to my question. How do we do this in a way that doesn't lead us to a decision that we have to apply it generally?

15:24 J. Rieke The only thing that I can think of is that I can show you mechanically what happened and that I didn't know it happened.

15:29 Chair Ellis Everybody is going to have a story – the dog ate my homework story.

15:36 J. Rieke I agree. It is a problem.

15:39 Chair Ellis Then related to that I would have to say the lawyer in me read the language that you are relying on, the language that says “unless authorization for late submission is granted.” I would read that as contemplating an application for authorization before the deadline has past. I don't see that as an open sesame for coming in after the deadline has past. So the Lincoln County discussion that was someone asking for an extension before the deadline.

16:21 J. Rieke I understand.

16:21 Chair Ellis What percent of your practice is public defense?

16:24 J. Rieke At this point I had taken it down to virtually nothing else going on except public defense, except from time to time I pick up a case.

16:35 Chair Ellis You use to have a firm that did a lot of other things and this was just a piece of that.

16:38 J. Rieke Well that is what happened in 2003 when that set of changes occurred. We were doing a lot of private work. I have been in the public law eye since then taking a few cases that come in that are usually people I know. The most recent was a teenager who had a alcohol related homicide in Welches.

17:04 Chair Ellis I am just asking you have been there before and you presumably could fill at least a significant percentage of your practice time with retained cases.

17:17 J. Rieke I couldn't say that I could. I haven't been doing much of anything except just tag on stuff that didn't get in the way of the time I spent on these cases. That is why I am asking. I wasn't ready to retire.

17:28 Chair Ellis The other potential, of course, is as this biennium unfolds we run short of qualified death penalty counsel. There could be additional RFPs go out. It is not necessarily true that the window is set forever for the two years. We don't know how the caseload is going to go.

17:57 J. Rieke I appreciate that that is true. I don't know where you are on the cases.

18:01 Chair Ellis Any other questions for Joe?

18:07 J. Potter I am grappling with your question that you asked in my mind. I appreciate where Joe is at. It has happened to me. I have had stuff go into a junk filter that was a contract to me. I have been told the same thing that you have been told by your son. You have to go through and look at your junk mail periodically and read that stuff. I understand it all, but getting back to the chair's question, I guess I want to know what damage has happened here and whether or not there is a way short of reopening the whole process to everybody, to take care of any damage that may have happened. That is has somebody else applied in competitiveness with Joe? If not, can we go back and say here is what has happened in this particular contract that is outside the limits. It is in the death penalty arena. We are opening only this part up for a one month extension. Anybody apply. Everybody should know that this is what happened and ameliorate any damage perceives or real that may have taken place here.

19:19 I. Swenson Mr. Chair, if I could, I would like you to hear from Kathryn about the other late applications that are still coming in and the fact that we have had to inform them, as we did Mr. Rieke, that the deadline has past and some of those are death penalty applicants as well.

19:44 K. Aylward Yes. It is true. There are other existing contractors who missed deadlines. There are people who had asked to be on the list and be notified when an RFP was issued because they were interested in a contract and they also missed that deadline. They have contacted our office and we have said, "Sorry, you missed the deadline. The next RFP will be issued in two years." My concern is there are other people who have called and said, "Well, I am interested in public defense in Oregon." I say, "Oh to bad. You just missed an RFP. I will put you on the list for next time." I don't even know that there was a way of tracking any interest. It came right down to Friday when I got an email from someone who said, "Oh, I missed the deadline but here is my proposal just in case you will take it late." I have a concern that if an exception or an extension is made is today the day? Is tomorrow the day? I don't know. I would feel bad about people that I had said, "Too bad. You are out of luck."

20:53 S. McCrea Okay. To answer Commissioner Potter's question, how many people have tried to submit or asked to submit proposals late? You got one by email by the person saying just in case you will take it. How many others have we had?

21:16 K. Aylward We have had at least one other who has said he might have submitted a proposal. We have another person who didn't submit a proposal and hasn't made any comment yet about whether they wish to continue or not. We have someone who submitted a proposal past the deadline by a day. We said it is past the deadline. As far as I am concerned I have been saying no to people.

21:47 S. McCrea I understand, Kathryn. That is what I want to know is how many. It sounds like maybe there is three or four. The other questions that Commissioner Potter asked was were there any competing contract proposals made to what Mr. Rieke would have proposed?

22:12 K. Aylward We had eight new death penalty proposals. We don't necessarily say that I am bidding on this person's case or the cases in this county; it is just death penalty statewide. So we did get eight new death penalty proposals.

22:30 Hon. Elizabeth Welch I don't know if I am crossing some line, but if we say no to all of these people including Mr. Rieke what have we done to the quality of representation for the next two years. To me that is the real question. Do you have adequate applications to cover that work?

22:53 K. Aylward I think in the death penalty arena we now have enough capacity. I think it has been over a year since we have used someone who was a non-contract attorney. As far as the other providers go, it seems to be the case the combination of caseload dropping around the state and providers being hungrier, more competition, that we do have alternatives for the work that people would have done pursuant to a contract if they had submitted it in time. I think what we would probably do in the case of Mr. Rieke's contract, he has pending cases. Obviously those need to be completed and we would probably extend his current contract so that work on those cases could be completed.

23:42 Chair Ellis How many of those are there?

23:44 J. Rieke We are allowed to keep two at a time. I have one that will be tried, I think, in October and the other, I think, in February of next year.

23:59 Chair Ellis I would like general counsel, since you are leaving, if you are able to address the two legal questions that I asked. One is what is the standard that we should apply, and that leads to what are the consequences if we make a single exception. Do you read the language, "Unless authorization for late submission is granted" as applying that the application for the authorization needs to be made before the deadline not after the deadline?

24:35 P. Levy I will start with the easier question, the second one. I think in the context of the contract even though it is not explicitly stated in the terms as you read it that that is the fair reading of that and the fair understanding of the provision. As to what standard to apply I haven't thought about that. Perhaps I should have since this was on the agenda, but the notion of Mr. Rieke today and potentially many others after him coming to the Commission and saying, "Please order staff to consider my late submission." I haven't figured out what standards the Commission should apply for that.

25:39 J. Stevens If we were the Department of Transportation and this would have been on a road project and it came in late. Think how it would look if we said, "Okay, fine. We understand your problem and even though we have already done the bidding we are

going to let you come in later.” I understand the problem this poses for Mr. Rieke and I really would hate to do it that way, but I just don’t think it passes the smell test at all.

26:11 S. McCrea

I completely disagree. The reason for that is because part of the charge for our agency is provide the best quality at the most reasonable price we can get. There has been a real change in the contracting circumstance in that we have accelerated it. So contractors who have previously been use to the contracting period being at one point, have now had to be on top of it. I thought you were very honest in saying that I screwed up. I think we have an exceptional circumstance here. I think we have a quality contractor. I am sorry Mr. Chair and Mr. Levy, I do not read the plain language of part two, section 2.1(b) deadline the way that you do. It does say the submission deadline for proposals is June 13. Then it says if the applicant fails to submit the proposals in accordance with the deadline, which to me means by June 13, then PDSC will disqualify the proposals unless authorization for the late submission is granted, meaning that the proposal comes in after June 13 and it is only considered if there is the permission in writing. So I see it as we can do it on a case by case basis. I think that is the plain language that is communicated to the contractor reading this. My position is that given that Mr. Rieke has taken the time and the effort and has the good will to want to continue this work with the Commission, has come forward to us, taken the time to come to Salem to talk to OPDS, and this is an unusual situation. I would make an exception in this case for good cause and do it on an ad hoc basis this one time. Then if somebody else comes forward and has a similar situation, we consider that on an individual basis too. Then we get to the point where general counsel, if there is general policy that needs to be enunciated, can be. That is where I am on it. I would go ahead and allow him to do the late submission in this case with these circumstances.

28:33 P. Levy

Can I just interject a consideration into this. As Commissioner McCrea has articulated this, it requires an entirely separate set of facts for the Commission and considerations for the Commission. You prefaced this as we have a quality provider here. That is an assumption that hasn’t been established and would have to be tested.

29:05 S. McCrea

Actually I think the chair made a statement to that effect. That the quality was not an issue before us.

29:11 Chair Ellis

I did said that because I don’t think we should be deciding this because we like Joe personally or we think he is a good lawyer. It should be decided on a principle.

29:22 P. Levy

I am not implying that the quality is not good, but that if the quality of the provider making the request is a consideration as you have articulated, that is a focus and a discussion that I don’t think the Commission should ...

29:34 S. McCrea

Okay. Let’s take the quality out of it. I still see it as it is something that we have to make on a case by case basis. I see that based on the plain language in our own document. It is up to the applicant to come forward to PDSC, which Mr. Rieke has done in this case. As I see the plain language, we the Commission have the discretion to allow an authorization for late submission. There are no articulated standards for that, so I am inferring my own standards to that. Based on the standards that I see I would allow the late submission.

30:25 Hon. Elizabeth
Welch

I have another question. I agree with Commissioner McCrea. But I am curious about the implications. Is it possible for Kathryn to identify the other people, these other people, and open the process for them as well? Whether that would make a difference to other members of the Commission and that was possible. It has to be evenhanded in terms of people who missed this particular deadline.

31:00 K. Aylward That is what I was trying to say earlier is that those people might not be identified. I don't know if an analyst received a phone call from someone that was interested and we just said, "No." We may not have kept a record of that.

31:20 J. Potter Mr. Chair, a follow up to the question. If there are eight people that have applied for death penalty contracts, if Joe's had been on time then there would have been nine people?

31:31 K. Aylward These are eight brand new people that we have never contracted with before.

31:39 J. Potter So there are eight new applications in there. If Joe's was in there it would be nine. Other already existing death penalty contractors have submitted applications as well. Would he then just be part of the mix? You would have the eight that have already submitted, plus people who have submitted before, plus Joe. You, as staff, are going to make some recommendations that we would discuss later today in executive session.

32:09 K. Aylward You are saying if he had submitted on time – no, we have existing contractors and then we have new people. There is no priority for existing contractors. We just look at the mix altogether.

32:20 J. Potter But he would be in the mix.

32:22 K. Aylward Absolutely.

32:24 J. Potter If the Commission decides to allow a late submission, it is not deciding to award a contract to Joe. It is just allowing the late submission to be considered amongst the pool of people who have already applied?

32:41 K. Aylward I understand that. My concern is for the ones that I can't identify.

32:47 Chair Ellis I have another problem. You are assuming that our fairness standard would only apply to death penalty. I don't see how you can say that we are making an exception in death penalty. We will open it for that but not apply it to everybody. This same deadline applied not just for DP but for all.

33:13 J. Potter I agree with that. Initially what I was asking was could we just open it for death penalty. Then when I heard Kathryn say that she has applicants for other types of contracts since the deadline has past and they have said that the deadline has past.

33:33 J. Rieke Can I insert something here? Janet raises a point that she is the smell test. None of these submissions are about money at this point. Our negotiating with this organization always comes after.

33:45 J. Stevens I understand that.

33:45 J. Rieke Okay. At least you are not facing the low bid. As long as you know you are not cheating in that sense.

33:54 Chair Ellis I think this is one of those issues that if anybody has additional questions let's do them. Then I think I am going to call for the question. Anymore questions for Joe? Alright. Does anybody want to make a motion?
MOTION: Shaun McCrea moves to allow authorization in writing for late submission of a proposal by Mr. Rieke; Hon. Elizabeth Welch seconded the motion; motion carries.
VOTE: 3-2.

34:52 J. Rieke That is the story of my life and I am delighted. Thank you. I appreciate you listening.

34:52 I. Swenson Mr. Chair, just for clarification – these other folks who may have attempted late submissions have not yet requested any action by the Commission. I think there is a distinction you can make. Mr. Rieke did. He took the appropriate avenue. I think we can take the position that if someone seeks to do that they need to go through the same process.

35:22 S. McCrea Yes.

35:22 J. Rieke Thank you.

35:25 Hon. Elizabeth Welch I want to make a comment and it has nothing to do with Joe Rieke. I moved to Oregon from Chicago and it has been a long time ago. Chicago then and now is just a political cesspool. I am very proud to live in a state where people are this careful about fairness and even handedness. Even though we disagree, I think this was a very impressive discussion on the right topics. I am proud to be here.

Agenda Item No. 3 PDSC 2011-13 Budget Update

35:56 Chair Ellis The next item is the budget update. Ingrid and Kathryn?

36:07 I. Swenson Mr. Chair, I sent you a document shortly after adjournment of the legislature with some numbers. I sent it by email to you and other interested people telling you where we ended up in terms of total budget amount, and the fact that 3.5% of our biennial budget was held back as it was for other agencies. We will need to pursue that funding, at the appropriate time, probably in the 2012 session. We are now just sorting through what the impact of how some of the changes made by the legislature to all budgets is going to affect us. We had an initial discussion at our management team meeting this week about how to approach the cuts that we sustained internally as well as in the account. Also what the impact of union settlements on behalf of other agencies will be. We haven't been able to resolve that. Kathryn has looked at some of that and may be able to give you a little bit more detailed information about the impact.

37:18 K. Aylward Generally what we do in terms of our operating budget is we look at what the unions negotiate and we look at what the judicial department does. Judicial department is non-union so we look at the changes made in those two areas, and then the Commission decides what it is going to do for its own employees. The first union agreement that I don't think has been ratified, but they have reached agreement, involves employees contributing 5% toward their medical benefits.

37:47 Chair Ellis Is this SEIU?

37:49 K. Aylward It is ASFME. I believe SEIU is still negotiating. If employees have to contribute 5% of the cost of their medical benefits, for a single person it is about \$1,000 a month. For a person and a spouse it is \$1,500.

38:08 J. Stevens Not the 5%?

38:09 K. Aylward The total. So that works out to about \$50 and \$75 a month per person. For employees who are earning less than \$2,696 a month, there will be a \$30 subsidy toward that \$50 or \$75. In addition, the union has negotiated a cost of living adjustment effective December 1st of 1.5%. So depending on your salary you may have your contribution covered, or you may have it not covered. It is effective December 1 of this year, so within just a few months. Then a second cost of living adjustment December 1 of the following year for 1.45%. In addition, the union agreement involves all employees taking 14 furlough days during the biennium. Those are unpaid days. For some agencies it involves office closures. For other agencies that can't close it is a rotating furlough day. That is the picture that ASFME is looking at.

39:28 J. Stevens Fourteen furlough days in a two year period, what percentage

39:33 K. Aylward It is 2.63% as a person's salary. In fact they have offered that as an alternative. They have said if you are someone who can't take furlough days because you are crucial you can just take a 2.63% pay cut.

39:51 I. Swenson Mr. Borden is here and I look at him because I am thinking that this union agreement probably fits within other agencies requirements in terms of their budgets as well. Do you have an understanding of that yet, Mr. Borden? When the Governor negotiated this agreement with ASFME, was the assumption that following those guidelines would allow those other agencies to make the cuts that they are going to need to make?

40:23 J. Borden Our understanding is that they are within the constraints that were originally considered.

40:30 I. Swenson Thank you.

40:37 Chair Ellis I am unclear. Are you just giving us information or are you asking us to do something?

40:40 K. Aylward I am just giving you information. It will be up to the new executive director and the management team to make a recommendation regarding our own agency. We are still waiting to hear what judicial's plan is.

41:02 Chair Ellis Anything else on the budget?

41:02 I. Swenson I don't believe so, Mr. Chair.

41:05 Chair Ellis How does this hold back work? Is it like the old E-Board where you have a – apparently not. Apparently it depends on how revenues come in?

41:22 I. Swenson Mr. Borden could address that but my understanding is that this money was held back from the budget so it is not in our budget. It has been deducted from ours and everybody else's. It remains in the legislative funding system somehow. I think it was about \$310 million total, something like that. Those funds are there and probably the 2012 legislature would be the one to decide what the revenue picture looked like, what agency needs looked like, and make a decision about whether other needs have emerged that might overshadow the needs of these agencies or not. Anything else, Mr. Borden?

42:11 J. Borden It will probably not be done by individual requests but probably done globally.

42:22 Chair Ellis We will have a new economist so maybe more optimism will inject itself.

42:30 I. Swenson They did authorize us to spend 54% in the first year of the biennium in the expectation that the balance would be there.

42:42 Chair Ellis I am getting the sense that it is not like you start over. It is like the hold back is there if revenues have come in at a pace that it can be done.

42:55 I. Swenson The money is there. It is sitting there now. It was from this biennial budget, but whether it gets allocated or not.

43:11 J. Borden I think there is going to be some more complicated factors for the Commission. It is about a little over \$8 million dollars. As we approach February there will be a look at the overall state revenues and what holes may exist, priority holes. Some of them are for sure holes like judicial compensation as a constitutional mandate. That hole

will be filled. There may be some debt services things. Perhaps your caseloads will decline. Perhaps there are other factors that could be considered.

- 43:44 Chair Ellis So in our minds we should think in terms of when the first of these annual sessions starts in February that we address then what we need to do to communicate on the hold back.
- 44:07 I. Swenson Possibly as early as December there would be some more information about what was anticipated.
- 44:15 Chair Ellis And is the legislative process partially completed on this? In other words it is appropriated but not funded. Something like that?
- 44:20 J. Borden Right now it is in the ending balance so it is not appropriated. It is sitting there. (Inaudible). You have the three co-chairs of Ways & Means. One in particular has a very conservative approach. The appropriation process could be as early as February.
- 44:59 J. Potter Mr. Chair? Mr. Borden I heard you say and I heard the chair reiterate the month of February for this short session. Do we have dates yet set for the short session?
- 45:10 J. Borden There is a legislative calendar out. I don't have the precise dates. I think it is the month of February, maybe a little bit into March.
- 45:23 J. Potter Thirty-five days?
- 45:25 J. Boredn Something like that.
- 45:30 I. Swenson Thank you.
- 45:30 J. Stevens Am I understanding correctly that the hold back, in effect, you are going to have a mini budgeting process all over again. Everybody can come in and say they deserve 90% of the hold back and you don't deserve any. Did I understand that? I exaggerate. I am aware of that. But you see the point I am making?
- 46:02 J. Borden I think that would be the very worst case scenario. I think the co-chairs are under the hope that the revenue situation will continue to improve, and that agencies will be allocated what has been held back. We are still early in the process as far as revenues. Also maybe understanding some of the ramifications of the budget that is going through and what major holes may exist or become known.
- 46:33 Chair Ellis In any event the world as we know it is going to come to an end next Tuesday. Anything else on the budget update?
- 46:51 I. Swenson No, Mr. Chair.

Agenda Item No. 4 PDSC Schedule for 2011 – Meetings and Possible Topics

- 46:50 Chair Ellis I don't know if we have completed Item No. 4. We did some of it. You had our new ED on the agenda and discussion of possible topics.
- 47:30 I. Swenson I simply set these out so that you would have some indication of issues that have previously been identified, either by you or staff, as things that need to be dealt with in this time frame. It is very flexible. It was just there for a suggestion on my part. I also put in December, 2011, some 2012 items that you have either previously earmarked for consideration or that have long been on our agenda for the Commission and have not yet been addressed.

- 48:14 Chair Ellis I am going to suggest that in fairness to our new executive director we not do this today. Let's take a look at the September 15 meeting. That gives Commissioners a chance to give some thoughts to areas that we want to address in the coming year.
- 48:33 I. Swenson
Agenda Item No. 5 This was certainly not here for action. It was just for discussion.
Presentation of Dependency Report
- 48:41 Chair Ellis Okay. The dependency report.
- 48:52 I. Swenson Mr. Chair, all I did with that report was I felt like it might be appropriate to produce a summary of some of the issues in dependency representation. You had a Commission review in 2006. Then various strategies have been employed since that time in an effort to address some of the issues identified in the Secretary of State's audit, identified long ago by the bar as potential quality concerns about juvenile representation. OPDS and others have taken a number of steps to begin to address some of those issues. I provided to you a copy of some correspondence from 2007, with the Senate Judiciary Committee. That was the last time the legislature gave specific attention to this as an independent issue, the funding of public defense representation. We had hoped that it would emerge in two later sessions as a potential funding issue, and it really did not either in 2009 or 2011. You had it as policy option packages in your budget, but as you know they were quickly off the table this last time around. Although the Interbranch Work Group was certainly a good forum in which to talk about those issues, and I had hoped that some kind of action would be forthcoming with the considerable effort that that group put in during the course of the entire legislative interim to examining problems in the dependency system, but after making their presentation in December of 2010, nothing came forward. We had the piece in our budget which would have been a vehicle for talking about that, but in view of the budget circumstances it just wasn't anybody's priority anymore except ours. It certainly wasn't even our top priority. We had to get our essential funding in place before we talked about policy option packages. But I do think that funding is critical. The caseload – I mean there is a relationship, obviously, between caseloads and quality. I included in here the Washington Pilot Project information because it is a national model. It is a good pilot because it is about more than half the counties in Washington who participate in the model. They are able to compare the results in pilot counties with the results in non-pilot counties.
- 51:37 Chair Ellis It did seem focused on enhanced parental representation.
- 51:38 I. Swenson It was. That is exactly right. But there is no reason to think that it might not translate to representation of children. Washington focused on parents because they felt satisfied with the representation that children were receiving, but the deficient, at least as they understood it, was in parent representation. That had been their focus. Their caseloads are capped at 80 clients per full-time attorney at any time. It is a very desirable caseload if you can reach that. Other states have not been anywhere as successful. California did an intensive analysis of the caseload levels that would be appropriate in these cases. While they recognize that probably the highest they could go reasonably, under the basis of their own study was 128 per attorney. They never reached that goal and they haven't yet. They are considerably above that. In Oregon we have a huge discrepancy. Now don't trust the data because we only did a spot survey. We have only done it twice of all our juvenile providers. We can't ask our combined criminal and juvenile providers for this data because there is too much flexibility between the types of case work they do. Among those who provide only juvenile representation, the caseload fluctuated in the spot survey we did late last year between 67 cases and 253, people, open cases for clients that were existing at that time. Believe it or not it was the ones with 63 who were complaining they were overwhelmed and couldn't keep up. It is very interesting. I think it will take significant additional funding to make a major difference. I think we have addressed the availability of training for lawyers. I think it is there. I think your contracts now require that lawyers access that training. That they be familiar with the performance

standards. That they abide them. You actually required that they abide by those standards. Issues continue and we will continue to monitor them, but until there is increased revenue in that part of our system, I just don't know how much more you can do.

54:20 Chair Ellis

Questions for Ingrid on that?

54:23 I. Swenson

Oh, I wanted to hand out just for your information. Please don't keep them. Give them back to me, but as part of the Juvenile Resource Center they have produced these documents. If you will take a look at them they are really self-empowering things for teenage clients and for parents. The idea is here is a statement of your rights. Here is a statement of the system and how it works and to make the client more knowledgeable about what is required of their lawyers and what they can demand of their lawyer and those kinds of things. It is good. It has been made available to all of our contractors.

55:11 Hon. Elizabeth
Welch

Reading your report it is kind of like rubbing salt in the wounds. It is not really a pleasant experience. One of the things that I have tried to advocate for since I have been on this Commission that I feel it could be addressed is data collection by the Commission. Defining, in a very analytical, hard look way, what it is we should be measuring in terms of the representation of children and parents in dependency cases? What is good? What is desirable? What is actually happening? To collect that data and at least do the best we can to collect it, either internally or with the assistance of the Judicial Department or DHS, whomever. I just want to say that I don't think that we can ever do anything other than a pretty superficial generalization until we have data. We need data in the delinquency side too that we don't have. It is sort of like all the foofaraw that we produced with the business about waiving counsel. Having a number, even though we all knew that the numbers weren't necessarily scripture, they weren't necessarily accurate, still got some attention. We were able to say, "Look. This is bad. This is wrong." Nobody defined the conclusion. I think it is just absolutely critical. I think it would help a lot because we don't have that kind of data. We don't have the beginnings of it.

57:08 I. Swenson

Well, Mr. Chair and Commissioner Welch, what Washington decided to do in terms of data collection we can certainly follow a model. They really require the participants in their pilot program to use a checklist. I did this, this, this, this, and this in every case. I saw the client within this amount of time. That was part of the pilot and it has helped them understand the energy that goes into it. Then the goals that they established were ones that could be measured through DHS and court data in the sense that if there are quicker reunifications in cases where there is going to be reunification, or quicker adoptions if it is going to be an adoption plan. They consider that as a success and measured that. There weren't necessarily direct measurements of quality available to them, but we can certainly attempt to use some of those tools that they use.

58:03 Hon. Elizabeth
Welch

The differential between 67, or whatever your numbers were, 230, there are some very obvious potential explanations for that from a standpoint of someone who has worked in the system. One of them has to do with another one of my long standing issues which is getting domestic relations relief for custodial parents in dependency cases so the cases can be closed. How many people are carrying a case that the kids are in fact at home, but the parent doesn't have legal custody so the case is left open. There are a lot of ways to look at what are we talking about here? What are the actual issues and what are the real differences from contractor to contractor? I will be still. I just feel really strongly about this. Not to just operate on anecdotes and what they think or know.

59:10 Chair Ellis Your concept is widely accepted in the non-profit world. Anecdotal evidence of impact is not nearly as significant as having some measurable data. You are preaching to, I think, a portion of the choir here.

59:37 Hon. Elizabeth Welch It is a matter of it rising to the level where we just ...

59:42 Chair Ellis Anything else on Item 5? Okay. The monthly report?

Agenda Item No. 6 OPDS Monthly Report

59:51 I. Swenson Yes, Mr. Chair. We have a couple of things. I think Pete is here. Oh, one was that the John R. Justice Act was finally funded and just about two months ago, I think, we went through the initial process of identifying recipients of prosecutor/defender funding through this federal money. Oregon's share of that grant was \$100,000. The Criminal Justice Commission, Greg Hazarabedian is a member of that Commission, was the agency charged with developing a process for awarding those grants. Half of it was given defense and half to prosecutors.

1:00:48 Chair Ellis Parity at last.

1:00:49 I. Swenson Yes. So \$50,000 for defense lawyers. Now unfortunately it can only go to either employees of non-profits or public employees. You had to be a full-time defender. It couldn't be juvenile dependency work. It had to be criminal or juvenile delinquency. The applicant pool was somewhat narrow, but 13 grants were awarded to defense attorneys.

1:01:17 Chair Ellis This is to pay down student debt?

1:01:17 I. Swenson That is right. I forget what the minimum amount was. Maybe \$2,500 to \$5,000 per year. It is funded now for two years. It is hoped that the bill will be refunded in Congress and both of our senators have signed on in support of an effort to extend funding under that act. So finally that is available. I am happy to announce that and one of our OPDS attorneys qualified for one of those grants.

1:01:57 Chair Ellis You know the rule. You can't retire until your loan is paid.

1:02:02 I. Swenson The only other thing is in terms of transitioning to our new executive director, we have been able to meet this morning, Nancy Cozine and I briefly before this meeting. We will meet tomorrow. She knows that I will be available at least by phone and certainly for in person meetings as appropriate. You and I had spoken, Mr. Chair, about notifying people of the change. I have sent notice to many, many people.

1:02:31 Chair Ellis I saw no press on it, though.

1:02:34 I. Swenson Certainly legislators and legislative staff letting them know about the change. I have been receiving responses to that. I don't think I had anything else.

1:02:55 Chair Ellis Do you want to talk about the date that Nancy will start?

1:02:58 I. Swenson I think September 7. Is that correct, Nancy?

1:03:01 N. Cozine That is correct.

1:03:06 Chair Ellis I thought that was fine unless somebody had an issue with it...

1:03:11 P. Gartlan Thank you, Mr. Chair and members of the Commission. I only have three items today. One is we extended offers to four attorneys and they accepted the offers and they will be starting. Laura Coffin, who works at Marion County PD, will be

starting in two weeks. Liz Dailey, I don't think I mentioned her last time. Liz has been working in Brooklyn for the last three or four years. She is coming back to the northwest and back to Oregon. Erin Snyder. I did mention her last time. She is currently a clerk with Judge Haselton. Then Lindsey Burrows who is taking the bar and will hopefully start with us in late September.

- 1:04:05 Chair Ellis Is that a first to have a person who has been a trial level defense lawyer become one of our appellate lawyers?
- 1:04:15 P. Gartlan No. We have several former trial level defense attorneys in the office.
- 1:04:20 Chair Ellis I react positive to it. I think it makes a lot of sense. Has Mr. Sermak accepted this change in his situation?
- 1:04:33 P. Gartlan I have been avoiding Mr. Sermak so I don't really know. The second item is we have just closed the application period for a juvenile position with the juvenile appellate section. Again, we had a large number of applicants. We had 121 applications for that position.
- 1:05:01 Chair Ellis For one position?
- 1:05:01 P. Gartlan Yes. We will be going through that process right now. Finally, we had the Supreme Court was very busy last week and allowed review in five of our cases. We will be very busy for the next couple of months. The arguments will be set in November. I have assigned each of you to a different moot court team. We will need all the help we can get.
- 1:05:28 Chair Ellis You are talking about the Oregon Supreme Court.
- 1:05:34 P. Gartlan Yes. If you want to hear about these cases I can tell you about them.
- 1:05:52 Chair Ellis Don't argue them.
- 1:05:52 P. Gartlan First is Cabanilla. It is an interesting question. It is really statutory as you know. Under the DUI scheme, when somebody is arrested the officer tells them about consequences and rights. One of them being if you refuse the intoxilyzer examine, your refusal can come in as evidence against you. In other words as evidence that you are guilty. It is an admission. In this case it is questionable whether or not the defendant speaks English. So if somebody doesn't understand the rights is that refusal truly probative as of a guilty state of mind.
- 1:06:32 Chair Ellis Why isn't that a self-incrimination issue.
- 1:06:39 P. Gartlan Self-incrimination is Fifth Amendment statements. The concept is a refusal goes to consent. Consent goes to physical evidence so it is not self-incrimination. The physical evidence itself is not testimonial, so they transfer that onto the no. The physical
- 1:07:11 Chair Ellis A lot of physical evidence like fingerprints or voice ID or DNA and the like, they can extract that from you without consent.
- 1:07:24 J. Potter You were asked not to argue the case. The chair is arguing.
- 1:07:25 Chair Ellis No. The chair is not arguing. It is just that I understand the issue. Okay. Number two.
- 1:07:32 P. Gartlan I will switch to the ID case. This is interesting again. Identification is kind of settled back in the 60's. The analysis goes that if there is a suggestive identification by police. So let's say the police show a photo and ask, "Is this the person who did it? Is this the person who assaulted you?" If it is suggestive the case law was that out of

court identification cannot be used at trial, but if there is an independent basis from which that witness could identify somebody, then that in court identification was permissible. One of the cases that the Supreme Court took is challenging that. Whether or not there can be an in court identification if there has been an out of court identification that was corrupt and tainted. Some of it is based on new findings of neuroscience about how memories are created. Once they are created it is very hard to uncreate them. The argument goes that that out of court identification taints the in court identification. The in court identification is based on a corrupted out of court identification. The next case is the court is again in the area of other bad acts and whether or not other bad acts can come in to prove, in this instance it was to prove that the victim did not consent. One of the arguments is other bad acts can come in to show what defendant's motive was, but defendant's other bad acts should not be admitted to show what some other person was doing if that makes sense. No. I didn't think so. Anyway, it is a quagmire. I think the court has taken it because there is another case already up there with other bad acts evidence, and other bad evidence has become a quagmire probably because of Oregon Evidence Code 404(4) was past a few years ago that said there is no balancing. Without any more balancing the state is aggressively arguing that any kind of bad act if it is relevant to anything, minimally relevant to anything, it should come in. The battleground is out there. It is going to be a difficult case. Another case involves – it is a statutory interpretation case. It is about whether or not there were exigent circumstances that excused the police from getting a court order to make an audio recording of a transaction between an informant and a suspect. Finally, very important case, Hemmingway, the state is taking a head long run at a case called *State v. Hall*. *Hall* involves suppression of evidence, exclusion of evidence, and *Hall* didn't establish principles, it reestablished long-standing principles. That if police conduct an illegality – let's say an illegal seizure. If an officer makes an unlawful traffic stop and requests consent, the law under *Hall* is that consent is tainted by the unlawful stop. The state wants to argue that if somebody voluntarily consents, then whatever evidence is produced from that voluntary consent is admissible. I won't argue too long, but under the state's view that would mean that the police could stop anybody at anytime, without reasonable suspicion or probable cause, and request consent and the evidence comes in. We are going to try and resist that state view of how Oregon should be run.

- 1:11:56 Chair Ellis So how many different lawyers will be arguing the five cases?
- 1:11:59 P. Gartlan Five.
- 1:11:59 Chair Ellis That is great. I will say it again that you do a great job of letting other lawyers in your group get the visibility and the experience of arguing before the high court.
- 1:12:19 P. Gartlan Thank you. It is not that difficult of a decision. Most of them are better than I am.
- 1:12:24 Chair Ellis I was trying to stay away from that.
- 1:12:26 I. Swenson Kathryn, any updates?
- 1:12:29 K. Aylward Nothing going on in CBS. You will have three hours of hearing what we have been doing.
- 1:12:36 I. Swenson Paul, did you have anything? Mr. Chair, the only other thing is we skipped over the Deschutes Service Delivery piece, which is Item No. 2.

Agenda Item No. 2 Approval of Service Delivery Plan for Deschutes County

- 1:13:00 Chair Ellis Do you want to present that.
- 1:13:01 I. Swenson Yes. It is presented to you as an action item. You are essentially not being asked to make any significant changes in Deschutes County. Some of the issues that you

looked at were the EDP program, the Early Disposition Program, and the case numbers are so low now that it looks like a situation where we may not need an EDP contract.

- 1:13:27 Chair Ellis It got away from the group representation problem by not having any clients.
- 1:13:32 I. Swenson I think we don't know yet where all those cases went and how they are being handled, but that will have to sort itself out over time when the Deschutes County prosecutor's office kind of settles down.
- 1:13:44 J. Stevens If that ever happens.
- 1:13:45 Hon. Elizabeth Welch I am just curious is there any news on that front?
- 1:13:49 J. Stevens Everybody goes to court about every four days. Then they all come home.
- 1:13:59 I. Swenson Then there was a question about whether there were an adequate number of felony attorneys available. I think the last time you were there in June that we were informed that that doesn't appear to be a problem now.
- 1:14:14 Chair Ellis Because there aren't enough prosecutors.
- 1:14:15 I. Swenson Probably that was part of it. Certainly Tom Crabtree thought that that might be a factor. The court docket they have gone from an individual docket to a central docket, largely. There were some dependency issues and just generally quality of contact with clients in particular. I think those were the issues and the recommendation is that you approve continuing the current service delivery plan which involves a public defender and a consortium and law firms as needed.
- 1:14:55 Chair Ellis Is there a motion:
MOTION: John Potter moved to approve the plan;
- 1:14:59 Hon. Elizabeth Welch No. I'm sorry. I want to talk about EDP for just a second. I don't want to talk but ask. I read all that stuff again because it is in seven installments or whatever it was. It seems to me that there is a principle involved here about quality representation that shouldn't be resolved simply by saying that they don't have very many clients so we are not going to worry about it. I imagine that that might be addressed in the work that Kathryn and company are going to do. Shouldn't this Commission take a position on that question of the propriety of saying that a person who gives legal advice, generalized legal advice to a room full of people – is that something we want to pay for?
- 1:15:53 I. Swenson Commissioner Welch the Commission has said that by way of its own guidelines. It adopted guidelines which have been provided to Deschutes County on a number of occasions but certainly most recently. The only suggestion about the caseload is that we don't need an EDP program anymore. If the caseload remains what it is, it will be case by case appointment. There won't be a special appointment for someone who plans to come in and meet with a group of people I think during the course of this process and the discussions which have been held, the initial testimony that you received was that it was some form of group representation. Through the process that lawyer would no longer claim that that is kind of representation being offered. It is ordinary, regular client representation and he is certainly aware of that. I don't think we left the situation unresolved in terms of what the expectations would be if the program were to continue, but it appears that it will not be needed.
- 1:17:06 Chair Ellis I did think it was clear where you have that circumstance where a lawyer meets with multiple, unrelated, different case defendants, there is no privilege. It is not legal

advice anymore. At least not client legal advice. Okay. There has been a motion. Is there a second?

Janet Stevens seconded the motion; hearing no objection, the motion carried:
VOTE 5-0.

- 1:17:47 Chair Ellis Okay. Anything else on the public meeting?
- 1:17:54 I. Swenson No, Mr. Chair. We will need to reconvene after your executive session.
- 1:18:02 Chair Ellis I am going to suggest that we take a short recess. Then we will resume in executive session at which time I will read the appropriate statement that our general counsel has kindly provided. I also think our new executive director should be invited to attend the executive session. Is there any problem with that? Others are invited to enjoy the day.
- 1:18:41 G. Hazarabedian Mr. Chair, I have a question. Is anything going to happen after the executive session in public?
- 1:18:47 Chair Ellis We do have an action item: Approval of Statewide Service Delivery Plan, which sounds like a modest undertaking.
- 1:18:56 G. Hazarabedian Is it going to be in the form of a consent agenda or an individualized discussion on contracts?
- 1:19:01 I. Swenson I don't think we know yet.
- 1:19:08 Chair Ellis I am hoping for the former and I am fearing the latter. We don't know yet. I have not had a lot of success getting people on this Commission to do what I want them to do.
- 1:19:22 G. Hazarabedian Is there a time that those of us, who might want to return for any subsequent discussion, would be advised to do so?
- 1:19:30 Chair Ellis It is probably going to be about 12:30.
- 1:19:36 K. Aylward Three hours. You are in for it.
- 1:19:45 I. Swenson Maybe you could set it for 2:30, Mr. Chair. It would be close enough.
- 1:19:59 Chair Ellis Alright. We will take a 10 minute recess and resume at 11:38.

(Recess)

0:04 Chair Ellis Back on the record and I see that the auditorium is filled. The record should show that the Commission, for the last approximately three hours, has been meeting with staff going over county by county where we stand with a view to being sure that we have the opportunity to communicate to staff, at this stage, whether we believe they are acting consistently with policies that we have enunciated in the past. Then staff is to go from here and carry out the negotiations. We will get a chance at that end of the process to review the contracts as negotiated. So I would ask Commissioners if they, based on the executive session, are satisfied that staff is proceeding consistent with the guidance that we have tried to give in the past?

1:21 J. Potter I believe we are.

1:21 S. McCrea Yes.

1:21 Hon. Elizabeth

Welch Yes. But I want to say something. As the person who kvetched first about the prior process, you know what kvetched means don't you? I want to say that this couldn't have been better, more informative, it couldn't have been. It was wonderful. I now feel like I understand the relationship between the staff and Commission. I feel this is the kind of information that I should have in order to say that I am actually participating in the administration – whatever the correct word is. I just want to compliment everybody. All of the presenters and all of the hard work that you do. I am thrilled.

2:16 Chair Ellis There was one issue that arose that I would like to mention. That was staff did identify with some counties that they had received information in the nature of complaints or comments regarding the administrator in one or more counties. I think the guidance I would give is when that has happened, I think we need to communicate that to the boards that supervises those administrators. I would encourage you to go ahead and do that. Other than that is there anything else that Commissioners wish to do?

3:09 J. Stevens Barnes, I think some of the things we talked about we might want to talk about at a retreat where we have got time to think about it. For me, I have to drive home this afternoon. I think it takes more thought than we are really ready for right now.

3:28 Chair Ellis I too thought it was very helpful and at a level of detailed that I think all of us felt we have a much better sense of what is going on.

3:41 K. Aylward I have great analysts don't I.

3:43 J. Potter The next meeting is on the 15th in Salem.

3:55 Chair Ellis Yes. The 15th in Salem. If there is nothing else 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 5-0.**

Meeting adjourned

Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 10, 2011
Newport, Oregon

EXCERPTS:

Agenda Item No. 3 Presentations on Public Defense Delivery in Lincoln County

15:34 Chair Ellis Alright. We are now to the main business of the day, which is Lincoln County. We are very happy to be here. Let me just comment a little about our process and then we would be very interested in meeting and discussing issues here in Lincoln County with our guests. This Commission was formed a little over 10 years ago, so it goes back awhile. There has been some change in the mix. Commissioner Welch came on about six years ago?

16:14 Hon. Elizabeth Welch No. It more like three, I think, two and a half.

16:17 Chair Ellis When you are having fun time flies. We were charged by the legislature with trying to develop a system that has the combination of quality and efficiency. Of course that is the tension that lots of public service faces. One of the things that we have done for the last eight years is to go to communities around the state, meet with the providers and the other system participants in each of the communities, and see if we have the right structure in place. That is not to say that places where we have made a change somebody did something wrong, it is that we inherited a system that grew without any planning. It started back with the *Gideon* case and then you had all of a sudden a requirement in every criminal case where there was risk of incarceration of public defense availability for indigent defendants. That was just sort of thrust upon not just Oregon but all states. There has been a long history. In 1980 the responsibility for that shifted from county provision to state provision. When that happened the state really didn't have a structure to do much more than provide funding. It evolved with a group in the State Court Administrator's office - wonderful people who did the very best they could but without any real authority, real planning opportunity. When the legislature agreed that this Commission would come in after a year long study - and many of us were involved in that - we did have the authority and the responsibility to try to bring some planning to the process. We didn't want to let it be just, "Whoever throws a proposal over the wall, send them money." We wanted to find a way to structure, in each of the areas around the state, a public defense system that does meet those two criteria of quality and efficiency. There are several places in the state that we have made substantial changes in the structure that was in place. One you just heard about - Lane County, which had inherited an old, individual appointment system that seemed to please a lot of the lawyers in Lane County, but it really didn't please the judges and it didn't please us in terms of the quality and the efficiency - the two things that we focus on. You heard what we have just been through. Significant improvement has occurred in Lane County. In Marion County we had something somewhat similar to what we have in this county, which was a single provider consortium model. That can work. We have been very consistent in all of our work that we do not take a one-size-fits-all approach. But in Marion County we got some awful reports. They heard them so I am not saying anything that the providers in that consortium didn't hear themselves. But it was not well administered. It was too large. The quality was not there. The efficiency was terrible. We got repeated reports of lawyers not being present. When the lawyer doesn't come everybody else who does come can't function. It was just simply not an acceptable circumstance. With quite a lot of effort, including some people from the community who took a leadership role, we have structured Marion County and have created a public defender there that is now carrying a significant part of the load. MCAD, which was the consortium, instead of fighting that change realized it was not working. "We are not doing the job nearly as well as we should." They have made huge strides in improvements. They have a very good administrator. They have taken on a much stronger leadership role. They scaled down their membership. They have moved from an hourly system to a unit payment system. They are undertaking CLE training and quality supervision. So what has happened in Marion County, and I have said this to them and I will say it wherever, we have had a win, win. We had a significant structural change that has lead to significant improvement by the players in a system that was really not working when this process

started. It took a couple of years. The hearings in Marion County were in, like 2005, if I recall. I don't think we completed the process of change until about 2008. I could be off in my dates, and correct me if I am wrong, but I think that is about right. It doesn't happen overnight, but it did happen. For a while you felt like maybe the community was treating the new defender like an outsider. I think that has changed. I think the community now recognizes this is a far better system for provision of defense services than we had before. That is an example. I think we have gone to 14 communities. We have been all around the state trying to do this. We are not here to impose a system, but we are here to really work with the community and jointly develop the best system for that particular community. The models vary. We have places like Hood River or Douglas County where law firms play the dominant role as providers. Those two areas have very strong law firms, very focused on this work, so we have been happy with that. Obviously you have the very largest counties. Multnomah has a mix of a very large public defender, plus a consortium, plus specialty in the juvenile area. In Washington County you have the same defender from Multnomah in both counties. Clackamas County is a single consortium provider model similar to how this county has been to this point. We have shown a willingness to work with a range of models. Where we are really not willing to do is to just sort of sit back if we find evidence that either the quality is not there or the efficiency is not there. Our job is to try to find a way to help the community bring together the resources to improve it. That is where we are. I think everybody here should have received the draft report that staff put together. It was Ingrid, John, and I forget who else was involved.

25:12 I. Swenson Shelley Winn, who is right behind you.

25:13 Chair Ellis There we go. They came over and met with a range of people from the community to try to give us a starting point. Then what we like to do is, and this is not a cross-examination because we are all here with the same fundamental interest. We really like to hear from people in the community - their thoughts on how things are going, how things could be improved, and what the structural issues may be. Then it often takes us two, three, or four meetings. The other meetings probably won't be here. We like to kind of work through what we have learned and see if it leads us to a view that some change may be appropriate. Then we carry on that dialogue. That is our process. With that introduction who would like to lead off here? Is Judge Littlehales here yet?

26:27 I. Swenson I don't see him yet.

26:37 P. Ozanne Here he is.

26:37 Chair Ellis Judge, you just missed your introduction. Thank you for coming. Why don't we start off - did you get a chance to see the draft report that our staff did?

[Judge Littlehales noted that he had been ill for a period of time after first reading the report, and requested an opportunity to review the draft again before testifying.]

28:23 I. Swenson Guy Greco is here, Mr. Chair.

28:24 Chair Ellis Guy, do you want to come on up and we can start with you. Walk us through who participates in the consortium and your own role, how long you have been with it and that sort of thing.

29:05 G. Greco I have been doing indigent defense in Lincoln County since 1977, making \$30 an hour when I was on the list in the county and we submitted our hours so I have been involved in every permutation of the system since that time. I can go back to when IDSD and SCA administered the contract.

29:35 Chair Ellis Has it always been a sort of single consortium provider?

29:38 G. Greco No, no, no, that is just where I was going - to just give you the history. We all started out being on the list and working by the hour. Then IDSD came up with the concept of contracts. Instead of doing it by the hour, we were getting paid a certain amount of money per case and it was a fixed amount per case. It wasn't weighted by the type of case that it was. What we did was we actually broke into two groups. There were actually two contracts that were issued. I can't remember the name of the other one. We had a Lincoln Defense Consortium and, I think, there was the Lincoln Defenders. Basically one of them had maybe 60% and the other one had 40% of the total

caseload. We would routinely submit RFPs independently and individually and then negotiate the amount of fees per unit. It wasn't until the PDSC rolled around with OPDS that it became a single entity, and quite frankly it was strongly recommended and suggested that we do that. It wasn't something that was really voluntary. At the time there were more law firms. Now it is kind of half law firms and half sole practitioners.

- 31:10 Chair Ellis Two law firms...
- 31:08 G. Greco There are two law firms and five sole practitioners.
- 31:14 Chair Ellis And the law firms, one of those is yours?
- 31:16 J. Pridgeon Yes, sir.
- 31:16 Chair Ellis Let me just kind of get the landscape. How large is your firm?
- 31:20 J. Pridgeon I have five members of my firm and four of us practice indigent defense.
- 31:26 Chair Ellis Okay. And the other law firm is which one?
- 31:27 J. Pridgeon Ouderkirk and Hollen. They have four people.
- 31:35 G. Greco They have four people in the office and we display them as four providers but primarily the indigent defense is performed by two associates. The two partners combined maybe account for 10% of their load. They are the most experienced ones. One of the things we talked about with Ingrid, as far as Measure 11 is concerned, of the more experienced lawyers we have only three, him included, that really only do Measure 11 work. We did compete. When PDSC came around they moved us into a single unit. Essentially then – it has worked smoothly from our end, we submit an RFP every biennium as the group and then negotiate that way. There then was no longer the competition among practitioners internally as to how much of the work they would do. In fact, we just negotiated it amongst ourselves as to how many cases per year everybody would do. As my administrative tasks have increased, which they have, I have backed off and done fewer actual cases.
- 32:48 Chair Ellis You had four lawyers in the two firms. How many individuals participate?
- 33:02 G. Greco Five.
- 33:02 Chair Ellis Okay.
- 33:05 G. Greco People have tended to gravitate to certain areas. For example, probably six or seven years ago I stopped doing juvenile appointments and basically concentrate solely on criminal. Mr. Pridgeon has preferred to do juvenile and so he is almost exclusively doing juvenile work. We don't have any problem internally with that. I think that adds to efficiency because he knows dependency and I don't. I can focus more on the criminal work and the judges don't mind that. The way we are structured in court - Fridays, for example, are juvenile days. I was finding myself not being able to try cases on Fridays because I was just doing juvenile work. Now I am freed up on Fridays and I can do other things.
- 33:51 P. Ozanne Guy, what is the percentage of your time now with administrative tasks? You said it had increased over time.
- 33:59 G. Greco You mean the percentage of my 70 hour work week? I don't know. It varies. At the end of the month there is probably at least a half a day tabulating the statistics. Then there is balancing the books and paying people. I don't know maybe five to 10% of my overall time. It is all over the place. There are certain things that you do monthly and there are certain things that you do all the time that you don't really even think about.
- 34:28 Chair Ellis Of the five individual participants in the consortium, what percent of their practice is criminal and of that what percent is public defender criminal?

34:43 G. Greco Mr. Scholl, what percentage of your practice is criminal and what percentage is indigent?

34:52 R. Scholl They are both criminal so it is 100% criminal but 95% indigent and probably 5% retained.

35:01 Chair Ellis That is you. Is that roughly true for the others?

35:06 G. Greco No. I can go through it. I am just estimating without real hard data. Ms. Benfield - 90% of her practice is probably indigent and 95% criminal. Mr. Reynoldson is in the back. He is another sole practitioner. What percentage of your practice is indigent and what percentage is criminal?

35:25 A. Reynoldson Criminal as a whole is probably about 85%. Indigent is 75%.

35:33 Chair Ellis Seventy-five of the 85?

35:36 A. Reynoldson No. Of the whole, of my entire practice, 75% is probably indigent. It varies, depends. In some months with terminations and those kinds of things it consumes much more. But I would say of my cash flow probably 75% of it comes from indigent defense.

35:55 G. Greco I would say our other sole practitioner is probably the same. I am probably different. I have the smallest percentage of actual appointed cases of any of the sole practitioners. I would say that indigent defense is about 45 to 50% of my income and practice.

36:12 Chair Ellis Including the administrative?

36:12 G. Greco Yeah. Maybe 55% if you include that. Probably 25 to 30% of my practice is civil. The remainder is retained criminal. I do a lot of civil work.

36:27 Chair Ellis Then within your law firm can you answer the same question?

36:34 J. Pridgeon I have two associates who primarily do indigent defense at this point. One is doing probably 95% indigent defense. The other is probably 85%. Then I have a partner who probably does 50 or 60% of his time on indigent defense. I think I probably do about 60% of my time on indigent defense, but it is not nearly that large a fraction of my income. I have a civil practice that obviously makes more for me than doing juvenile work. I do juvenile work because it needs to be done.

37:12 Chair Ellis Are you able to describe the same thing with the other law firm?

37:21 J. Pridgeon Well, our impression is that the Ouderkirk and Hollen firm has two associates that do almost all indigent defense, and two partners who do 10% indigent defense.

37:33 G. Greco They do 10% of their office's caseload. I think it is probably a very small percentage of their overall work. I know Jeff Ouderkirk does some retained criminal, but I think they mostly practice civil.

37:47 Chair Ellis The associates in your office, what is their experience level?

37:51 J. Pridgeon I have one with one year of criminal defense experience and one with two years of criminal defense experience. That lawyer has a prior experience as an immigration lawyer.

38:08 Chair Ellis The Ouderkirk firm, the two associates there, what is their experience?

38:11 J. Pridgeon More experience than that - one with appellate work and one with prior indigent defense practice in Eastern Oregon.

38:25 G. Greco I don't know. Mr. Biedermann worked for the Appellate Division. He did that for five or 10 years, I don't know.

38:29 Chair Ellis So has there been a fair amount of turnover at the associate level?

38:36 J. Pridgeon There is always turnover at the associate level in any law practice that I am aware of.

38:43 Chair Ellis Give me a little sense of that. Has the pattern been the younger lawyers come and work two or three years and then move into something else?

38:56 J. Pridgeon Well, Mr. Reynoldson started in my firm and now is a sole practitioner here. Mr. Scholl started in my firm and is now a sole practitioner here.

39:04 Chair Ellis Are they among...

39:03 G. Greco Yes, and Mr. Taylor started in the Ouderkirk firm and now he is a sole practitioner.

39:10 J. Pridgeon And Ms. Benfield too.

39:16 G. Greco Yeah. A lot of them stay.

39:20 J. Pridgeon It has been a feeder system but then we also lose people to other – one of my former partners is with the Attorney General’s Office. People have gone to other places in the state. I think it’s the normal lawyer turnover.

39:39 G. Greco There is a sort of “rain attrition” in this community. There are certain people who want to go to drier places.

39:44 J. Pridgeon And per capita income is very low here as you might be aware and the cost of living is higher. It is a little tough to make a living. Sticking here depends on how much you like to look at the ocean.

40:01 G. Greco I come from the New York metro area and I have been in heaven for 35 years.

40:06 J. Pridgeon And I am from flat land Ohio.

40:08 Chair Ellis So within your law firm, how do you do the supervision, training, I mean you have these young associates coming in. They are being given a significant responsibility handling these criminal cases. How do you do that?

40:25 J. Pridgeon To this point, and this is the criticism that came out of the interviews in the draft report, it has been very informal. It is tag along with the senior lawyer to court. I have an open door policy at my office. My door is open seven hours out of eight every day. They can wander in anytime they have questions. We don’t have a formalized training thing other than CLEs, OCDLA conferences, and those kinds of things.

40:56 Chair Ellis And do they go to those?

40:58 J. Pridgeon Oh yeah. Because of that being identified as a possible weakness in our group, Mr. Greco and I are going to start an ongoing training process, if you will. We are going to meet the first Tuesday of every other month and come up with what are the issues, what needs work, who needs help, that kind of thing.

41:27 G. Greco If I could follow up on it because he wasn’t here for the earlier testimony. It is kind of like the other gentlemen talking about having pizza and we are identifying a restaurant that has a conference room in town. We will set an agenda, like Measure 11, and we will meet and talk about Measure 11, or the repo statute or how you report your cases to me. So anything and everything that we can do and if I could also follow up on that, we were in the process of doing it when Ingrid was here several weeks ago. I am not able to sit down and watch trials and evaluate lawyers. There is just not enough time in the day to do that. The people that are probably most capable of evaluating the performance of our lawyers are our judges. I have finally been able to work with them. Everything they like to do is mostly anecdotal, but I did submit a survey to them about a month ago and I have just gotten it back. I plagiarized from Marion County. Surprisingly, I think there are only maybe two lawyers that have red flags that I see as far as the judges evaluating their performance. I am going to meet with the judges. We are going to have more

anecdotal conversations with them. I am then going to individually meet with the lawyers that I say would be at the level of concern. The surveys will have helped me identify where they are weak. I will take the time to mentor them specifically in the areas of weakness. Nobody is really being criticized for not showing up for court. That has not been an issue as far as I can see from any of the judges. They are concerned that there is no motion practice coming out of this lawyer.

- 43:21 Chair Ellis There was one comment, and I don't need to get into names. That is not the level at which we approaching it. I would have to say that I was not happy to see a comment that one of the lawyers was viewed as providing a far better level of service for retained clients than for indigent clients.
- 43:42 G. Greco And I will talk to that person.
- 43:44 Chair Ellis That is just unacceptable to us.
- 43:49 J. Pridgeon We agree. You are not getting an argument on that point.
- 43:55 Chair Ellis So, structurally, you have no board.
- 43:54 G. Greco We have a board. The board consists of a minimum of one member per office. Each sole practitioner gets to be on the board, then one lawyer from each of the firms. However, when we have board meetings it is not unusual – I believe that in the two firms both partners will come. The associate lawyers are really the only ones who wouldn't participate. We have those meetings roughly every six months. They have primarily, so far, been designed to control the flow of funds to each firm because we have to make sure that we have sufficient funds to repay OPDS in the event we go under contract. Ever since we have been converted to the weighted system we get paid more than we earn. We paid back \$136,000 last biennium and we had it. We didn't have to go reaching into our pockets, so we have to monitor that constantly and we make sure we have the money in reserve. As the Lane County people said, our caseload fluctuates wildly, wildly. We have had a gap of \$55,000 worth of difference in two different months.
- 45:16 Chair Ellis I assume your population fluctuates wildly. Summer is probably double here what it is in winter.
- 45:21 G. Greco Our big months are August and September. In the summer we have an extra 100,000 people here.
- 45:33 J. Pridgeon They are not residents just people in the county.
- 45:39 G. Greco Who are boozing it up and getting into trouble.
- 45:39 Chair Ellis I don't think criminal issues are limited to residents. Are you familiar with the policy that we have adopted that takes effect ...
- 45:50 G. Greco January 2012.
- 45:51 Chair Ellis Correct.
- 45:52 G. Greco Yeah.
- 45:52 Chair Ellis What is your plan?
- 45:57 G. Greco I don't know. We have talked about having non-lawyer members of the board. I am not sure we see the utility of that. I was interested when I heard the Lane County gentleman indicate that Koenig and Diment were on their board. So they were not indigent providers but they were at least lawyers who understood ...
- 46:24 Chair Ellis That is perfectly acceptable.
- 46:24 G. Greco I have a few. There are a few criminal practitioners in the county who don't do indigent defense. I think they could make a contribution and maybe an accountant to help me count the dollars. Again, the issues we deal with are making sure we don't overpay ourselves.

- 46:59 Chair Ellis You have no bylaws. You are operating on an oral understanding.
- 46:56 G. Greco Pretty much. You have to understand that essentially what has happened – the way we are providing services isn't a whole lot different than it has been since about 1990. We kind of do it the same way we did it starting in 1990 with IDSD. A lot of it is generated by what the courts want. The court wants to have a lawyer at every arraignment. The court wants a lawyer to show up for every shelter hearing. We work with the courts because they morph into different kinds of status hearings. In criminal cases - it is probably in the report - we have to report every three or six weeks. At one point they had all the lawyers in all three courtrooms at the same time. I had to go into the presiding judge and say, "That isn't going to work. We can't manage that." What we have tried to do is basically to provide the services that the courts want us to provide in terms of where we have to be and when. That has pretty much always been the same.
- 47:53 P. Ozanne Guy, what is the total value, roughly, of our annual contract? How much money comes to you per year?
- 48:02 G. Greco Annually we were at \$1,169,000. I just got Shelley's reconciliation for the year two days ago, yesterday. That \$1,169,000 is what we were paid. We had a \$28,000 shortfall through December. We have \$55,000 in the bank. The courts have driven how we provide indigent defense. I guess we could have bylaws. Because we are a mixture of firms and sole practitioners, I think it is the firms' obligation that their associates are mentored and their associates attend CLEs. We are all competitors. It is kind of difficult for me to put my foot down and say, "I am going to do A, B, and C to you."
- 48:58 Chair Ellis Have you had new entrants into the consortium in the last five years?
- 49:08 G. Greco The way it works is like a feeder system, as Jeff Pridgeon said. There will be turnover in a firm and 50% of the time if someone leaves a firm they are able to stay in the county. For example Mr. Taylor, who is now on his own, was an associate and then he became a new, separate member when he was no longer an associate. The reason that happened was only because the person that preceded him in sole practice went to the Attorney General's Office. There was an office waiting for him to go to.
- 49:40 J. Pridgeon There isn't anybody practicing indigent defense in this county that came to this county to open up a shop to practice indigent defense. I came to the district attorney's office. Guy came to the firm. These people that we have mentioned have come through the firms and then have gone out and become sole practitioners. It is with everybody's blessing that they do that. They are all people who have proved they are competent.
- 50:07 Chair Ellis Around the state there are, I think, 14 public defender offices. Just to describe that, I think they are all non-profits who contract for a caseload. They have full-time employees working in the indigent defense area. That model has worked very well in terms of training and supervision. I think it really is a strength of that model. Have you all given any thought to structuring a true defender's office here?
- 50:56 G. Greco No.
- 50:59 J. Pridgeon No.
- 50:59 Chair Ellis I thought that would be the answer.
- 51:06 J. Pridgeon It is not necessary and I think we would have a fallout of some of the senior people.
- 51:13 Chair Ellis Walk me through what you are saying there.
- 51:13 J. Pridgeon Well, I am certainly not in a position at this stage in my career to just do indigent defense. I have a family to support and ...
- 51:25 Chair Ellis And you have a blended practice. I understand that.

51:24 J. Pridgeon I have a blended practice and I pretty much – we don't like to use the word "specialize" but I pretty much specialize in juvenile law. The way this group is constructed allows me to do that. Am I going to be an employee of a public defender's office?

51:43 Chair Ellis You might even be the manager.

51:45 J. Pridgeon As a full-time employee or not, I am not interested in that. I like doing what I am doing because I am representing the most vulnerable people and I like doing it.

51:57 Chair Ellis I understand that answer relating to your personal situation. From the standpoint of provision of service in the county, what is your thought about a defender office, if we could get to that, that would probably include some of the people that are here?

52:17 J. Pridgeon My impression of public defender offices is that they have greater turnover than we have. We have people that have been in this community for a long time. I have got people where I am representing the third or fourth generation of the same family in this county, whether it is with criminal problems or other kinds of problems. We know the community. We are all part of the community. It works for a small community like this in a much more intimate way than a public defender office, where I think you are going to get more turnover as people move through. That is just an impression.

52:53 Chair Ellis I do get the impression from each of you that until our staff came through and started asking these questions that training wasn't high on your agenda. Am I right?

53:08 J. Pridgeon I will admit to that, yes.

53:14 G. Greco I can't speak to that because I probably get 20 hours a year of criminal CLEs. I try to get them for free so I moderate them. Everybody knows that I am reading these things all the time when I am sitting in court. Again, you made of us aware that the training dynamic is supposed to come from the consortium on down. I expect that the lawyers that work indigent defense are responsible enough to fulfill their obligations to meet their educational requirements. I am pretty sure that the sole practitioners are like me. They attend CLEs. At the one we did in Newport there was a sprinkling of our members. We have a lot of OCDLA CLEs in Newport, quite a few. Those educational opportunities are available. I wouldn't want to say that we don't think of it. I think it is an obligation that every practitioner should do that.

54:14 J. Pridgeon I think we do that. I think the criticism was more about dealing with local issues: Do you sit down and talk about district attorney policies and how they affect indigent defense globally, practice in the courtroom, the application of the administrative rules for the sentencing guidelines as one judge is seeing it? I took that to – when I actually looked into that, people are doing what they are required to do by the bar. It is really kind of the nuts and bolts of how you are practicing here, and is everybody getting the same treatment from the district attorney's office and the judge and are we aware of it? I think that is the area where we have been weakest in any formalized kind of sense. In an informal sense as you have gathered, we all know each other pretty well. We have been on the same side or butting heads with each other for a long time. So you pick up the phone and you call somebody. It is pretty one-on-one in terms of working with each other.

55:27 Chair Ellis So the Ouderkirk firm is not here today I gather.

55:34 G. Greco They are not.

55:36 Chair Ellis I don't want to be unfair. As I read the report, it sounded to me like the two partners there do very little of this work, that the firms take their allotment of cases and the young associates are the ones performing the work. Is that accurate?

55:56 G. Greco That is pretty much it.

55:59 J. Pridgeon Not real young at this point.

55:59 G. Greco They are not real young. The aging of the bar. Got that from you. They were aware of the issue. I circulated the draft report to everyone. I know Mr. Hollen planned to be here. I had invited them to address the issue and I don't know why he isn't here.

56:27 Chair Ellis Let me just say as I think I indicated in my introduction, we have worked with law firms as contract providers in various places. Janet, is that you?

56:59 J. Stevens [By telephone] It is I.

57:01 Chair Ellis Alright. You are in the middle of a large public hearing here in Lincoln County. Welcome.

57:09 J. Stevens Oh, great.

57:10 Chair Ellis We were talking about one of the law firm members of the Lincoln Defense Consortia. As I understand the report the two partners themselves do very little. I think you maybe indicated 10% of their time. The associates, who may not be young but they are associates, 90 to 95% of their time is on indigent work. I guess my question is – I want to compare that with law firm providers that we deal with elsewhere in the state. One of those is the Morris law firm up in Hood River and Wasco County. Jack Morris is the partner. I am not sure whether anybody else is a partner with Jack, but it is clearly a law firm. He does a great job. Jack is all over it. He is a very focused provider himself. We had the same kind of circumstance in Roseburg in Douglas County, where Jim Arneson is the lead. He is a very admired guy in that community. He does a great job. It is he who participates when there are discussions about the criminal justice system, etc. So this is a different model than we have seen before. How would you describe it? Are you comfortable with the partners in a law firm participating in your consortium but really passing the work on to their employees?

59:00 G. Greco I don't know what the percentages are of Morris and Arneson. I am implying from what you are saying that they probably – are they doing almost exclusively indigent defense?

59:08 Chair Ellis That is my understanding.

58:09 G. Greco That would also be the Ramsdorff firm in Bend. I think historically in Lincoln County there were never any firms that were 100% dedicated to indigent defense. We grew up as practitioners having that as part of our overall practice but not all of it.

59:26 J. Pridgeon Part of that was at the request of the predecessor to Mr. Ozanne, because ...

59:40 Chair Ellis Are you talking about Ann Christian?

59:40 J. Pridgeon I think so. I think it was about that time. It became clear that we needed to have a large enough pool of people doing this so that we could meet the conflict situation when a group of people got arrested for the same thing and we had to have enough lawyers to cover all the co-defendants. We were kind of encouraged to spread it out to a size that could accommodate those kinds of cases.

1:00:04 Chair Ellis Actually the firm participants complicate the conflict issue. The two law firms are subject to the unit rule.

1:00:18 J. Pridgeon Of course. You have the two firms and then you have the solo practitioners and that is large enough.

1:00:20 Chair Ellis Unless I am missing something that is not quite catching the issue that I am asking about.

1:00:30 G. Greco Let me get to that. I can, at least to a certain extent, paraphrase what Mr. Hollen said to me. He indicated that they are providing the overhead and the office and all the staffing. The amount of money they receive is close to what they are paying for two full-time (inaudible). In other words, although the partners are not doing a lot of the work, if they have two people that are working 100% of the time on indigent defense they are getting almost two FTE worth of compensation. That is only factor to consider. The downside to me is that when I hear the judge saying that they would like some better Measure 11 defense, I am just concerned why can't these practitioners –

we have got two experienced practitioners who would be available to provide that work and they are not doing it. The other concern is that perhaps the associates are maybe doing more in terms of caseload than one FTE. So they may have too many cases and that is affecting their performance.

- 1:01:46 P. Ozanne The downside for me is that the two FTEs aren't receiving that plus the overhead. There may be something else going to the firm. We don't know about the firm because we don't have any business piercing the firm veil, if you will.
- 1:02:15 G. Greco Exactly. We don't know how much profit is over the overhead expense. When I tabulate my numbers it was an eye opener for me to see how few credits they were actually taking. I want to go ahead and paraphrase Mr. Hollen again. That is he say, "Well, if my associates told me they were working too much and were overloaded then Mr. Ouderkirk and I would take the overflow. They are not telling us that." I just want to make sure I get that out there that that is what he has told me.
- 1:02:54 Chair Ellis I don't want to sound like I came here with an agenda because I didn't. I already know you're kind of resistant to thinking of a public defender here. But as I read the report and I saw this description, I will tell you the question in my mind is wouldn't Lincoln County be better served if you had a PD office with a real manager managing those associates, who would then become public defender employee lawyers, than if you kept the model we are looking at? It does seem to me that the partners become kind of a pass through. They are not really engaged in defense work.
- 1:03:47 J. Pridgeon Not in my firm.
- 1:03:54 Chair Ellis No. I am trying to be accurate. So am I wrong? Am I missing something?
- 1:04:03 R. Scholl I have been here 20 years. You have five or six sole practitioners with a lot of experience. Those practitioners would not be part of a public defender's office. They just wouldn't do it.
- 1:04:21 Chair Ellis They don't have to be. Most of the communities that have a PD also have a consortium. You can't do it with just a PD because of the conflict issues. PDs are subject to the unit rule, but as an organizational structure designed to provide services, PDs have been pretty good.
- 1:04:47 R. Scholl I don't mean to say that a PD office would not be appropriate. I guess the point that I wanted to make was that the five practitioners who are sole practitioners are all experienced. We train ourselves with CLEs and primarily OCDLA. I would suspect that we are all members of OCDLA. That should be mandatory. We exchange ideas with people in the state. It is really a statewide system in terms of legal analysis of cases, etc.
- 1:05:20 Chair Ellis This is good.
- 1:05:26 R. Scholl OCDLA is our trainer for the most part. Then through that you link into the MPD trainer and all the resources there. That is how we get our education here in Lincoln County. There is always the exchange of information. For example if I don't have a pleading that I need I can email Guy and he will tell me if he has one or a case that he had one. For us to be well trained we use OCDLA. It is the best resource there is.
- 1:05:59 Chair Ellis You are not the problem that I am talking about. You are essentially a full-time, focused criminal defense lawyer and you are doing your thing and we are proud of you. I am focused on this model of a law firm participant with two partners who are spending really very little of their time on it. The work is being done by associates and I am asking if that is a very good model.
- 1:06:33 R. Scholl Right. The epilogue to my little story here is that the four people we are talking about, the people who work for those law firms who provide a lot of indigent defense, if they are getting the mentoring from those law firms - and I don't know if they are or not, I am assuming Jeff is doing that - they also have the statewide resources that we could use. The only thing that I see is missing, if it is missing, would be the mentoring of those fairly new associates working for those law firms to make sure that they are taking advantage of all those statewide resources and all that type of thing. That is all I have to say.

1:07:07 G. Greco One final point. I can see the concern you might have with that one entity, but I didn't get an impression from the report, nor have I gotten one from any of the district attorneys, judges, or any of the participants that we are broken. We are providing excellent service as a general rule. If we are not broken why do you want to fix it?

1:07:32 Chair Ellis Let me read a passage that prompts this. I don't know the names of who is being referred to here but this is at the bottom of page 9. It says, "Three of the senior public defense lawyers who could provide excellent representation in all case types, including Measure 11 cases, never appear in criminal court. Two of the experienced lawyers who do appear seem apathetic and one of them provides obviously better representation to retained clients than to public defense clients. Neither of these latter two attorneys files motions or takes cases to trial." I am not here to go after any particular individual. I look at that and say is this a system that is really providing quality representation? I have to say that those sentences, if true, indicate no. Let me go to one other subject here.

1:08:33 J. Pridgeon One of those three is me. I don't do criminal cases. You can't even do good juvenile work in this county because all of your kids live someplace else because we don't have any resources here and you have to try and keep up with them all across the state. I don't do criminal cases because I have my hands full.

1:08:59 Chair Ellis Okay.

1:08:59 J. Pridgeon That is for me. As to the other two I can't speak to that.

1:09:05 I. Swenson Mr. Chair, can I interrupt? Judge Littlehales has a hearing at 10:30. Can you hear from him and then return to this discussion. What is your preference?

1:09:15 Chair Ellis Okay. I tell you what. Let me ask one other question and then we will bring Judge Littlehales up. I don't mind making this a community deal. It doesn't have to be one on one. I did want to ask this question and it appears at page 11 of the report. I think it is an area in which you are going to be the responding person. It says, "However it appears that while agreeing to a contract that valued cases appropriately" – this is the contract between the consortium and OPDS - "the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms."

1:10:16 G. Greco I don't agree with that. I don't think that that is accurate or true. It is accurate in the sense of how we compensate ourselves internally. But I would differ with the suggestion that the Measure 11 cases are then pushed on to the less competent lawyers or associates because of that. We think in terms of volume and not in terms of weighting the cases, okay. Bottom line is that our overall compensation will depend on that mix. In other words, we are holding money back because we don't know what the compensation is going to be because the cases come to us randomly. But we assume that overall, since we all agree to do a certain percentage of the volume ...

1:11:10 Chair Ellis That includes the heavy cases.

1:11:14 G. Greco Yeah. They are going to average out. But some people are willing to make sacrifices. He does juvenile cases. I don't begrudge him that. I don't know how difficult it is anymore because it has changed. We generate a lot of review credits. There is a lot of revenue that comes in from review hearings. Interestingly enough the variation of that has to do with how often Judge Sanders is here. When she is gone for two weeks that goes down because there are no review hearings and when she is here it goes up. I don't do any juvenile. Frankly, juvenile was much more time effective for me. You can do a juvenile case in less time than you can do a Measure 11. I don't care. I would rather have more Measure 11 cases and continue to do that. In other words, I don't get a random assignment because I don't do juvenile. Most of the practitioners, Mr. Scholl, Reynoldson, Taylor, they get the whole mix. We had decided, and this was just a conscious decision of our board, that we would just rely on the randomness of it and we basically pay each

firm a fixed amount each month. The mindset should be you are receiving \$8,000 a month to provide the best defense service you can. You are on a salary.

- 1:12:31 Chair Ellis You don't think there is cherry picking going on?
- 1:12:36 G. Greco I responded specifically to that paragraph by email to Ingrid. A DUII can take way more time than a Measure 11 case. Especially now if you get a third offense you are going to trial because that person is going to lose their license for life. Half of the Measure 11 filings settle out of Measure 11. You get a plea offer that takes your client out of Measure 11 you are done. So I don't necessarily think the weighting system is necessarily commensurate with the amount of time involved.
- 1:13:12 Chair Ellis I am going to agree with that on any individual case. I think we feel that over time and with a reasonable population of cases...
- 1:13:23 G. Greco I don't see any cherry picking at all. We have described the way the delivery system is working. The Ouderkirk firm has got two full-time indigent lawyers. There is no cherry picking because they take what they get.
- 1:13:37 Chair Ellis Let's stop for a minute. Judge Littlehales I want to respect your time. You guys can stay here if you want.
- 1:13:47 J. Littlehales I had it in my notebook. I have to apologize. I really wasn't sure what this hearing was all about. I did read and responded on the 25th to Ingrid. As far as reading the draft and any comments that I had, I didn't have much of a comment other than there was an error in there.
- 1:14:20 Chair Ellis Thank you for joining us. We are very interested in hearing from where you sit what your observations are as to – we are not talking about individuals. We are talking about the system as a whole - the provision of service to indigents accused of crimes. Do you feel like the quality is good? Do you feel like there are ways we could improve this system? What is your sense?
- 1:14:50 J. Littlehales I think that overall they are doing an adequate job. I have been doing this since 1969, so I am not a newbie in this. I have watched the different systems that we have had on indigent defense long before you set up the statewide system. The new lawyers come in and in the past they were getting a lot more mentoring. Our big concern, and even with some of the ones that are doing Measure 11, is that you have people who aren't that familiar with the Evidence Code. I am talking about the three, Hollen, Ouderkirk and Jeff Pridgeon, experienced lawyers, but they are not that experienced because they are not doing Measure 11 kinds of cases, particularly when you get into child sexual molestation cases. You have a lot of Evidence Code issues and you look out there and say, "Well wait a minute. Have you explored that?" They don't come into court. It is their newbie guys and gals that come in. Overall they are doing a good job. I would like to see more mentoring in looking at the case when it initially comes into the office. It isn't just indigent defense but it is also the district attorney's office too - that you evaluate your case based on the resources that you have. We are seeing a lot of cases go to trial that should never go to trial. On your DUIs you are kind of locked in because you can't negotiate them unless you have a second charge. The DA's office will usually throw in a couple of complimentary recklessly endangering things. They can throw those out and let the person plead to the DUI. I have had a number of cases in the last three or four years where we have gone to trial and it hasn't been in the best interest of their clients. By the time I hear the whole case, I am hearing a lot more than I would have heard if I had gone in for a plea and sentence. In a plea and sentence you get a real watered down version. You get the PC report, oftentimes, as the only factual basis you have. You go to trial and you find out this old guy was stalking these young cheerleader girls...
- 1:17:15 Chair Ellis You sound like the piece in the paper this morning about Judge Ken Walker. The molestation case and the defendant makes an impassioned argument why he shouldn't be sentenced. Judge Walker, according to the paper, says, "Well, I wasn't sure what I was going to do before I came in but you didn't help yourself."
- 1:17:38 J. Littlehales Exactly.

- 1:17:38 G. Greco If I can interject here for just one minute on that. One of things, and this is a compliment, I think, to our bench, is I have no sense, and never had any sense, that an individual is getting a more serious sentence if they go to trial. Our judges are really good about that. I have done 25,000 cases and I have not seen – I mean obviously if you get convicted of more counts than the plea bargain that is another story - I have not seen anybody getting punished for going to trial. That is something that I think we have to counsel our clients about. If you want to see the horses run that is your business. It is your right to go to trial. I am not going to stop you. The only time you tell them they are looking at a worse outcome is if they are rejecting a plea bargain that is going to expose them to less time than they could get. I just want to interject that.
- 1:18:24 J. Littlehales I appreciate that. There is a factual basis for the plea as you well know, and then there is an exposure to what really happened. When you have the victims there testifying that this person was doing certain things and it scared them, as opposed to a lot of stuff we see where there is disorderly conduct and people with a mental illness. They are just being nuisances. One gal we have sits over on the JC Market bench stark naked yelling and screaming at the people coming in - a big nuisance and a problem in our community but not a real danger to the public. After I have seen some of these trials I become quite aware. I don't punish them for going to trial, but they just gave me more information than I would have had before.
- 1:19:17 Chair Ellis An issue we have talked about this morning is one of the law firms that participates in the consortium has two partners who spend approximately 10% of their time on this work. They have two associates who spend 95 to 100% of their time on this work. That is a different law firm model than we have seen elsewhere in the state where some law firms provide wonderful defense service but the partners are the real leaders on it. Yes they will have associates but the partners are actively involved supervising, mentoring, and so on. Do you have any reaction to whether this model of limited time partners and full-time associates is working?
- 1:20:14 J. Littlehales I don't think it is the best scenario. I think if we are dealing with Greco, Mr. Greco, he is up to speed on all this. I am not sure that the others would be up to speed on most of the criminal law issues. As far as their mentoring you have to know what the law is and you have to be in doing these kinds of cases.
- 1:20:32 Chair Ellis I don't practice criminal but I have great respect for those who do. I know perfectly well it is as difficult, complicated, and specialized a field as any field I can think of.
- 1:20:45 J. Littlehales Sure it is. You have to keep up. You have to read your advance sheets. You have to make sure – you know the Supreme Court came out with a 403 ruling today - make sure you have read that one before you go into your next hearing. Those things are changing constantly, particularly in the area of the extended search in the stop on a DUI and the “May I search your car?” kind of stuff. That is a constantly changing process that requires you to read those advance sheets and keep up with what the Court of Appeals and Supreme Court are saying, just as you do in probate or family law. Family law has changed so much. I don't like doing [juvenile cases] anymore, although I take a number of Judge Sanders' conflicts, just because – I don't know when it started, [addressing Commissioner Welch] you probably know better than anybody - about 10 years ago the feds got involved and put in some pretty specific requirements on active efforts, reasonable efforts, and all this kind of stuff.
- 1:21:49 P. Ozanne Judge, your comments seem to be borne out by your statistics about trial rates. The felony trial rate in Lincoln County is below the statewide average and the misdemeanor is above. If I understood your point, you are observing cases that really aren't worthy of trial or taking your time. It might be happenstance of course, but do you think it could be due to the unavailability of senior people to assess the cases on either the DA's side or the defense?
- 1:22:22 J. Littlehales I think on both those two. An experienced lawyer will have client control. Sometimes you have the mentally ill that you have no control over. On those you either go with fitness to proceed or you just let them go in there and do their thing. But in many of the cases we have you have to evaluate the case from both sides. You say, “We have had this offer from the state and we make a counter offer and the best deal for you is to take this.” Now if they say “no” it is a decision whether you go on in spite of that or whether you resign. I don't think you want to push resigning all the time because that just makes another attorney have to go through the same process. I don't

think there is enough pressure by the defense attorneys as well as the prosecutors to really evaluate those cases. We have a lot of cases statewide and we can't try every single one of them. We don't have the resources. We don't have the jail space.

- 1:23:33 Chair Ellis Do you have much of an issue here with substitution requests where the client expresses dissatisfaction with the lawyer and you are in the position of having to decide, "Do we allow a substitution?" For us this can be a very inefficient, costly thing. We will have paid the lawyer and then you have to pay the new lawyer. Is that an issue that has surfaced here?
- 1:24:02 J. Littlehales I don't think it is so much of an issue. You can name the individuals because we see these people repetitively. They can't get along with any lawyer. They want to be in control and they want to tell the lawyer what to do. Again, a lot of that is mental illness. As far as firing the lawyer I have had them say, "I am going to fire my lawyer." I say, "Well, fine. You go hire your own. I am not going to appoint another one. You have competent counsel." If their concern is over a substantive issue I talk to them. The lawyer is usually there. The lawyer says they aren't agreeing on that. "I don't think we can do this." He may want to tell a different story than he told the lawyer the first time.
- 1:24:47 Chair Ellis But you aren't seeing it as a recurring ...
- 1:24:47 J. Littlehales I don't see it as a real repetitive thing. What do you see?
- 1:24:52 G. Greco What I see is it is Measure 11 driven. When you have a client in jail who is only going to be offered some substantial prison, they don't want to hear it and you are stupid. Quite frequently I will see Measure 11 cases cycle around to more than one lawyer. It is almost like they need a second legal opinion before they will walk off that plank. Again, there are the mentally unstable people but I don't see any particular lawyer in the consortium that has got a problem with it. In my experience it is like, well, I am not going to win this case. I have one right now that is going to get 140 months because the judge said he is going to give him 100. He wants to go to trial for five days. He hasn't fired me but usually at the last minute they will want to fire me.
- 1:25:48 Chair Ellis The other area we encounter that leads to a lot of inefficiency is late identification of conflicts. A lawyer gets started on a track and didn't realize that a former client is going to be an adverse witness.
- 1:26:07 J. Littlehales I have not seen that here. I think they do a pretty good job of screening out cases that they would have some kind of conflict with.
- 1:26:14 Chair Ellis Is that kind of left to the individual lawyer to read the file early and see if he or she has an issue?
- 1:26:22 J. Littlehales Absolutely. I think the lawyer has a responsibility to go through the police reports.
- 1:26:26 G. Greco We have a system internally in the consortium on how to handle that. If you get appointed to a case and you have a conflict you have a particular other law firm that you go to. We have a protocol written out of who the next person would be. We don't get the court involved and we have a standard form of substitution. We will say conflict of interest and boom. We take care of it all and the court doesn't have to worry about it.
- 1:26:51 (unknown) It would be rare to have a double payment. There are no double payments unless you have had the case for six months or so.
- 1:26:55 G. Greco There are no double payments on any substitutions. We don't have bylaws but we have a policy on how that will be portioned out.
- 1:27:10 Chair Ellis Good. Any suggestions you have how we can do our job better in respect to Lincoln County?
- 1:27:25 J. Littlehales If we could have more than just two or three who are capable of doing Measure 11 offenses and the more serious offenses. You have burglaries and others that are up there that can rack up some time if you get yourself up in the A category of the sentencing guidelines. There aren't enough when you have just the four young ones that come in to spread that around.

1:28:03 Chair Ellis The extraordinary expense issue, defense lawyers that need experts and the like....

1:28:10 G. Greco You are reading my mind. I was just thinking of that. Go ahead.

1:28:11 Chair Ellis I am interested from the provider point of view, do you feel that the process for reviewing and approving that is working?

1:28:27 G. Greco I think it works quite well. I think you have to talk to staff at OPDS about whether they feel there is any abuse of that. I can only monitor my own. I probably only apply for expenses in 10% of my cases. That is probably it. I will just give you the anecdote because I handled two murder cases last year. They were outside the contract and I got paid by the hour. In one of them – just the frustration you get. One of them I got paid \$700 for. The other one I got paid \$900 for. My expert, who helped me get my settlement, got \$6,000 to go and interview my client to establish an extreme emotional disturbance defense. I presented it to the DA and settled my case. I got paid my hourly rate and settled the case. But you are seeing this psychologist getting \$6,000 or \$7,000 dollars and you are making \$800 on a murder case. You wonder why I am doing this. I just wanted to share the anecdote so you could see some of the economic frustrations that we face. I don't see a problem with the extraordinary expenses. Staff would have to tell you if there is an issue.

1:29:45 Chair Ellis Was the Ouderkirk firm invited to be here?

1:29:46 G. Greco They are here. Come on up.

1:29:50 Chair Ellis Judge, I know you have got a 10:30.

1:29:56 J. Littlehales I do but they won't start without me. We can go a couple of minutes.

1:30:15 Chair Ellis Any other thoughts or suggestions you have? You know our job is to do the best we can, with the state resources for indigent defense, to structure a system within each of the communities that works. That is what we are here for. Any other thoughts you have?

1:30:39 J. Littlehales I think I need to be more aggressive. I think the judges are looking at that now, as far as communicating not only with Guy but the other members of consortium. I don't like the selection by the defense - what I would consider judge shopping. Our newest is out of the prosecutor's office, as is Judge Sanders. We get cases where the defense says, "My client can't get a fair trial." The person's name is Jose somebody that doesn't speak any English. He wouldn't have knowledge of that particular judge unless the attorney is saying that. Now if the attorney is saying you can't get a fair trial before a particular judge, then he really shouldn't be trying any cases before that particular judge. It is, just to me, of concern although it is getting better now. I think they are getting more comfortable with Judge Bachart. She is an outstanding lawyer, at least in my opinion. She deserved the job. She was our first female on the bench. She came out of Toledo. Has a family here in Newport. She is just a marvelous example – in fact she gave the commencement speech last year to Toledo High School. She was the first one in her family to graduate from college. I very much like our judges. I enjoy working with the bar, both the district attorneys and the defense bar, but for a while there we were getting a flurry of them. Some of it might have just been a nervousness about the fact that she came out of the DAs office. I think every judge in Lincoln County for the last 15 years has come out of the DA's office.

1:32:40 Chair Ellis At breakfast this morning we were talking about around the state there were are a lot of judges who came out of the defense practice, PD offices and the like, and they tend to be the most severe on defendants. There is no certainty about that.

1:33:00 J. Littlehales I tend to believe that judges shouldn't be severe on anybody. They should follow the law. With sentencing guidelines we don't have a tremendous amount of discretion. I don't have any defendant that I have any animosity towards. Conduct yes. I do the best I can to do my job, to be fair, impartial, and impose a sentence that is appropriate with what authority I have.

1:33:43 Chair Ellis Anything you want to support, disagree with, or add to the report?

1:33:58 J. Littlehales No. I thought it was pretty accurate as to what we have here. I read it a few minutes ago and nothing jumps out at me.

1:34:20 Chair Ellis We would welcome any written thoughts to Ingrid.

1:34:28 J. Littlehales I appreciate that. I appreciate you folks coming over. Our civil side is just as important to me as our criminal side. Although if I never get another one of those things that Judge Branford is doing down there - they have a complex litigation court now set up. We are going – he has been going since about the first or second week in January. That has a tremendous impact on our ability to dispose of the 90% criminal cases that we have.

1:35:00 Chair Ellis Unless there are other questions...

1:35:02 G. Greco Can I ask a question? I don't know if you were in the room when we were talking about this. Do you feel that a service delivery model based on a public defender office – in your view would that improve the quality and efficiency of indigent defense services in Lincoln County?

1:35:28 Chair Ellis This would be a group of full-time defense lawyers functioning as a non-profit law firm in the community. You would have a manager and whatever number of others who are full-time defenders.

1:35:44 J. Littlehales In Lincoln County we tend to be interrelated with everybody. You have many so many conflicts.

1:35:51 Chair Ellis You couldn't do it as the only provider. That is a given.

1:35:58 J. Littlehales You would have to have five to seven other lawyers that you would hope to be up to that experience level that could be doing the conflict cases. I don't think a public defender system in Lincoln County is going to be the best bet. I think a system such as what we have that is more closely monitored by myself as presiding judge and the other three judges and the contract head to make sure that we are getting the representation that these people are entitled to...

1:36:31 Chair Ellis The model that we have found that works quite well in several counties - and Lane would be an example, Marion is now an example - is a combination where you have a PD office carrying a piece of the caseload and some other form, typically a consortium of individuals, separate lawyers...

1:36:56 J. Littlehales But you are looking at counties – Lane County, Marion, Multnomah, Clackamas, Washington ...

1:37:02 P. Ozanne Coos.

1:37:05 Chair Ellis Deschutes.

1:37:05 J. Littlehales Well Coos would be similar to ours. The others have a lot of extra lawyers in them that are experienced and you could have the conflict cases dealt with. I am not sure you could do that in Lincoln County.

1:37:16 Chair Ellis Thank you very much.

1:37:18 J. Littlehales Thank you.

1:37:26 Chair Ellis I would like to take a five minute break.

[break]

1:38:46 [Janet Stevens signs off.]

1:40:03 Chair Ellis We have Mr. Hollen of the Ouder Kirk firm. Have you had a chance to see the report?

1:40:16 J. Hollen Yes. I apologize. From looking at the schedule I thought you had a fairly full schedule this morning. I had a 9:30 hearing that I went to.

1:40:21 Chair Ellis Well we took the occasion to do a lot of talking about your firm when you were not here.

1:40:30 J. Hollen That is good. I can come in unbiased.

1:40:33 Chair Ellis Any thoughts or comments you have on the report?

1:40:34 J. Hollen Lots of them. The one thing I am looking at is that there are only two firms, Pridgeon's firm and our firm. We have two associates. Alan Biedermann has been in the public defender's office doing appellate work before he came here. He has been doing – I didn't count the years but he must have 15 or more years under his belt in indigent defense.

1:41:04 Chair Ellis How long has he been with your firm?

1:41:11 J. Hollen I would say 15 years, I think, I really didn't count.

1:41:12 G. Greco Between eight and 10 would be my guess.

1:41:17 J. Hollen Seems like it has been a lot longer. When we first hired him he was doing civil work. That was when we were up the hill so that would be about 10 years ago. Then he began doing exclusively criminal work somewhere along the line. Our newest associate just became Measure 11 qualified. He has been with us for a couple of years. He seems to be doing fine. I have not heard any complaints about his performance. I am not sure who is being talked about. Other than that it would have to be the Pridgeon firm. The other thing that I noticed based on the statistics is that the more experienced attorneys aren't handling Measure 11 cases. I guess that points the finger directly at Jeff Ouderkirk and me. In the last contract and a half, the amount of work we have had to do on the indigent defense cases has dropped more and more and is down to almost nothing. That is based a lot on the volume of cases and the ability of our associates to handle them. That is really what that is based on. The other thing is whenever an associate leaves someone needs to fill the gap and then we would pick up more cases.

1:42:38 Chair Ellis So what percentage of your personal practice time is spent on criminal?

1:42:51 J. Hollen I would guess maybe 5%.

1:42:54 Chair Ellis And of that what percent is the indigent piece?

1:43:00 J. Hollen Probably half of that.

1:43:01 Chair Ellis Is the same true of your partner?

1:43:03 J. Hollen He actually has a little less.

1:43:07 P. Ozanne I am really disappointed about Jeff. He was in my first trial practice class and I expected him to continue on with all he learned in trial practice.

1:43:17 J. Hollen I will say that it is difficult at times to have your foot half in and half out. The indigent defense schedule pretty much consumes you. If you have an indigent defense case you are over here at the jail. You are back over here. Back at the jail. Your schedule is completely disrupted and always on short notice. It is difficult to run both a regular practice and an indigent defense practice. In the past we have had this situation and we have worked around it because there have been four or five of us. Whoever is going over to the courthouse can handle that appearance and can leave me free to take my office appointment with either an indigent defense client or a civil client. We have always tried to make it work for our schedules in terms of who is going to be over here. If our associates doing indigent work are able to handle it, then we will allow them to take as much as they can. That leaves us free to handle our other cases.

1:44:25 Chair Ellis Was there a time that you did a lot of criminal, or has that never been a big part of your practice?

1:44:32 J. Hollen When I began in 1976, I think they had just raised it to \$35 an hour. That was 95% or more of my practice. Over the years I have done criminal defense work. I would probably say in the last 10 years it has declined more and more as we have basically another office. We have two offices. One pretty much does exclusively indigent defense work. The other is an office more involved with civil.

1:45:11 Chair Ellis One in Lincoln City and one here?

1:45:13 J. Hollen No. One is right down here next to the jail. The other is right next to the post office less than a block away.

1:45:24 Chair Ellis So when you weren't here and we were talking about you, let me tell you the question that I put to several people. We do contract with law firms elsewhere in the state and some of them are among our very best providers, but in the ones I am thinking of the partners are essentially full-time on this. They are kind of the point persons in their communities for criminal defense. They are the ones who talk with the DAs and the judges about system and structure issues. They train, supervise, and mentor the younger lawyers in the office. It has been a very successful model. Your office is, to my knowledge and I may not have perfect knowledge here but I have been involved with this for quite some time now, is very different than what I have seen elsewhere. The partners are not playing that role at all. You said 5% and maybe 2% for your partner.

1:46:37 J. Hollen On the current contract that is correct.

1:46:39 Chair Ellis So tell me why we should think that is a good idea?

1:46:44 J. Hollen Okay. I am still involved. My one associate three or four years ago or something, had an indigent defense juvenile client complain about them. OPDS did an investigation and didn't like his performance. I supervised him for the next two years watching every case and following up. I still read, as Judge Littlehales indicated we should, pretty much every criminal case that comes off the list that looks like it has any significance. On search and seizure and the different types of search and seizure, I categorize them and put them in our computer base. We have a criminal law computer base which has the cases for warrantless stops and all these different categories of issues that might come up. We use those and my associates are aware of them and use them. I am still reading pretty much every criminal case of significance.

1:47:44 Chair Ellis But wouldn't we be better off dealing with a provider office where the senior people were heavily involved and not just marginally involved?

1:47:58 J. Hollen Certainly, yeah, you would be better off. If you could find an office that fit that model in this county I would say sure. Primarily you are really looking at indigent defense as the bulk of it. Maybe a half of one percent of the criminal cases in the county, maybe one percent or more, are retained. There is not an ability to have anybody with specific experience ...

1:48:36 Chair Ellis I would have thought with the amount of tourism you get here, both in Lincoln City and the Newport area, that there would be a fair number of high income tourist types.

1:48:55 G. Greco It varies. I would have to say 30% of my criminal practice is retained. I am pretty networked into the list, the pond, and everything. I am handling those people. I have clients in Massachusetts right now, Arizona, Washington, Nevada, and we are going to see the Seafood and Wine festival here pretty soon for all the DUIs. I am a little bit different.

1:49:22 J. Hollen Do we agree that you probably have more retained criminal cases in the county than anybody else?

1:49:26 G. Greco I do.

1:49:27 J. Hollen I don't even know who is a close second.

1:49:33 G. Greco The judges said I have the lowest percent of the indigent caseload. The judges tell me that I do more criminal cases than anybody.

1:49:40 P. Ozanne We have four or five senior people. A couple of these two are doing full-time indigent work.

1:49:50 Chair Ellis Why does it even make sense for you and your partner, and you obviously have a successful practice but it is in other areas, to even carry this indigent defense component that you have the two associates doing? Why does it even make sense for you?

1:50:04 J. Hollen Maybe Guy can give you the better percentages. I know that we are doing a very small amount now. I have been keeping up on criminal law. I have done some retained work and some appointed work. I have done it since 1976, and up until the last contract, contract and a half, we have done more. We have two associates that if we said, "Forget it, see you later," I guess they would have to go out and open their own offices. It is really no problem. It keeps the office busy and they are providing the service.

1:50:45 Chair Ellis But it doesn't sound like there is a whole lot of synergy going on here between the work they are doing and the practice you and your partner have.

1:50:57 J. Hollen They are different types. If we were to become a purely criminal law firm there would be 100%. As it is we handle all different kinds of law. That is pretty much since 1976 what we have done. We have handled indigent defense. We have handled personal injury. We have handled estates. We have handled a lot of things. I have to say from your perspective and looking at the statistics you might ask why are they involved? Because we always have been, since the '70s, but our involvement has been declining. We have an office that is right next to the jail. We have a system set up. Our secretary down there - you talk about conflicts - she checks for conflicts when the discovery comes in and brings it to the attorney's attention. The system is set up.

1:51:43 Chair Ellis And I have been told that that is working. This is not a county that has late discovery conflicts.

1:51:48 J. Hollen She spots them and brings them to the attorney's attention before the attorney even sees discovery.

1:51:53 Chair Ellis She is an administrator in your office?

1:51:53 J. Hollen She is an assistant, receptionist, the secretary.

1:52:02 Chair Ellis But she has the institutional memory and the skill set to check those conflicts?

1:52:08 J. Hollen She is familiar because she looks at all the names as they come in. She has been with us off and on for the last 30 years. We also have a database. She checks the database for names against the police reports when they come in if she doesn't know them.

1:52:29 Chair Ellis How would you describe the value added that you bring to what the two lawyers who are doing all this work do?

1:52:34 J. Hollen The question again?

1:52:42 Chair Ellis Where is the incremental value of having two partners who are not really practicing in the area but are only the contracting party?

1:52:52 J. Hollen I guess a place for these people to land. Without us being there they wouldn't be here. There is not enough money in indigent defense to attract a new practitioner to this area to set up their office. Our last associate, Dan Taylor, was lucky enough - he was with us and probably would still be except an indigent defense provider, Paul Reim, left and basically, between him and Marsha Buckley, gave him an equipped office with staff. That doesn't happen very often. Other than that I guess Kathy Benfield was an associate and then partnered with us. She is providing indigent defense. We have had other people come and go. It is difficult for us to even fill those slots when we are competing with the district attorney's office's benefits and better pay. We can't compete with the state.

1:53:45 Chair Ellis I am going to assume you are not in this for eleemosynary purposes.

1:53:50 J. Hollen No. We do make some money off of it. We do put our efforts into it. We have an investment there also. We have the building. We have the computer system. We have the staff. We have all of the equipment. We have the connection to the internet and to all of the things they are supposed to do. They are not required to deal with the payroll for the staff, the hiring and firing of the staff. They have basically a working system set up. All they need to do is practice law. They don't have to do anything administrative. That is 100% on us.

1:54:31 Chair Ellis Which is what would be true if we had a PD instead of what you are describing.

1:54:37 J. Hollen That has been a thought since 1976. What if they put in a PD office and wiped us all out? I guess I would say you would soon learn what a close knit community this is. What Judge Littlehales has described in terms of conflicts is exactly that. For example, even in juvenile someone comes in and their child is being taken away. You find out, oh yeah, the mother has been our client in half a dozen criminal cases and has actually had three or four of the lawyers in town here already. Who are you going to appoint to represent the child who doesn't have a conflict with the mother? You have the same thing with criminal cases because of so much repetitiveness.

1:55:23 Chair Ellis From your point of view, would it really matter to you that much if it got restructured with a PD office and the kind of staffing that you have in your private office now was staffing a PD office? Would it really matter?

1:55:44 J. Hollen Well, you were talking with Judge Littlehales a little bit about ages. At this point I wouldn't care if you took it all away.

1:55:51 Chair Ellis I already told you I knew your father.

1:55:51 J. Hollen The pay is so low on this and the work is so demanding that I am surprised we can keep our associates. Maybe the benefit of the PD office would be being able to provide benefits commensurate with the district attorney's office.

1:56:14 Chair Ellis As I have said before, I am not here with an agenda but I am here with questions. The other benefits are that you have institutionalized recruitment, training, supervision, mentoring, and participation in the criminal justice system as a voice on the defense side. I am not sure I am hearing those things happen very much in the model that you have.

1:56:45 J. Hollen I will answer it in this way. We do have that set up and we do have the selection process. We want to get qualified associates and we did that with Dan Taylor. We have done that with our other associates. We have not had a problem in terms of selection, training, and mentoring with our associates. We do that. I have done criminal law since 1976. While I haven't tried cases actively in the last several years, I have tried many cases and have basically kept up on the law with these topics. I don't appear in Judge Littlehales court very often with these issues because my associates do. I do have communication with my associates. At this point, yes, Alan Biedermann, who has been with us this long and his experience in the appellate office probably has – he is the go to guy when we have a question about the law. We rely on him heavily, yeah, he has got that experience. There is nothing wrong with that. He is a very experienced in terms of what the law is. He is a very experienced attorney. Who am I supposed to be supervising and mentoring that needs it in my office? We have those two associates. Now with respect to the newest one I talk to him about his cases. We talk about where to go with them and what to do. There is that going on. I have not heard any suggestion that he is not handling the cases adequately. If you want to replace our office with a public defender office to try to do the same thing, you are going to walk into the conflict problem.

1:58:27 Chair Ellis It wouldn't be any more of a conflict than your firm, which is a long-standing firm in the community, would have.

1:58:38 J. Hollen Sure. If you had a PD office with two people in it like we have two people right now who are actively handling criminal defense. If you want to have a four person office then you are going to need to make it pay, you are going to need at least 50% of the contract to handle what we handle now which is 20%. I have looked at it before and thought why don't they? It doesn't pay off with the size of the community and with the conflicts.

1:59:09 Chair Ellis We have had some communities of similar size that have had success.

1:59:15 J. Hollen Yes, Coos Bay. I am not sure how they run it down there or why they have done it. I think they have a public defender's office down there and it seems to work. I don't know what their structure is. That would be something if you could do that here. That might work. It is a little different in terms of how the population is scattered around.

1:59:43 Chair Ellis It doesn't have anything like the summer crowd that you get. It is different and it is much more stretched out geographically in a way that is very challenging.

1:59:58 J. Hollen I guess I would say, why are we a target and why are we here, and I guess it is because we have done it for that many years and we have the system set up. If we were to go, what would be gained? We have two experienced people doing criminal work. If you were to jettison Ouderkirk and me at this point and deal directly with them what would you gain?

2:00:23 Chair Ellis Take the middleman out.

2:00:23 J. Hollen Well, that is back to a good question. If it is a viable thing to do to come into this community and set up your own office and just do criminal defense work, why hasn't anyone else done it? It doesn't pay enough. If you could do anything talk to the legislature. They are pounding their chests creating Measure 11 so that all these people go to prison. Then you have to build prisons and now they are wanting to shut them down. That all sounds good when you are passing the law but think of the consequences. Recently we have a new edict that we have to go see our foster kids in situ. Now we have the attorneys pretty much pressured into going to the foster home, which is in Waldport or Lincoln City. My associate recently drove to Portland to visit his kids in a foster home. That is now being put upon the defense attorney. The suggestion is why don't you ask for mileage? Okay, well a day out of the office and I am going to get 10 cents a mile or something. Again, ask what you are imposing on the attorneys and to me it is – I hope I am not coming across too aggressive on this - it isn't...

2:01:34 Chair Ellis We are here to listen.

2:01:36 J. Hollen It isn't worth it to do all of that. The legislature, and actually you folks, keep putting more on more on us without raising the pay. I am not sure what they are getting in the valley, but we can't compete with the valley much less with the institutional people here in the county. It is a real problem. Why aren't they coming here and setting up an office? It is because it won't pay. If we shut ours down our associates would probably go to another county.

2:02:10 P. Ozanne They have figured out, as you say, in smaller communities that it does pay. Our problem - and I wrote this in the original report - as Barnes says, is how firms work. We are giving out a million and half according to Guy...

2:02:23 G. Greco One point one.

2:02:24 P. Ozanne ...over a million dollars and you are getting 20% of it. We respect you as a law firm but we can't see what is going on in your firm. We don't have any business doing that. If we have another structure we can figure out what people are getting paid, what the overhead is and where the money is going. With a firm it is difficult for us to be sure. You say you are getting a profit. I have no business asking what it is. That is why we are concerned about the firm model. As Barnes says it works.

2:02:54 J. Hollen I guess I am looking at it in terms of the benefits we have. One, Ouderkirk and I are not inexperienced attorneys. If one of our associates has a problem we are there. If one of them takes off and goes to another job we are there. We fill the gap. The reason we have not had to have much involvement in the last two years is maybe because the caseload has dropped. That is the only reason. If the caseload came back up we are there to fill the gap or hire another associate. If the associates were able to open their own office, then that is fine. We are not going to cry about that. We are just saying that in one sense we are providing a service. It is place where they can

come and start work. They don't have to deal with all of that other stuff. How much we are making on it? I have never really penciled it out.

- 2:03:50 P. Ozanne And certainly over time you have been a great service and done a lot of things. As I say, with that huge amount of money we're not imposing anything on you. We get a big chunk of money and we are responsible for managing it. We are held accountable to the legislature. We are always looking at what is the best way to do this and how can we explain if we are doing it cost effectively? I don't want to suggest that the work you have done over time we don't appreciate. I know you personally do great work. I do have kind of a mystery, having practiced a lot of criminal law for a while, but after a couple of years I wouldn't do it. I guess you are reading the advance sheets. I don't read them all the time anymore. It is tough now for anybody to keep up on it unless they are doing it in my opinion. You are more motivated than I was or smarter than I am. That is the problem when the senior people, as Barnes is saying, aren't engaged in the practice. It moves along. Common law and the courts change. As you say you are reading the advance sheets.
- 2:04:55 J. Hollen I would say if I was doing a greater volume of cases I would be even more hands on. There are some notice requirements that I would have to look up. They are being followed. I know that.
- 2:05:06 Chair Ellis Do you go to OCDLA meetings?
- 2:05:11 J. Hollen I have. I can't remember the last one I have gone to. We get all the materials for it. Generally, rather than having all of us go, we normally order the materials.
- 2:05:21 Hon. Elizabeth Welch Changing the focus here for a minute or longer. In both the report that the staff put together and in Judge Littlehales' comments, I think to me the most important issue here is the fact that Measure 11 cases are not being adequately addressed according to the presiding judge. There is a concern about that and I am not really raising that as a question to you. It seems to me that that is at least an issue. The question then becomes what can we do or what can the consortium do, not just this particular law firm, to respond to that? What is the problem?
- 2:06:15 G. Greco One thing I would like to point out. Mr. Pridgeon at the break commented on this to me. I am not sure that Judge Littlehales' numbers were accurate. We counted it and we have 13 lawyers in the consortium. Eleven of them are Measure 11 qualified and eight of them actually practice Measure 11. So it is not two or three there are eight people that are taking Measure 11 cases. Then we have the three people that you know about that are Measure 11 qualified.
- 2:06:41 J. Hollen Am I one of the eight?
- 2:06:42 G. Greco You are one of the eleven. You are not one of the eight.
- 2:06:47 J. Hollen I haven't done one recently but there is no reason that I couldn't handle one if I needed to. If it came up in our office I would. When we lost our last associate I think I took over a couple of Measure 11 cases that he had. I guess I will take issue with Judge Littlehales in this sense that Measure 11 cases are a problem. I don't know who he is talking about that hasn't handled them appropriately. No one from my office that I am aware of. No one has ever told me that my associates have had a problem. Our newest associate just became Measure 11 qualified. I will say that I don't know why you see it is a problem.
- 2:07:45 P. Ozanne We don't know either. It is a hypothesis at this point. The judge is saying there is a problem with case selection, which cases are being dealt and which cases are being tried. The numbers here would suggest that maybe that is true. There is a lower than average felony trial rate, and a higher than average misdemeanor rate. There might be a lot of reasons for that, but one could be that there is not the attention given to the Measure 11 cases in terms of evaluation and whether deals are being done at a higher rate than they should be in Measure 11 or other felony cases. That is just a hypothesis.
- 2:08:17 J. Hollen If I could address one thing that came up, in terms of when the Measure 11 cases come in and who they go to. In our office they pretty much go to whichever attorney doesn't already have a bunch

of them. You don't want to have a single attorney with a bunch of Measure 11 cases coming up for trial in one month. We try to divide them that way.

- 2:08:41 Chair Ellis I take it that their compensation isn't going to be affected whether they get a lot of Measure 11 cases or not?
- 2:08:47 J. Hollen No. They are on salary. They get X dollars per month.
- 2:08:54 Chair Ellis Other questions for Mr. Hollen?
- 2:08:52 J. Hollen I will say on Measure 11 cases I have not seen a problem with those cases as opposed to any other type of cases. As far as cases going to trial, I will say that our office took a position several years ago when we had a different district attorney that it was less time consuming and more efficient to take a case to trial if you don't get an offer from the DA's office at the very start. Their office policy was they are not going to negotiate. "You plead to the highest charge and dismiss lesser ones and by the way, for the highest one you are going to end up with 120 months in prison." There was no evaluation of the cases on their side as to whether it was a weak case. You couldn't get an answer out of them for the life of you. So, yeah, the mentoring I gave to my associates when I saw how much time was being consumed with that and dealing it with myself from time to time to try to make the deal. If you can't you are wasting your breath over there. Set it for trial. We started doing that and cases got right up to the date of trial and just as we predicted they weren't ready. They had too many cases and they were overloaded because they wouldn't deal. The other thing that would happen is at the last minute the case would get dismissed. Instead of getting something they got nothing. Measure 11 cases were mixed right in with that group. If our statistics look a little skewed right now you might look at the past practice of the district attorney's office. They are the ones who can really throw the monkey wrench in here with their policies.
- 2:10:39 Chair Ellis We are about to talk to the DA.
- 2:10:40 J. Hollen If you don't have someone down there who can evaluate the case and make a decision based on looking at the facts of the case, you are going to have that kind of problem. We had that problem for many, many years. I will say the current practice in that office is much improved. You can talk to people. They make sense and there is no iron fist above telling them, "You can't negotiate that type of case."
- 2:11:14 Chair Ellis Thank you very much.
- 2:11:14 G. Greco For all of his remoteness, he is very much on top of exactly what is going on with the relationship between the defense bar and the district attorney's office. He is hitting it spot on.
- 2:11:34 P. Ozanne Thanks for your comments.
- 2:11:34 I. Swenson Mr. Bovett had to leave, sorry. He won't be able to join us.
- 2:11:40 A. Reynoldson If I could just have a moment. I am one of the five solo practitioners, Alan Reynoldson. I have been here since 1992. I started with Mr. Pridgeon and his former partner Pat Stimac. I was with them for five years. Then I managed to get a piece of the contract. They were in the middle of expanding it and adding another full-time position. I was fortunate enough to be able to catch that. I opened my own office in 1998. In 1999, I started on the contract. I do mostly indigent defense, not exclusively. I do probably maybe 75 to 80% indigent defense work.
- 2:12:19 Chair Ellis The balance is retained criminal?
- 2:12:19 A. Reynoldson The balance is retained criminal and I do some divorce work. The family law stuff I am starting to get away from just because it is becoming more and more difficult. This is a poor area. There isn't a lot of money. There aren't a lot of rich divorce cases. You go to CLEs and you see half million dollar estates or two million dollar divorce estates. In this county you are dividing up the debts. Unfortunately, that is kind of how it is with the opportunities for criminal defense. I get maybe two or three retained criminal cases a month, mostly DUIs or misdemeanors, and they are handled the exact same way. If this area were to go to a public defender's office, I believe you

would be squeezing out a number of us practitioners. For one thing - I think it was mentioned earlier - you are in for a penny or in for a pound in this business. If you are doing only a third of your time instead of a full-time position, you are still going to be here most of the day Monday. You are going to be here most of the day Friday doing juvenile work. You are still going to have the issues that come up on a regular basis. You can't dabble in this. Either you do it or you don't.

- 2:13:29 Chair Ellis In one sense you are preaching to the choir. I think we have all been pretty consistent that we view criminal law as a specialty practice. It takes a lot of time to keep yourself current. It is not just what happens from the Supreme Court in Salem. The recent cases mean you have to be experts in immigration law and all the rest of it. It is not our vision that we want a lot of people doing it as 20% of their practice. We would rather have fewer people doing it as 100% of their practice.
- 2:14:10 A. Reynoldson Here is one thing. Talking with clients mostly with glass between you, they are going, "You are just a public pretender. You are a public defender. I can't afford a real lawyer." My response to those people is, "Pull the phonebook out." I am paying probably \$7,000 a year for phonebook advertising in our four phonebooks in our small county. This is a small place. If you make a practice of screwing your indigent defense clients, your reputation gets out. All of a sudden you aren't worth any money to be hired. There is a built in incentive if you have a combination practice to do a good job for the court appointed people, if for no other reason than it looks good for the retained people. There is a reason I am doing a good job for them. Besides what you think it should be and what it probably ought to be, for sure it is the ethical reasons, which are there. Sometimes the indigent people need to have more assurance because they don't trust anybody. I don't blame them. I wouldn't trust me either.
- 2:15:08 Chair Ellis So assume, and I will repeat I don't come here with an agenda, but I do come here with real questions about what we have now. If we went to a model where you had a PD office handling let's say 30% of the caseload, and you have people like yourself who are essentially full-time criminal defense lawyers in the consortium handling the balance, wouldn't that be a pretty strong mix?
- 2:15:39 A. Reynoldson I don't think there is enough to go around. I may be misinterpreting, and I don't want to put notions into anybody's head, but I think the main irritation is that the legislature and the board are irritated by the relatively easy case counts. The reviews, the pvs, all this stuff and of course there are no conflicts on those and you can channel those into a PD's office and there would be no conflict on those. The problem is this. Yes, I do do juvenile reviews. I do do pvs. However, that doesn't cover when I do a DUI trial. Or when I ...
- 2:16:23 Chair Ellis You're right. It does balance out.
- 2:16:23 A. Reynoldson It all comes out in the wash. What you would be doing in a PD's office is you would be channeling all of the work that makes it worth it to do this, and taking it away from the practitioner and you are giving those solo practitioners cases that are much more likely to go to trial. By the way, one thing not mentioned is this last thing they got passed last November with the DUIs, your third within a 10 year period now is a felony. You get up to 14 months in prison unless the DA's office wants to give you a break and wants to give you the 90 days, which is how it was billed to begin with. It is a 14-month sentence. You are going to have a lot more DUII cases going to trial, even though there always have been a lot of them going to trial because of the life time suspension on a third conviction, now that third conviction has the potential of sending you to prison. You are going to have more trials in those areas. If you start dividing up the practices between PD offices and private practitioners, I do believe you are increasing the workload. As it is now the costs are being shifted continually to the practitioners.
- 2:17:24 Chair Ellis I am going to take issue with you. I really don't think the history in counties where we have that mix of a PD and either individuals or a consortium that the PD is taking the high volume, low cost cases. I don't think that has been the case at all. I think, if anything, PD offices tend to take the heavier Measure 11 cases and the serious felonies.
- 2:17:55 A. Reynoldson Okay. I have never been in that situation. I am going to rely on your experience for that. My thinking is we are already withholding - what, 10% I think it is of our checks - to cover the overs

and unders. With what I am bringing in, I have to provide for probably \$3,500 to \$3,800 a month in overhead, plus pay taxes and take what I can get out of it. If you start reducing that by very much, if I bill and collect two hours a day on a private practice case, I can pretty much replace my defense contract. But I don't want to do that. For one thing it keeps you in front of the courts. There are benefits to doing this for me as an attorney. I don't want to lose that. I am just saying that there comes a point in time where the balance is going to start going out of whack. If what you are really concerned about is the way we are monitoring ourselves, I do believe that our group can address that issue satisfactorily.

- 2:18:49 Chair Ellis You use the future tense. Up until now what self-monitoring has gone on?
- 2:18:59 A. Reynoldson We are all friends. I mean with the DA's office ...
- 2:19:01 Chair Ellis That sometimes makes monitoring harder not easier.
- 2:19:04 A. Reynoldson It does but it doesn't. It also makes it easier to call up somebody and say, "What do you think?" I have no problem doing that with people. I will call up Guy and any conflicts he has come to my office automatically. I call him frequently when I have a question. That is an open door policy or at least an open door arrangement between all of us. It is not formal. Sometimes being formal isn't really all that it takes.
- 2:19:35 G. Greco Once again, in order to monitor there has to be communication. From my point of view I have to know that there is an issue. When Judge Huckleberry was the presiding judge there was reluctance on the part of the judges to identify that. We couldn't monitor because we couldn't know. Within the last 24 months, and that is how long Judge Huckleberry has been gone, the judges have been more receptive to notifying me when there has been an issue that needed monitoring. You asked if there was any monitoring. It resulted in one lawyer basically being taken off the contract because we couldn't fix it. The other one I met personally with. I take the time to do that and address the issues. After that occurred the judges were telling me there had been marked improvement. There is monitoring. That has always existed since I have been here. Somebody has to let me know what needs to be monitored. Again, I can't be in every corner at all times.
- 2:20:42 Chair Ellis The way it is set up now you are just doing that out of your communication skills. You have no authority. You have no real ...
- 2:20:56 G. Greco I don't have the authority to remove a lawyer, but if the judges tell Ingrid a lawyer has to be removed that happens. I have ways of making it happen. I don't have the authority.
- 2:21:09 Chair Ellis When you go to this board with outside representation in January will that help you?
- 2:21:16 G. Greco I don't know.
- 2:21:21 Chair Ellis How are you coming on structuring Lincoln Defense Consortium with a board and outside participants?
- 2:21:28 G. Greco I have learned a few things here today. I am going to review the modifications. I think that if we bring in some criminal defense lawyers who are not part of the consortium that is going to help. I have learned today some ideas on how we would approach it. This is a learning process. You are communicating with us and it is helpful.
- 2:21:57 Chair Ellis That is why we are here.
- 2:21:56 G. Greco I think it is doable. I didn't think of the idea until just this morning about having some people experienced in criminal law giving us the input. Again, I don't know how we are actually going to select a non-lawyer member. I like the idea of an accountant just because of the financial issues that could come up. Getting that kind of a board member isn't going to help us a lot on monitoring and mentoring and quality control, but we are working on that. I told you already we have a survey going.

- 2:22:30 Chair Ellis One of the competing themes – and I respect everything you have said - you have a life to lead. You have got to make a living, etc. We are here with sort of a public service orientation. We are trying to blend the private practice issues with the public service issues. That is why it takes us towards this notion that we shouldn't just have a collection of people who happen to be there and call themselves a consortium and let it go at that. We really do want some sense of community responsibility, some cohesion, some supervision, and some process. You know you may not have it now but sometime somebody may have a substance abuse problem. Somebody is going to be trying to hang on too long. They get too old but they are hanging on too long. There are a range of things that will happen. If you have too buddy-buddy a circumstance everybody protects each other and we don't get the quality of service, and the clients don't get the quality of service that they should. You can see where we are coming from.
- 2:23:50 G. Greco I come from a state where there was a State Public Defender's Office. When I was working in the criminal court there was just an agency that was the public defender.
- 2:24:11 Chair Ellis There are states like that. Colorado does it that way. They are very proud of their system. They are all state employees but we haven't done that.
- 2:24:19 G. Greco When I came to Oregon I was kind of shocked to see how it was done. The only point I am trying to make is you are just butting into a culture. The practice of indigent defense in Lincoln County is cultural. For 35 years lawyers who were in private practice performed the service. You heard Mr. Hollen say that we have been doing it for 35 years and providing the service. I am not opposed to what you are saying. Maybe the best answer would be that we had a statewide public defense office. That would alleviate a lot of concerns that lawyers have about salary and benefits. You could have one centralized system that is compensating the lawyers. I am not here to try to butt heads about what you are suggesting at all. It may be a very, very good thing. But you are dealing with a culture as I think Mr. Reynoldson and Mr. Hollen have expressed to you. Whether that culture has any value in a system of shrinking dollars, maybe not. You know \$35 an hour 35 years ago was still only \$35 an hour.
- 2:25:20 Chair Ellis I think you are going to agree with this comment that none of us in this room want to say we should do it that way because that is how we have always done it. We ought to keep trying to make ourselves get it to a position where it is done better. Maybe what's been done is just right. To me it is not a powerful argument.
- 2:25:50 G. Greco I am not making that argument.
- 2:25:50 P. Ozanne We have also had a track record of struggling to respect the people who have done the work. We just don't throw people willy nilly out of work.
- 2:26:01 Chair Ellis Any more comments?
- 2:26:04 A. Reynoldson I have probably said more than I should have. The five of us that are on our own have a different perspective on this whole process than the ones that are in firms. All of us have been trained by the firms. When I got here I spent two years downstairs in Judge Branford's court doing district court. There were only misdemeanors and sometimes that was a really good thing. When two of the DAs downstairs started with me the same week, for two years that is all we did - misdemeanors. Then they blended circuit and district court and it all changed. Training is an issue but it is something that we can overcome.
- 2:26:37 Chair Ellis Thanks for sharing with us. Judge Bachart is here. This is a friendly discussion. This is not a cross-examination and you are not up for Senate confirmation or anything like that. Did you get a chance to read the staff report?
- 2:27:03 J. Bachart Yes I did.
- 2:27:11 Chair Ellis Any thoughts or comments?
- 2:27:11 J. Bachart I shared with Ms. Swenson that it is extremely thorough, first of all. As far as the weaknesses and the qualification standards, I think this is certainly reflective of my comments. When I met with

Mr. Potter and Ms. Swenson that was, again, it was consistent with what I felt could be improved in the model that we have.

- 2:27:42 Chair Ellis I don't know how long you have been able to be here this morning, but anything we have talked about that stimulates...
- 2:27:50 J. Bachart I have a court trial going on so I haven't heard any of the previous discussions here.
- 2:27:57 Chair Ellis Give me a little better sense of your role. Do the judges specialize here? Do you get a broad mix or are you focused on juvenile or criminal?
- 2:28:10 J. Bachart First of all I am new to the bench. I took the bench in June of 2008. I have been here in Lincoln County longer. I started in the district attorney's office in 1997. I was appointed in June of 2008. I took retiring Judge Huckleberry's position. As far as my caseload, it is a little bit of everything. It is easier to say what it isn't. I don't routinely handle juvenile dependency, juvenile delinquency, traffic, small claims, FED. I will handle them on occasion but that is not part of my normal caseload. Otherwise it is criminal and civil, probate. I handle the domestic violence specialty court. That has only been up and running about a year in February. I handle all the domestic violence cases.
- 2:29:10 Chair Ellis Kind of the big topic that we seem to keep coming back to this morning is whether it is a value added arrangement to have one of the law firm members of the consortium, two partners who spend very little time on this work, two associates who spend a great deal of time on this work, whether that model, which we have not seen elsewhere, is a good thing, a neutral thing, or might be improved. We have talked about the potential of converting that into a true public defender. You would have full-time practitioners rather than what we have here which is the partners at 5% or 2 1/2%. Any reaction that you have to the current situation and the potential for change?
- 2:30:08 J. Bachart I haven't worked with a public defender's office. I think when I spoke earlier and was asked for input on this report and saw as a weakness maybe in the current model, that it isn't as conducive to collaboration among the attorneys that do this. There are associates that are brought in and those are the ones I see. I see the associates that are actually doing the contract work in my courtroom everyday. The senior partners out of the two big firms, the contract, I simply don't have contact with.
- 2:30:58 Chair Ellis From your point of view how does that impact you?
- 2:30:59 J. Bachart The way it impacts me sometimes is the associates who are brought in and picking up a heavy misdemeanor or contract work, sometimes - a lot of times, and this is just with all new attorneys - there is a learning curve. There is a lack of experience. That could be benefited by mentoring, okay. If the senior persons in the firm aren't doing the work, I don't know where they go for that mentoring. Who would they ask if they had a question about a guidelines issue? Who would they ask if they had a question about something that came up at sentencing or trial strategy? I haven't seen in this county even a senior partner or somebody who would observe another attorney in trial. I have had what I think is their first trial and no one there. I think somebody to guide them through the process could be a benefit. I am not here to advocate a particular model. How would that benefit me? I think defendants would be better represented if they had somebody - if they didn't have the answer, they would know where to get it.
- 2:32:30 P. Ozanne Judge, we haven't raised this yet but you have a unique perspective because of your recent law practice here before this court, right?
- 2:32:32 J. Bachart Yes.
- 2:32:38 P. Ozanne You are a judge now looking at the system and learning it. What perspective do you have on the lack of a centralized docket as a practitioner and now as a judge? Do you have a different perspective now that you are on the judge side? It is increasingly less common to lack of a centralized docket.
- 2:32:53 J. Bachart It is. As a judge I like being able to control my docket.

- 2:32:57 P. Ozanne I thought that was probably the case.
- 2:32:57 J. Bachart I do because I like knowing the case and the history of the case. I have heard the motions and when I am making those decisions then I am the same judge who is hearing the case. I like being able to control trial status knowing what is going in my courtroom at a particular time. I have trial readiness hearings and I like that. With the domestic violence docket it has really significantly impacted my docket as a whole. I am not sure how that would work with a centralized docket.
- 2:33:37 P. Ozanne Taking you back to your recent practice experience there is a trade off. It is a little more challenging. On balance, now that you are a judge, are you comfortable with the costs and benefits?
- 2:33:40 J. Bachart I am. I think we have tried to incorporate - I mean I have trial status hearings three weeks before because I am sensitive to attorneys who have three trials set for the same week in different courtrooms and not knowing what is going to go. I have tried to give certainty to the attorneys that are doing work to let them know what trial is going to go, what is going to get moved and what else is on my docket so that you know if I have an in custody Measure 11, I could tell them at trial status, "Your trial is probably not going to go." I think we all do that - I can speak for what my practice is - to try to keep them informed about what is going and what is not. I try not to have to reschedule matters.
- 2:34:34 G. Greco A centralized docket would make our lives a whole lot easier. It is never going to happen in my lifetime but it would make us a lot more efficient.
- 2:34:48 Chair Ellis Other questions?
- 2:35:50 Hon. Elizabeth Welch I should have looked up the references to Measure 11. There were some concerns raised in this report and by the presiding judge about the quality of representation or the availability of lawyers qualified to represent Measure 11 defendants. Do you have any observations? As a former prosecutor I would think you would be very aware of all of that. What do you think about how it is working?
- 2:35:32 J. Bachart I don't know the qualification standards with the state office for Measure 11. I just know when the case is being arraigned the attorneys inform me which attorney in their firm this is going to be assigned to. I do have - as far as specific to Measure 11 offenses - I think we have quality representation in this county. I don't want to say that I have a specific concern that a single attorney who is appearing on the contract is not qualified to handle that. Again, I think they present complex issues especially with regards to sentencing. What I see is some of the inexperienced attorneys who I don't think sometimes aren't utilizing all the tools available to them in negotiations with the state and sentencing. That is just an observation. When you are looking at ways to improve what we have now that could be improved. The individual practitioners have experience in criminal law. Most of them have been doing this longer than I have, but the newer ones in the firms - the only way you know this stuff is by doing it every day. The law is constantly changing. If you have senior partners who only specialize in civil work, I don't know where they go to answer those questions. That is my point. That is the same for a Measure 11 case. I don't know where they go. Do they feel comfortable going to other attorneys on the contract? Everyone is busy here and you have to multitask to take on other cases to make a living here. I am sensitive to that. That is a concern I have about a public defender's office. I don't want to lose the good practitioners. To force them into something where they are not able to make a living and stay.
- 2:37:54 Hon. Elizabeth Welch I am changing the subject. I was surprised to hear from someone in the last few minutes that there is somewhat of a tradition of judicial restraint in complaining about lawyer's performances to their employer or to the state - that wasn't specifically mentioned but calling Ingrid or someone in her office. As a retired judge I think it is part of a judge's job to complain. I am just wondering if there is a culture of silence here in Lincoln County.

2:38:29 J. Bachart I wouldn't describe it as a culture of silence. Again, I am just speaking for myself. Being new as a judge the learning curve is like this. I am trying to do everything that I can to keep up. There has recently been a concern that I think rose to that level. When I met with Ms. Swenson and Mr. Potter, I was asked if I would feel comfortable going to Mr. Greco if I had such concerns and I did. I do not feel uncomfortable. If I felt that a defendant was not being adequately represented, I would, and I have, voiced that concern.

2:39:13 Hon. Elizabeth Welch I wasn't trying to put you on the spot. That was just an interesting thing, by the way, so don't misunderstand me.

2:39:24 G. Greco Judge, can I flip it? My comment was that two years ago there was this culture and two years ago is when she got on the bench. Let me ask you this. Do you feel that the judges were giving a lot of feedback to the performance of the deputy district attorneys back when you were a deputy district attorney?

2:39:40 J. Bachart Yes. Sometimes it had to be sought out and I did it on a regular basis.

2:39:49 G. Greco You were seeking it out. My comment before you got here was in order for me to deal with problems the judges have to communicate with me.

2:39:58 J. Bachart My experience as a DA was if judges had concerns about anything to do with my performance, it would be brought to my boss and my attention promptly.

2:40:10 P. Ozanne You could seek it out. Judges don't have to come to you. You can go to them.

2:40:16 J. Potter The culture of the community sounds like it allows people to approach the judge.

2:40:21 J. Bachart Yes. Absolutely.

2:40:28 J. Potter But it is not happening.

2:40:30 J. Bachart Mr. Greco has given us the evaluations. I have completed those. I thought that was great. I welcome those and tried to be as constructive in details as possible as far my impressions. I debrief with the juries after. Everyone knows that I do it. I would welcome attorneys to come contact me to share their insights. Again, it's all about making it better.

2:41:02 J. Potter Can you expand on that? Tell us about debriefing of the juries. That is one of the areas that I hear lawyers complain about. They never get to talk to juries. They don't know what they are thinking. You can't approach them in this state. Yet you are debriefing them. What is that process?

2:41:18 J. Bachart I go in and thank them for their service. I formally discharge them and say, "Now that you have been discharged do you have any questions about the process, about the trial itself, anything that was said or done?" I am specifically not there to comment on their verdict. I discourage that. I tell them that I would invite any feedback regarding the attorneys.

2:41:53 J. Potter Are the attorneys there?

2:41:53 J. Bachart No. I ask for feedback that they would like me to hear that I could share with the attorneys or the courts, anything that we could have done to make their service...

2:42:07 Chair Ellis Judge Kantor does that and then he goes one step further and says, "Would any of you want to meet the lawyers?" A few of them will do it and it is very informative.

2:42:21 J. Bachart I had a request from counsel in a civil case that I did. They wanted me to specifically ask that and I did. A few of the jurors came out – it was a week long trial - and spent some time with the attorneys and it was great.

2:42:36 Chair Ellis If you have a split verdict the dissenters always want to talk to the lawyers.

2:42:40 J. Bachart It was very helpful. I would welcome attorneys - I don't do it until after sentencing - to meet with me and I will share whatever the jury says.

2:42:47 Chair Ellis Have you been through an election cycle yet?

2:42:52 J. Bachart I was appointed in June and ran in November and it was uncontested.

2:42:56 Chair Ellis You are good to go. You have six years until the next one.

2:43:01 R. Scholl Have you ever had a juror tell you about a prosecutor or defense attorney being just terrible? Didn't like them?

2:43:06 J. Bachart Yes.

2:43:06 R. Scholl What did you do with the information?

2:43:08 J. Bachart Reported it to Mr. Greco.

2:43:16 A. Reynoldson(?) One thing is that the judges have historically been from the district attorneys office. One judge I noticed while on the bench wanted to still run the district attorney's office and wanted them to do things the way he wanted them to do it. The judges are more interested in how the DA's office ran than the defense because they had never operated on that side of the table. The judicial control historically in the county was always the DAs, "Here is how we want you to run your office."

2:43:48 J. Bachart I am sensitive to that. Again, I can only speak for myself. I think I am more critical of the state because that is my background. I try to balance that. What I am sensitive to is the defendant. If the defense attorney doesn't know the sentencing guidelines, they are not properly advising their clients on the sentencing ramifications. That is huge. When they screw up it means a lot more. When I have concerns about not knowing the sentencing guidelines, if the state screws up defendant can withdraw their plea and we can start over. That is not so on the other side of the table. I am going to hold them to a higher standard as far as their ability to handle Measure 11 cases and complex sentencing issues, yes.

2:44:41 A. Reynoldson I was just thinking historically. I don't recall the judges really interceding on the defense bar's side saying you need to do a better job. If it was critical of anybody it was generally of the state. That was my impression in the past.

2:45:03 Chair Ellis Any other comments?

2:45:02 J. Potter Judge Littlehales made some mention about mental problems of clients and that there were quite a few of those. Do you hear mental commitment hearings in your courtroom?

2:45:12 J. Bachart I do.

2:45:13 J. Potter What is the level of understanding by lawyers of their roles?

2:45:22 J. Bachart We spoke about this. I don't think we do them often enough. I do have concerns. I prepare all of the orders in the mental commitment hearings. I don't ask anyone else to prepare them. I think it was Judge Hargreaves who did all the materials for us and everything and what the state hospital wants. What I find a lot of times is the attorneys appearing to rely too much, in my opinion, on the court knowing what is supposed to happen at those hearings and what their role is and the law. It is complex and I think those are some of the most complex type of hearings. We don't do them enough to really stay up on them.

2:46:17 Hon. Elizabeth Welch They are ultimately challenging. You are automatically dealing with someone who is not going to be a very helpful client.

2:46:31 J. Bachart That is a particular area that I have concerns about.

2:46:31 Chair Ellis Thank you very much.

2:46:33 J. Bachart Thank you very much for the chance to be here.

2:46:21 I. Swenson Your lunch has arrived.

2:46:43 Chair Ellis Do we have other Lincoln County witnesses? We might as well eat lunch. Ingrid, any other Lincoln County witnesses?

2:47:01 I. Swenson Nobody is scheduled. If anybody wants to say anything you are welcome to do it.

2:47:09 G. Greco We are not going to hear from Mr. Bovett at all?

2:47:09 I. Swenson He had to leave and go out of town.

2:47:17 G. Greco I wish we could hear from him.

2:47:17 I. Swenson He did speak to us and we included his comments.

2:47:18 Chair Ellis Let me just tell you where we intend to go from here. It will take several months but at our next meeting we will comment to each other what we think we learned and found here. There will be a big write up of the testimony that was given today. All our meetings are open. We welcome people coming although it won't be as convenient as this one. Then we will start moving towards our conclusions which may be that the status quo is fine. It may be tinkering. It may be more structural. Then depending on where that goes, our staff will keep interacting with the people in the community. We are not looking to impose. We are looking to stimulate a process where both sides of it are looking at the same issue and what makes sense. That is the process we follow. We very much appreciate the input. I thought this was a really interesting morning.

2:48:41 D. Taylor I am one of the local practitioners that has a piece of the contract. I am Dan Taylor. I suppose you guys have probably already heard this a lot in every place that you have been. My largest concern as a practitioner is the issue of compensation. What I am really concerned about is trying to bring quality people into the county and being able to hold onto them for what we are being paid. We just recently had a prosecutor who was fired downstairs. You probably know a little bit about that story, maybe not, but it doesn't matter. He was making over \$70,000 a year with a full retirement package, full health benefits, and for me working my office I am a public defender to the core. I have been ever since I was in law school and will continue to be for as long as I practice. My office probably brought in a little over \$100,000 on the contract last year. I have 9.6% of the contract. Out of that money I looked at my tax returns last year. I actually put \$62,000 into my own pocket. The rest of the money went out for overhead. I have part-time staff. I only have a secretary in my office from 8:00 in the morning until 11:30, then from 1:00 to 2:00 in the afternoon four days a week. That is all I can afford to pay. Continually what I am seeing is costs being passed from the courts onto us. We seem to be the weakest link in the system in terms of funding.

2:50:24 Chair Ellis Although it has been a lot better since '03.

2:50:27 D. Taylor It has been better. I can't say that it has been significant. I have actually crunched the numbers. I am making less than \$45 an hour with the time I spend and the money I take home. I would probably be better off billing at \$45 an hour than I am making money on this contract right now. Out of that \$62,000 that I claimed on my taxes last year, five hundred and eighty and some odd dollars of that per month goes to my health insurance. I have no retirement plan. I am paying for all of my own bar fees and my PLF. I try to give my secretaries a living wage for what I can. One of my secretaries has dental insurance and the other, thank god, is married and her husband has full benefits that she is able to benefit from. I try to pay my staff something that they can afford to live on. There just really isn't a whole lot left for me when it is all over and done with. Again, I think compensation is a huge issue if the board is concerned about bringing quality representation to the county. I am going to do this work for as long as I am practicing law. I think if you are really trying to recruit people to come here and stay here, then you have to be able to offer them

something more than they are being offered right now. They basically aren't making that much money. Consequently people go elsewhere. I think you see that in a lot of public defense firms throughout the state. I worked SWOPDS down in Coos County. I worked for a contract firm up in Washington County before I came down here. You would see a lot of movement in and out of those offices with new people. People were there a year or two to get their trial experience and then out the door they go. I think the under compensation that we receive now is reflected statewide. Again....

- 2:52:41 P. Ozanne What would you like us to do?
- 2:52:52 D. Taylor Advocate for more money in the legislature and emphasize that we are an important part of the public safety equation, and if you want to be able to prosecute people as much as you seem to want to and with as much money as you use for incarceration, law enforcement, prosecutor's offices, then we have to be on par with those ...
- 2:53:09 P. Ozanne In the 20 or 30 years that I have been at this, the people who do the work are the bureaucrats in Salem, and certainly since the board has been here we have been your advocates. The failure has been the individual lawyers who do the work don't contact their regular legislators. If you want us to advocate you have to talk to your local legislator. We are just basically a pass-through. We lobby on your behalf, as does John, but we need your help.
- 2:53:52 G. Greco You are the face of the legislature to him; that's why he says that.
- 2:53:52 D. Taylor Actually it's not.
- 2:53:59 G. Greco I don't know how many years ago it was, Ingrid, but I was brought up to Clackamas County to do a review of their consortium there. I was told that it was really working great and it was fabulous and that Ron Gray does a great job. I went to about four or five different offices of the lawyers. All of them were sole practitioners. All of them were working at slums. They were working in dives. You could tell that they were on the barest bottom budget. Their overhead had to be minuscule to be able to survive. The only reason I want to tie that together, and Dan may be different, is one of the things that Lincoln County has allowed me to do is I can use indigent defense money to supplement my income but I am not exclusively tied down to it. I am able to make a good living. One of the things you heard from people was that you could start with the firms and then go out on your own. In a community like this what do you do? I was on the Seafood and Wine Festival Committee for 15 years. You join the Kiwanis. You join the Optimists. You get your name out there. The local paper every week has the names of the lawyers who have handled cases. So if you are here three or four years you can build up a reputation and you can practice law and you can make a decent wage. In other words, it is almost impossible in Lincoln County to survive on what a lawyer is going to get from indigent defense. But this is a community where you can have a hybrid practice. I do quite well. I have heard some numbers and according to the ABA, I am above the medium income for lawyers in Oregon. That is only because I have a reputation and I am practicing in other areas. That is the practitioner's problem. Now maybe it is better if you had full-time lawyers in an office like you suggest. The question is can you afford it? You are going to have to crunch the numbers and decide whether or not you can rent the building and pay the lawyers and staff and decide if you will be ahead. Maybe it is as simple as that. Maybe Dan goes to work for that office and can get some benefits and can get a better wage.
- 2:55:56 P. Ozanne I think the model around the state and here in this county is that people are taking mostly indigent work. You are the unusual one.
- 2:56:07 G. Greco I am kind of like the firms. Maybe that is only because I have been here longer.
- 2:56:14 P. Ozanne It is possible to do what you have done.
- 2:56:17 G. Greco I work 70 hours a week.
- 2:56:18 P. Ozanne Most people haven't been able to accomplish that for lack of clients.

2:56:25 Chair Ellis Dan, thank you.

2:56:25 D. Taylor I am not being critical of the board. I am just trying to voice what I am sure you are hearing all over the state. We don't get much.

2:56:35 J. Hollen Dan Taylor was an associate in our firm and he was able to walk into an office ready to go. We provide a place for our associates to work and what does that consist of? He is describing the problem that our associates would face if they were on their own. Would they be better off without us providing them with a place? From the description you can say no.

2:57:00 D. Taylor I would have to say that Jeff was always available if I ever needed to knock on his door and I would knock on it very often and he was very happy to help.

2:57:10 Chair Ellis What do you suggest, Ingrid? Shall we eat? Let's go about 20 minutes and then pick up again at 12:30.

2:57:19 I. Swenson Sounds good.

(Lunch break)

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1:18:54 Chair Ellis Thank you for making me turn the page. I would like to get some initial reactions on Lincoln County. We had quite a lot of input today. John, how about you? Any thoughts?

1:19:15 J. Potter You talked a lot about a public defender and floated that idea out there. I think that was appropriate to do. The comments that I made to the judge sort of sum up my comments. To me it isn't as much about the model that we use as it is about the structure and the implementation of the structure. I think we can go around the state and we can point out successful models and unsuccessful models. They are the same models but the implementation didn't work. There are public defenders in the state that are doing a tremendous job – a majority of them. But there are those who aren't doing such a good job. There are good law firm contractors. There are good consortium providers and there are ones that needed help. It strikes me that the structure and how it is put together is more important than the model itself. In this county we may change models, but I would say before we jump into it too far we talk about the structure of any model and the structure of this one. This one seems to have nothing underneath it. There are no bylaws. There is no vision for the future. There is no training or mentoring. There is no anything other than getting the money and distributing it and then counting the cases and giving reports back to OPDS. I came away from this not alarmed by the system that they are using, but alarmed by the fact that they have no way to tell us what the system is. There is nothing there. It is just a hollow shell. I mentioned it to Guy Greco after the end of the meeting as well. When we start massaging this process, for me as a Commissioner I would want to see him coming back and filling this in, making a case for what the structure is going to look like and how they are going to implement it. You may say, "Well, John, you did that in Lane County." I argued, successfully I think, to hold on to the communist system that they had in Lane County of 50 lawyers and an administrator and everybody was in a happy place. That didn't work as it turned out and I would suggest it didn't work in large part because it didn't have a really good structure and a really good manager to manage the structure. In Lane County we now have essentially the same system in a much more compressed version with a good, turning out to be a good, manager. Maybe it is Guy who decides to step up to the plate and become a manager, which I don't think he is right now and doesn't appear to want to be. He wants to be a lawyer and that is fine. Brad, who we heard from originally in Lane County, didn't want to be a manger but he was sort of recruited and is doing a good job at it. He was given some direction and the expectations were clear. I think that if we came back to this county and made sure the expectations were really clear and set out a structure we want to have achieved that they might be able to make it. Peter may shake his head. We have a sort of deja vu of all this in this county. We have seen this. We have been here before. We have talked to people before and really nothing has changed.

1:23:30 P. Ozanne I like your structure/model distinction. We have always been rather abstract about this because we want to avoid personalities which isn't fair. Structure yes, but a manager, people to fill these roles who take it seriously. We have problems in others of the state with that deficit.

1:23:56 Hon. Elizabeth Welch I think I agree with what has been said so far. All I would say is that I think these people should be told what is the matter with what they have been doing.

1:24:05 P. Ozanne Well they have.

1:24:09 Hon. Elizabeth Welch I think that is the first step. What is the matter with what they are doing? Several people today said, "I don't like this situation with this law firm." I am really interested what it is they don't like? Are we all actually talking about the same thing?

1:24:29 Chair Ellis I can tell you one reaction that I was having was, start with CBS and they contract with this very amorphous, no bylaws group. That is what they are doing. The group includes a law firm. The law firm has two owners, two partners who are not players and then you get down to the two that are players. I found about five points of connection, no one having any real ability to do the fundamental things we really care about, the recruitment, training, supervision, mentoring and the discipline. I found not only no structure but no model. These are all nice people. No one is a bad actor in this. It is this way because, as one of the witnesses said, we have always had it this way. That is just how we have done it. Then it did strike me that this is a county where it could be a lot easier than it was in Marion County to move to the model of a defender and a consortium. I think there is a big vacuum to fill. If we went that route and got the right person to head up what would become a PD office, and might well have those two associates as part of it, I don't think Jeff would be that far out of joint, particularly if they subleased his building. In that sense I was encouraged that I think the climate is right. I thought we had two judges saying they could see that. That might well be something they would be supportive of so long as it didn't lead to one of the individual practitioners, whose is essentially full-time and as far as I could tell performing adequately, being left in the lurch. I don't see why that would have to happen at all.

1:27:09 P. Ozanne I don't think that I have much too add. I was down here. Kathryn alerted me to the issues and I knew Pridgeon and Ouderkirk as students and we came down here and told them what the problems were. I have to say that we were received far better this time and I think has been due to lots of informal communications.

1:27:37 Chair Ellis I think Shelley has probably helped on that.

1:27:37 P. Ozanne I am saying that is true. They were about ready to throw me out of here.

1:27:52 Chair Ellis It was probably your abrasive personality.

1:27:54 P. Ozanne They are much more amenable. The judges have changed and that has probably helped.

1:28:09 Chair Ellis Ingrid, what is your reaction to all this.

1:28:10 I. Swenson I have listened with interest to all of these thoughts. One piece that didn't get emphasized that maybe we need to keep in mind is that the independent lawyers that were mentioned, the five consortium people who are not part of firms...

1:28:24 Chair Ellis Two we heard from, actually three.

1:28:26 I. Swenson They do a substantial part of that caseload and by everybody's account, without any organization they are all doing good work. These are people you don't want to displace if you can avoid that. You want them to have enough of a caseload to maintain them. I think a public defender office, to be functional, would have to take a big part of that caseload and you might lose some of your very good providers. I also get a sense here, and I know you and Peter did a lot of work in Marion County to put together that public defender office. I think it would be a very difficult undertaking in this county. I don't sense that the bench here is quite where the Marion County bench was in terms of dissatisfaction. They have a couple of issues. They can identify them for you and they can identify potential solutions. I am just not sure that you want to, over the objection of so many people, try to pull together a group that doesn't have local support.

1:29:35 P. Ozanne And the big addition was we had the chief's help in Marion County. He said this was a problem and he made some calls. He made it happen. He helped us with the board and that was a big factor in Marion.

1:29:49 I. Swenson I think it would be hard. Some of the judges suggested that you look at contracting directly with the lawyers you want to deal with. That would be a model sort of like Lane County which is a consortium composed of all individual lawyers instead of with firms. Just eliminate the firms. "If a lawyer in your firm wants to join our consortium, fine, but that lawyer is going to be the designated person to take cases not whomever you decide to assign to this contract work." That is a possibility. I won't even mention my voucher proposal to you again. If there was ever a county where it would be an interesting experiment, you could simply tell the defendant, "Here is your voucher. You decide which of these law firms you want to take your case and OPDS will pay whatever the going rate is for that case." It is just a threat.

1:30:50 Chair Ellis I remember my reaction when you raised it before was I am really not sure many defendants are able to play that market function. That is almost the role that we are supposed to play which is to have really good providers available. I certainly listened and heard resistance in some quarters. To be honest, it was much less than I expected. I think it is an idea, if we percolate it and work with people, it could happen. It doesn't have to be to bring them in from outside and impose them on the county. I think if we found the right person who wanted - the Tom Sermak of Newport or Lincoln City - I think it could be done without too much disruption. I think down the road it would be a far better structure than we are looking at now.

1:31:59 I. Swenson It is a pretty small caseload here. It is a little bit different from Marion with a very large caseload.

1:32:08 Chair Ellis I understand that.

1:32:09 J. Potter How does it compare to Coos County?

1:32:11 I. Swenson That is much closer. Probably bigger than Coos.

1:32:15 K. Aylward Very, very similar, and in Coos the PD takes 62% of the caseload.

1:32:26 P. Ozanne We could start a lot smaller here. How many are there in your group, Tom?

1:32:30 T. Sermak Seven.

1:32:30 P. Ozanne What did you start out with, Tom, four?

1:32:39 T. Sermak Two initially and then added a third very quickly after that. We built up gradually to four, but four was going to be the initial business model and then we added the others as we took more cases.

1:32:57 P. Ozanne We could do it gradually with the aging of the bar. Some of these people are not going to be around.

1:33:06 I. Swenson I just wanted you to remember those lawyers who are doing good work on their own and probably are not interested in working in a public defender office.

1:33:17 Chair Ellis I respect that. In my mind I thought given the odd structure that we ended up with you could almost get to the PD model without any major disruption. It takes one good manager person and I think we could get that. Any other thoughts?

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Thursday, May 5, 2011
Salem, Oregon 97301

EXCERPTS:

Agenda Item No. 2 Commission Discussion of Service Delivery Plan for Lincoln County

- 6:25 Chair Ellis Do you want to share with us what has happened since our meeting?
- 6:34 G. Greco Lots of different things have happened. I think I mentioned to you in March that I was undertaking a performance review of all the lawyers providing services and we were in the middle of it. We were in the process of getting the survey to the judges. We pirated it from the Marion County questionnaire that had been formulated. I think plagiarism is great in this business.
- 7:10 Chair Ellis Remember that imitation is the sincerest form of flattery.
- 7:16 G. Greco What I did was I graded them in kind of an unscientific way. I was able to identify, shall we say the few lawyers, and they are a minority, where the most concerns arose. I then sat down with all four judges and myself so that I could communicate – they gave me comments and I wanted them to be more specific. I questioned them, “If this is a problem do you have any suggestions on how to fix it?” I took some copious notes. We identified three people that needed to be contacted by me. Yesterday I just finished contacting the third one with the minimum of an hour with each one. Each of the three lawyers has different issues. They are not the same. They are completely different issues, but why do I bring that up? The next request for proposals that you will see coming out of Lincoln County will be an entity that will be a non-profit corporation. We have drafted some bylaws. We cleaned them up on Monday a little bit. I forwarded those to Ingrid. We are not deaf. The corporation will enter into separate agreements with individual lawyers. The firms will not be basically contractors.
- 8:50 Chair Ellis What is your structure going to be in terms of a board and who picks the board?
- 8:55 G. Greco Exactly like we are required to do. What we have done is we have taken a senior member of every office. We have a majority of sole practitioners, but one representative from each office, with the exception of me, would be our initial board of directors. If I am going to be the administrator – this is a work in progress - I probably don’t want to be on the board. I want to be able to slice and dice and make the hard recommendations that people may or may not like and then not have to vote on them. I would be sort of the executive director role. Then we will have two members that are not affiliated with and do not provide services.
- 9:45 Chair Ellis Let’s pause. Will your initial board then be the appointing source for the additional board members? Who will be the appointing source?
- 9:57 G. Greco You got ahead of me. My first thought was that perhaps the Board of County Commissioners might be willing to do that and they declined. Their suggestion was the Lincoln County Bar Association. We are all members of the bar association, but I would expect that you might even narrow it down to the president of the bar association or a special committee of the bar association, because it will not be any participant who is providing services. We know by January 1, 2012 that is the way it has to be so that is the way it will be. There will be non-members and they will be appointed by someone outside of us. Again, plagiarism. What I did is I went and reviewed a lot of the materials. I spent an entire day drafting bylaws. I picked and chose what I thought were the best things that the various counties had.
- 10:53 Chair Ellis Were you working with Paul at all?
- 10:53 G. Greco Paul had sent me the CLE materials from when they had the practice management thing. There were a number of examples of bylaws. Again, I picked and chose what I wanted to have. Part of

that same day was, and I don't know if you have reviewed it, but we have created an agreement between each individual attorney and the corporation. It sets forth what the expectations are. It will set forth what the compensation will be, things like having to carry malpractice insurance, expectations for client contact, how soon you have to see your in-custody clients, that you have to personally attend initial hearings and, of course, I would like you to pay particular attention to Section 10 because it provides for numerous ways in which a lawyer can be terminated by the board of directors if their performance isn't up to par. So, for example, if Joe Associate is underperforming the board of directors would have the authority to terminate his providing indigent defense services. If his employer in the firm wants to keep Joe Associate on that is fine. They are not going to have the say as to whether or not that associate is providing indigent defense services. It is going to be central. I learned a lot in the evaluation process. You mentioned underpayment and that was something that was really ringing in my ears yesterday. We have one fellow who is probably doing too many cases and he is not being paid hardly anything. He is just a trooper and just wants to work real hard.

12:46 Chair Ellis

Is he one of the two associates in the Hollen firm?

12:53 G. Greco

That is just not going to happen anymore. One of the things that I have discovered is that there has been a real seismic change in the relationship between the judges and me, not the relationship – I have the same relationship - but they are talking to me now. What has happened in the last month is that I am getting debriefed on specific trials when they never did that before. They had a robbery case and the trial judge was disappointed in the performance of the lawyer who worked the case. She called me up and said, “Can you come over and meet with me?” We spent an hour and a half talking about what went on in that trial and where she thought there were problems in the performance. They didn't do that before. Just yesterday I was on the phone for 30 minutes with another judge. Again, we were talking about specific objections that weren't being made and that type of thing. Now I can connect that you need to improve this or you are going to have trouble. One of the lawyers - it is interesting - all of the judges say his cross-examination is horrid. Across the board they all say the guy doesn't know how to cross-examine. When I met with him I said to him, “Have you ever been to a CLE on the art of cross-examination? No? Well, that is where you are going, to go a CLE on the art of cross-examination.” I used to spend all day with Irving Younger.

14:23 Chair Ellis

I attended Younger's lectures.

14:26 G. Greco

Yeah, they were a joy. He is not around anymore.

14:26 Chair Ellis

He is on tape.

14:30 G. Greco

When I get back to Newport, I am going to go online and I am going to find a cross-examination seminar and he is going to attend it. That is the kind of hands on that you are going to get from me and hopefully whoever succeeds me. We are going to pierce the office walls. But the other thing is, but I am going to have to talk to the judges, sometimes you have to be careful what you wish for. They have had it really easy. They always have a lawyer on call. Whenever there is an appointment, whether it is a shelter hearing or in custody arraignments, they know who it is. They don't have to worry about assigning the cases because it is a lottery. If you are on call that day you get those cases, which, of course, has created problems because we have got some lawyers overworked. We have some lawyers handling the Measure 11 cases who shouldn't be handling them. We have got to go to a more selective case assignment. We have got to assign the cases according to the abilities of the lawyers. We can do that if we centrally run this. For example, there are probably two who shouldn't be doing Measure 11 cases. I think, Judge Welch, you were concerned about whether there are enough lawyers to do Measure 11 cases. Yeah, there are enough lawyers to do Measure 11 cases. We just have to assign them differently. I have got to quit doing Class B misdemeanors and Class A misdemeanors and take on more Measure 11 work. If I cut down my volume down, on the cases that I take, I can handle them. Measure 11 cases are not necessarily harder because they are also very ripe for negotiation, okay, because of the hammer. There is another lawyer who the judges say doesn't file motions or try cases, so let's get him a caseload where he is doing drug cases and maybe DUII. You have to try those cases and you have an active motion practice. We have just got to readjust and it has got to come from a central location. Again, with the random assignment that we have you have no control over that.

To a certain degree it is going to inconvenience the judges a little bit. What is going to happen is we will probably still have an on call lawyer who will be there for the arraignment, but that lawyer will not necessarily get that case. We will have a system in place depending on what type of case it is, "Your Honor that case is going to go Ms. So and So." Or, "Because of the type of case it is going to go to Mr. Greco." That will inconvenience them to a degree but I am sure it is something that is solvable. I think that is what we really have to do is get the right lawyers doing the right cases. We also have to monitor and control the number of cases. I was talking to Paul. I know the standards for full-time equivalence are old, but we have got to come to grips with what an FTE is and then it is, "If you are doing .7 FTE that is this much work. Are you doing 100% FTE? Well it is this much of these types of cases but no more." That is how we have to approach compensating the people. That is very doable.

18:03 Chair Ellis

A couple of comments. First of all I am very happy to hear what you are doing. I think you are making some correct moves and we appreciate that. I think you stayed for the whole meeting or maybe you missed the part where we talking....

18:24 G. Greco

I said earlier that I read the minutes after I left. We left at lunch time.

18:32 Chair Ellis

You probably recall that in those minutes Commissioner Ozanne, who once held Ingrid's job as executive director, had been in Lincoln County, and he didn't put a date on it, but my memory is it being 2003, and had a lot of questions about the structure or absence of structure, supervision, absence of supervision, etc. He expressed the view that not much had changed in eight years.

19:07 G. Greco

I read that.

19:05 Chair Ellis

He was not happy about that. Hi Janet.

[Commissioner Stevens joined the meeting by telephone.]

19:20 Chair Ellis

We are on Item No. 2 of the agenda relating to Lincoln County. Guy Greco has been here and has talked to us about some changes there they are in the course of making, including incorporating as a non-profit and moving to a board with outside representation and a much stronger structure in terms of his role as administrator and evaluation and review of the lawyers. That is where we are. I was just dialoguing with him on the meeting we had in Lincoln County that I think you attended by phone.

20:08 J. Stevens

Right.

20:13 Chair Ellis

One of the things that I am sure came through was a concern that several commissioners had that within your consortium you have the two law firms, and within the law firms, at least the Hollen firm, the partners don't play much of a role in indigent defense but two associates do. The worry is when you have a law firm as a consortium member there is very little visibility of what is happening because you have got the entity as the participant. Within the entity decisions are made as to who is going to be doing the work and in that case it was – I don't want to be judgmental yet – but it was different than what we have seen elsewhere in the state, that the partners played almost no role. What was your reaction to all that?

21:20 G. Greco

I agree with you.

21:20 Chair Ellis

What do you suggest we try to do? Let me just comment. I have no criticism of the partners. They are good people. We are just trying to find the right structure here. Go ahead.

21:42 G. Greco

I don't know that I can control what the lawyers are going to be compensated. What if I am an associate in a large firm and Safeway wants me to do all of their corporate work. They want to sign an agreement with me to pay me \$10,000 a month to do their corporate work.

22:05 Chair Ellis

In my law firm they couldn't do that.

22:06 G. Greco

I am assuming that a law firm could say that you are going to sign this agreement with them, or they are going to agree to give you the work but you are not going to get to keep all the \$10,000. I

don't know that I can say that every penny - here is where Hollen would come in and say, "I am providing overhead for these folks. I am providing the secretarial. I am providing their malpractice insurance." I don't know how we can ever control what the associate's relationship is with the firm with regard to money, but I think we can control what the associate does in terms of the cases that the associate is going to handle and how many and what kind. I think that this structure would give the organization final say on how much work they did and what kind of work they did.

- 22:58 Chair Ellis I don't know the two individuals, the associates, but would it be possible for them to think in terms of going independent of the law firm?
- 23:14 G. Greco I think that is on their minds. I don't know whether that could be prevented. I can only kind of walk through a scenario. They feel that if they get the revenue on the cases they are assigned in their agreement that they would have enough for them to open up an office. So they tell their employer that they are going to leave and I guess it would be something that the board of directors would have to discuss as to whether or not this would be terminated because of that. I would anticipate that the Ouderkerk representative on the board would have to recuse himself from voting on that. Then the board of directors would have to decide whether they would be allowed to do that. There is going to be no restriction in the contractor agreement. There is nothing in the agreement that is going to preclude someone from leaving the firm. It may be that the natural consequence will be that that firm won't be able to do that work anymore. I don't know. That remains to be seen.
- 24:30 Chair Ellis It looks to me like a troubling relationship. I am not, as I said, critical of the partners. They evolved the way they have.
- 24:37 G. Greco And I think the difficulty we have is that we only now have two firms. We had far more sole practitioners in the county doing the work than we did before, but at least the Pidgeon firm, even though Judge Branford has some resentment, all those lawyers are pretty much doing an equal amount of cases. Their case counts are roughly equivalent. There is a little bit of difference but the partners have rolled up their sleeves and they are doing the work too. Hollen is the only office where they virtually do zero. The two partners do zero.
- 25:17 Chair Ellis He was candid about it.
- 25:23 G. Greco I can ask you a question. I wouldn't think that we would want the non-profit corporation to insist that they divest themselves of associates. Is that what you would want to see?
- 25:35 Chair Ellis I am trying to find a way to work together and not have a collision, but I do want to end up with a structure that actually has a structure, which I don't think we had previously, and I am concerned that we are kind of dealing with a black hole. The contract or the relationship you have is with a firm. Then there is this layer that is not participating in defense. You have two people down the chain doing all the work. From our point of view that just strikes me as not a very healthy relationship. Let me ask you about another area. At several points in the discussion in March we raised the issue that the structure as we then understood it, and this is before the improvements that you are talking about, didn't seem to have much in the way of training, supervision, mentoring, and quality review. You're addressing some of that in what you have told us already and I heard that and appreciate that. One model that we have talked about, without saying we are definitely going to this way, would be to have a consortium and a public defender where you would have a non-profit with two or three full-time lawyers. Has there been discussion among consortium members about their reaction to that since our meeting?
- 27:37 G. Greco No. None of the lawyers that are currently providing services wants to volunteer to be in that office.
- 27:43 Chair Ellis If you know that then there has been discussion.
- 27:47 G. Greco We have now started and will continue monthly lunch meetings with everybody. Everybody has to attend and so there will be mini CLEs. The consensus that I have gotten from every single lawyer that is participating and providing services is they don't want to be that office. So if you

are going to get that office, you are going to be recruiting somebody from outside the current service providers.

- 28:22 Chair Ellis They don't want to be in it because - what is the thinking?
- 28:27 G. Greco They would rather engage in the private practice of law.
- 28:33 Chair Ellis Okay.
- 28:37 G. Greco I know that there are at least four people and they are the associates who probably are at 95 to 100%, but even those associates are able to take retained clients whether they are in the criminal law area or not. I am not going to do that. Indigent defense is half of my work. I have got a burgeoning practice with other things. Again, I think Scholl and Benfield have actually moved more to a 100% situation. But I have gone to people and asked if they want to be the public defender. They unanimously say, "No." They don't want to do it.
- 29:21 Chair Ellis What do you suggest we do to get away from this situation that I think I have accurately described where we are dealing with partners in a law firm.
- 29:33 G. Greco Tell us not to fund the associates. Tell us it is not acceptable and you are not going to give us any money to give to them for that. That is the only thing I can say. Turn the money faucet off.
- 29:45 Chair Ellis And then what do you think happens? Do the associates find a way to become independent?
- 29:48 G. Greco I have some confidential things that I know that I can't discuss about what is going to happen.
- 29:57 Chair Ellis Whatever you say here stays here. You know that.
- 29:58 G. Greco Well I am being recorded. If you want to talk off the record let's go to the men's room.
- 30:10 Chair Ellis I think that violates the public meeting law.
- 30:13 G. Greco ORS 192.804(3). We go into executive session all the time with the PLF. I think that at least one of those associates would probably hook up with somebody else and then be a firm of two people providing indigent services. This is where I got into the cultural and historical thing in March. I have probably been working for you, I think, for 16 years. I went back through my computer and that is how old my files are that I have been coordinating this consortium. But prior to that we looked to Salem to – we were all competitors. Then Judge Huckleberry used to be very proactive and if he thought somebody wasn't doing the job he would tell Ann Christian and they wouldn't get as much work. It was Salem that was dictating who was getting the compensation and who was not. We were all just little beavers competing with one another. What you've done, and I don't begrudge this, you have taken that level of administration and you want to move it down to the county level. You want us to be doing that kind of administering. You are getting us to move, why? Because you are threatening to put us out of business. Peter Ozanne did not sit my office in 2003 and say, "If you don't do it my way it is the highway." It is nine years later and we are still running along on the interstate. The point is that we are going to make these changes because you are telling us we need to make these changes. I can see the validity. I am not going to be a rebel and say it is all invalid. There are advantages to what you want to see happen. My concern for me is is it going to reduce my revenue? Am I going to work so hard running this show that it is going to cut into my other income? That is what I have got to think about. You are pushing us to do this because you are waving the public defender's office and that doesn't frighten me. It frightens the more marginal practitioners out there. I am going to be fine if you have a public defender's office, but some people won't be. Again, getting back to the Hollen/Ouderkirk situation, you have just got to say, "No." I can't tell them not to have associates. I am never going to be invested with that kind of authority but you do. You can cut off the spigot and say, "We will not let you fund those associates." I doubt that Mr. Ouderkirk or Mr. Hollen are going to be willing to become even 50% FTE providers.
- 33:26 Chair Ellis I doubt that too.

- 33:31 G. Greco The other side of the coin is Jeff and Jeff go to work and do some indigent cases here and then PDSC would be more comfortable funding this. They are my competitors. I am not in a position to say, "By the way you can't get any of this money anymore." But you can do that.
- 33:51 Chair Ellis John or Betsy, any comments?
- 33:52 J. Potter Go back to your original comment when you were talking about this new structure. I think you used the word "if" I am the administrator of this. It sounds like that is the assumption going forward. You would not be part of the board of directors. Would that mean that the board has hiring and firing capabilities for you as the administrator?
- 34:15 G. Greco Yes. That has basically been the status as it is. I volunteered for it so everybody acceded to that. No one has even for a moment considered getting rid of me because nobody wants to do it. I think I do a pretty good job. See, one of the things that is rolling through my mind, and we will be incorporated by the time the RFPs are going to come out - the RFP would be submitted by the entity - there are tax issues that are here. We have talked to Marion County and we have talked to Benton County. We talked to their administrators and they shrug their shoulders and say, "The accountant takes care of that." I usually tell my accountant what to do. It's not my accountant telling me what to do. I have got to make sure that as an administrator we are not going to be on the hook for paying payroll taxes. I don't want to be an employee of the non-profit generating some taxes. I think a lot of people don't consider those issues but they are out there. We try to create an independent contractor relationship with the attorneys. You can put it down on paper but what is really happening is what the IRS considers.
- 35:42 Chair Ellis It would blow a hole through a lot of things if consortium participants where the structure is a non-profit ...
- 35:55 G. Greco I don't think that is as much a problem as it is with being the administrator. I fully intend to still be an independent contractor. That may mean that we need to tweak this a little. Then we have an issue with retained earnings because we keep money in the bank because historically in Lincoln County the assignment numbers are all over the board. Last time we paid back \$136,000. Even now we keep money in the bank. We probably have \$125,000 sitting in the bank. When you cross the tax line what do you call that money? Is that income? Do we have to pay taxes on it, or have we created a trust relationship? We just want to make sure that whatever kind of non-profit that we use, and we are looking at two, that we don't have to deal with that. We will be formed probably within the next 30 to 60 days top. I don't know what to tell you about the Ouderkirk and Hollen thing. I wish I had a better answer for you. To me it is intractable where you are coming from and if you are concerned about it then I would invite you to act.
- 37:11 Chair Ellis I think I hear you saying that you understand why we would be concerned.
- 37:19 G. Greco Yeah. They are skimming the cream off the top.
- 37:20 Chair Ellis We don't know.
- 37:24 G. Greco I know. I know what their associates are paid. This is interesting because I went back yesterday to talk to this one associate and they conveniently, in the RFP, didn't put that down this time around. In other years they did and I didn't pick up on the fact that they just put N/A. The question to me is that I just simply don't know if the amount of money over the salaries is genuinely overhead or not. I have no way of knowing what their overhead is.
- 37:54 I. Swenson A question arises in my mind, Mr. Chair. Maybe everybody understands this better than I do. If you had a system, which is what is proposed here, of the new corporation identifying the lawyers it wants to participate with this contract, whether they are associates or partners, but the people who are going to do the work. If those individuals are subject to the control and quality oversight and everything else by this board of directors, isn't it safer to leave the relationship between the associate and the partner up to them? For example, if you work for a firm and you say, "I want to do public defense work." You go to your partners, and you say, "How does that work in your firm? Would that be okay if I do this? What is the split between you and me if I get part of this contract?" Then they either decide that it will work for them or not. Doesn't that accomplish

what the Commission wants to accomplish, which is quality oversight and selection of participants? They can get rid of that associate anytime.

- 39:06 Chair Ellis The consortium can.
- 39:09 I. Swenson Yes. I am not so sure that if it is their preference, for whatever reason, to work in this set of circumstances and to permit the partners to take some portions of their earnings, that that is not okay as long as it doesn't affect quality, caseload, performance, and as soon as it does this group has the ability to say...
- 39:33 G. Greco Another corollary to that would be this - I foresee there is going to be a vacancy in associates. I don't think that the firm should be authorized to independently interview and select another person who may be doing the indigent defense work that the other associate was doing. I would anticipate that the qualifications and approval of the board of directors would be required before a new associate would be allowed to work there and do the work.
- 40:10 Chair Ellis What I think you are really coming to is a structure where you form the entity and the entity contracts with providers. Your contract wouldn't be with the law firm it would be with the associate.
- 40:28 G. Greco That is the paradigm that we are going to be operating under. This is very close to what Benton has. We have made some tweaks to conform to our local practice that are different. I think the board of directors would have to approve any new associates.
- 40:42 Chair Ellis I think so too.
- 40:43 G. Greco They could do the interviewing but the board of directors would have to okay it before that lawyer would be permitted to provide the work.
- 40:53 Chair Ellis Let me comment. This is just a statement for the record. On the concept of forming a public defender, it is not an easy thing to do. We have done that in Marion County. You don't just pick an executive director. You really want the community to form an entity in the community. Then that entity selects the executive director. That doesn't just happen overnight. In Marion County it was a lot of effort and frankly the chief was very instrumental in helping us get a board that really was a quality board that we could relate to. I am personally not anxious to rush down that track if there isn't support within the community to do it. We can try to stimulate that support at some point if we really think that is essential.
- 41:59 G. Greco I think in a county like Marion or the larger counties that is a very good model. I guess you did describe that Coos might be a similar community where they have done that. I think everybody just wonders whether given our population it would be a workable model. You are just going to end up with a PD and then you still have to have a consortium. There are two entities now instead of one. I don't reject that as a potential model. You asked me the question if the current practitioners are interested in doing it. I think they like the freedom that they have. A sole practitioner has a whole lot more freedom than if you are working in a more structured environment.
- 42:49 Chair Ellis That is true.
- 42:50 G. Greco It is just a better lifestyle for the current participants to do it the way we are doing it. There are going to be some changes, of course, in their lifestyles because there is going to be an administrator that is going to be breathing down their necks. They are going to have a boss who is the administrator.
- 43:13 Chair Ellis I am encouraged by what you are doing. I want to express my appreciation. As you say you have been listening. You are not deaf to the concerns that we have had. I could well see us saying that you guys are making a good faith effort to respond to the concerns we have expressed, and you are making some moves, the key ones being forming the non-profit, bringing in the outside board, making you a much stronger position as administrator than I think you have had to this point, and structuring your relationship with the law firms so that you retain the power to review and approve

the lawyers that do the work. If they happen to be associates in a firm, so be it, but you still have a direct supervisory role over those lawyers.

- 44:12 G. Greco And we are already on that road. With these three people it wasn't just sitting them down and reading them the riot act and telling them what the problem was. I am going to mentor. We are now going to go and meet again. I am going to meet with these people at least once a month and question what they are doing to fix this. "These were the issues. I heard this from the judge about your last trial. This is stuff you need to work on." I am not going to let it go and make it a one time thing. Another thing I am going to do, and it is sort of in our own defense, is I am going to create a trial form where if you try a case you have got to report it to me. The kind of case it was - a jury trial, bench trial - and the type of charge, what the best offer was that you got out of the district attorney and what the result was. In some of the evaluative process with the judges there are personality issues that you have got to factor in there. They don't like that person and yet that person is winning their trials. And then they said that so and so isn't trying any cases. I want to see how many cases people are trying. I want them to honestly tell me the results of those cases. That is going to be good for me to debrief the lawyers. It is also going to help me interrelate with the judges if in fact lawyers are doing a better job than they think.
- 45:43 Chair Ellis Janet, you have been quiet on the other end. I haven't heard any barking for a few minutes.
- 45:50 J. Stevens I apologize. I have a poodle now and he is noisy and young.
- 45:56 Chair Ellis Did you have questions for Guy?
- 45:55 J. Stevens Not right now. It sounds interesting.
- 45:58 Chair Ellis Other comments or questions?
- 46:00 J. Potter I too applaud you for jumpstarting this effort. You mentioned that you will have something together in more or less final form in 30 to 60 days. Are you aware that this draft RFP that we are going to look at today has a June 13 deadline to submit?
- 46:12 G. Greco Did not know that.
- 46:13 J. Potter Would you be able to submit something by then?
- 46:18 G. Greco Are there any extensions granted?
- 46:22 J. Potter You would have to talk to the executive director.
- 46:24 G. Greco I think so. We have the articles of incorporation ready to go and drop into Salem. The big problem we have is the accountant we have selected and want to talk to just got through with April 15 and vanished for two weeks. We can get it together.
- 46:41 Chair Ellis Two weeks is over.
- 46:47 G. Greco I know. Guess who I am going to call this afternoon? I thought that too. I didn't know it was going to be that soon, but I'll make it. Maybe if we could get a two week extension. I don't think it would be anything beyond that.
- 47:00 Chair Ellis Don't count on the extension.
- 47:02 K. Aylward What we normally do is we would rather have somebody submit something by the deadline and if the application is not complete then we review it and we say, "Wait a minute where is this, this, and this?" You say, "Well, I can get it to you in 30 days." We can do something like that. Rather than not have something come in by the deadline, I would rather ...
- 47:27 G. Greco We can get incorporated. The attorney agreements and the bylaws are all done. What I want to do is make sure the new board is up and running before 1/1/12. We are going to change how we are going to distribute cases and that type of thing. I want to make sure that we are up and running.

That doesn't mean we can't get you the RFP. The RFP is a pretty simple thing and we will have the entity in existence.

- 47:55 Chair Ellis I think 1/1/12 is the date we put for having the outside ...
- 47:58 G. Greco No, no, we will have it done before that. I want to have this board up and running because it is going to have decisions to make that are going to come into play when the 1/1/12 contract starts. Those decisions are going to have to be made before 1/1/12, so we need to be up and functioning no later than September. We are going to have to have at least a couple of months of board meetings. There are changes that I am going to be making to how we are going to be assigning cases. It will be a radical change in how we are going to distribute cases. I can guarantee you that, for the better with matching the skills with the kinds of cases. No more lottery. We are not going to do it like a lottery. We are going to match the skills with the case types. We have to figure out an adequate way of making sure the compensation melds with that.
- 48:54 Hon. Elizabeth Welch I just want to say that I am very pleased about what you have accomplished in a very short time. I am curious; this is not really a question to Mr. Greco, the part of it that I think that I am impressed with is this contract between the lawyer who is a participant in the consortium and the terms relating to meeting one's professional obligations and getting adequate training and the oversight that that imposes upon the consortium director to see to it that they comply. I am curious because I don't believe that I have heard about anything like that in any of the counties or courts that we have looked at in recent memory. I am just wondering to what extent that is common practice? It sounds like something that we need to be talking about on a broader range.
- 49:43 G. Greco Ingrid and I were talking about the aspirational standards, but I did not see in any of my materials hard MCLE requirements. I have a lot of them. I am a mediator. I probably should take about 50 CLE credits a year because of all of the different things that I have got to satisfy. I think it is really important that we have certain minimum CLE requirements. I want to make it so that I am more proactive in directing – with all due respect to you Mr. Potter, I am not a real huge fan of a lot of the OCDLA seminars. Particularly in our situation I don't think we have enough focus on trial skill work, trial practice. I was talking to someone the other day and it is a lot of substantive law. I need to get these people to go to cross-examination seminars, to voir dire seminars, so I want to have a minimum MCLE requirement. Then I am going to be putting my two cents in as to directing them not just willy nilly. That is what they do now, just get their 15 credits a year and I don't have any say over it. When a lawyer has a deficit area then we have got to get them some training in the area they are deficient in.
- 51:00 Chair Ellis You remember the Irving Younger speech on cross-examination? I went to this years ago and a whole lot of lawyers showed up. They were all excited and he said, "You know there are only three things you need to be a really great cross-examiner." They all got kind of excited. "First, you need complete mastery of the facts of your case, but you can get that with hard work. Second, you need complete mastery of the law applicable to the facts in your case, but you can get that with hard work. There is only one other thing you need. Talent, and very few of you will have it."
- 51:44 G. Greco I remember from his seminars that that is what you hear almost the entire day, is everybody is laughing as they are learning.
- 51:55 Chair Ellis Here is where I would be inclined to go. I think you have been forthcoming and we are happy with the way you responded to our concerns. I would like to kind of calendar Lincoln County a year from now.
- 52:10 G. Greco I think that is a good idea.
- 52:13 Chair Ellis Let's see how the changes that you are making look a year from now. There are more severe steps that we could be pushing you to take, but I think when we get someone who is responding to our concerns, we ought to give you time to work on them.
- 52:31 G. Greco I drove for two hours to get here and was thinking about what we were going to discuss. I was thinking, "Give us at least one more contract cycle to see if we can satisfy some of your concerns."

As you say, it is going to take awhile to try another model in Lincoln. I think if you could give us another contract cycle, I think we can impress you.

- 52:58 Chair Ellis A cycle can be a one, two or three year cycle.
- 53:01 G. Greco We have historically done two.
- 53:02 K. Aylward The RFP says that we will award contracts in one year, two year, or even four year terms. It is up to the Commission in the individual situation. I think we should clarify. I know it is a remote possibility but we might get another bid. We might get somebody responding to this RFP. I think at this point it is premature to do any promising.
- 53:28 Chair Ellis What I have in mind, assuming that you end up forming the entity, assuming the entity submits the RFP and response, and assuming you end up with a contract, I would like to think in terms of a year from now let's take a look and see how we are doing.
- 53:53 I. Swenson Mr. Chair, could I make a comment in response to Commissioner's Welch's inquiry? These are best practices that have been promulgated by our Quality Assurance Task Force in terms of what consortium administrators as well public defender administrators and other types of contractors require of the participants who do the public defense work. Do all of our contractors follow those? Certainly not but we encourage it and whenever we do this kind of a review or a quality assurance task force evaluation, we certainly look for those things, comment on them and encourage, at the very least, our providers to follow them. To some extent their contracts require the same kind of oversight as well. So it is part of the system.
- 54:52 Chair Ellis Any other thoughts? I don't know that this requires a formal motion.
- 55:00 I. Swenson At some point to approve a service delivery plan, but you can postpone that if you wish until your annual review. That would mean that the current plan would continue to apply.
- 55:18 Chair Ellis I think that sounds a little too distant. Why don't we have you revise the report to include today's discussion. Then we will vote on that with the revised report in hand at the June meeting.
- 55:37 I. Swenson Very good.
- 55:37 Chair Ellis Thank you, Guy. We appreciate you coming over.
- 55:42 G. Greco You're welcome. I hope you see some progress.
- 55:47 Chair Ellis So do we.
- 55:48 G. Greco I said I hope you see some progress.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Thursday, June 16, 2011
Bend, Oregon 97301

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

- 17:45 Chair Ellis On Lincoln County, Ingrid, anything more on that? We have had two meetings in a row where we have focused on Lincoln County. Let me just set the stage for what I think was the one issue that was troubling the Commission. That was the phenomenon of a consortium that had a law firm member where neither of the two partners was participating much at all, but two associates that the partners managed were essentially full-time. I think it did seem awkward from our perspective to have that kind of arrangement. It is not that anybody is acting in bad faith or inappropriately, but that is just the way it was working out. As I understood it from Guy Greco at our last meeting, the consortium is incorporating and restructuring and the way they plan to proceed is to not have law firm members, but to have lawyer members – those two associates will be members and the two partners can be too, as individuals. It just won't be a law firm membership. That way, I think, we avoid what I did think was an odd and not really appropriate structure. Have I got it about right?
- 19:24 I. Swenson That is certainly my understanding, Mr. Chair. I think they have addressed that issue, but I think in doing that they have also begun to address the underlying issues which the Commission observed from the time we were there in 2004, I think, and then in the process of the site review. This was a system with no formal arrangement of any kind. They distributed money and that was about the scope of the administrator's duty. There was no quality oversight by the administrator and it was up to the law firms how they managed their own lawyers and whether they gave them any training, any mentoring, any oversight or ever evaluated them. So they have addressed all of those issues.
- 20:18 Chair Ellis And they are going to restructure and they are going to have a board with outside member participation. I have felt that they are making a good faith effort to move toward the standards that we tried hard to urge them to adopt.
- 20:37 I. Swenson It would certainly appear so. I have not seen their response to our request for proposals, but I certainly spoke with Mr. Greco about the contents of that and he sent us some sample bylaws and so forth that he was working on. I think our office has received the formal documents now and I believe he has followed through on all of those things.
- 20:57 Chair Ellis Any comments or questions from other Commissioners on Lincoln?
- 20:58 P. Ozanne It seems like a remarkable turnaround. I think it is great. I guess what I would add is in the process, assuming – I don't know at what point but - assuming when a contract is awarded that we revisit the county in a relatively short time, maybe within a year from now. I would be interested to see that they follow the plan.
- 21:33 Chair Ellis I share that view. I do think when you have a provider community that, to my perception, is sincerely trying to improve themselves and move to the direction we are pushing... You are the institutional memory and were there about six years ago.
- 22:00 P. Ozanne No. It is a great turnaround.
- 22:01 Chair Ellis Any more on Lincoln that we need to do?
- 22:07 I. Swenson No. If you want to approve a tentative service delivery plan, in accordance with your instructions from last time, it would be contingent upon their receiving a contract, and if they do then revisiting them approximately a year from the last meeting, which was in May.
- 22:21 Chair Ellis I think that was already included and I certainly support it.

22:30 S. McCrea I'm sorry. I had to miss the meetings on Lincoln County. I did spend some time reading the minutes. I am a little bit behind on it and I apologize for that. The question I have is looking at page 23 of your report, and Ingrid asked if it wouldn't address the Commission's concerns if the consortium were to contract directly with individual attorneys rather than law firms, so that even though associates in law firms might be handling public defense cases, it would be the consortium rather than the firm that selected the attorney members. For me for clarification, are the members of the consortium then the individual attorneys as opposed to the law firms?

23:17 I. Swenson That is correct. That is the intention. The consortium will have individual attorney agreements with all the members, all the people who intend to participate in the handling of public defense cases. It will be with individuals not with the law firms.

23:32 S. McCrea So if there is an associate of the law firm who is a member of the consortium, then the contract will be with that person?

23:41 I. Swenson That is correct.

23:41 Chair Ellis Just to fill that out. The two senior lawyers, who are qualified lawyers, I would like to see them more engaged in public defense. They too can be members of the consortium even though they might continue with a pretty low percentage of their time, but they would not be standing between the consortium and the two associates who were essentially full-time defense providers.

24:07 S. McCrea Then how did we resolve, if at all, what if one of the associates that we have a contract with decides to leave the firm?

24:20 Chair Ellis They can do that.

24:20 S. McCrea Okay. There is nothing to prohibit that.

24:21 P. Ozanne Mr. Chair, Shaun, it seems to me it is an issue with the partners. The law firm has agreed to allow review of performance, training and mentoring, and any responses to under performance are handled through the consortium and not the law firm.

24:51 Chair Ellis I think it is doable. If I were a partner in that law firm, I would still feel an obligation and an incentive to review.

25:02 P. Ozanne But in the absence of that it would be the consortium.

25:04 S. McCrea But then it is an employment issue and not a Commission issue what the compensation schedule is between the lawyer we contract with and his or her boss.

25:18 Chair Ellis Correct. My assumption is that the consortium pays the associate. The associate probably has to kick it into the pot of the law firm as you would (inaudible), and then the law firm will redistribute the way that they redistribute.

25:31 S. McCrea Okay. Because that has been one of our concerns in the past, that the person who had the contract, specifically the boss, would be getting the money and the associate would be doing all the work and not getting fair compensation.

25:50 Chair Ellis If I were that associate and it looked to me like I was bringing in \$100 and I am only getting \$60 back and rent and other things, I might decide that I would rather be an individual practitioner. They can certainly do that.

26:10 I. Swenson Mr. Chair and Vice-Chair McCrea, I just want to clarify that we are not contracting with the individual lawyers. We are contracting with the entity of the consortium which then has sub-contracts, if you will, with the individual members of the consortium.

26:30 S. McCrea So we are contracting with ...

26:30 I. Swenson A non-profit ...

26:34 S McCrea We are expecting that the consortium is then having a direct contract with the individual lawyers?

26:44 I. Swenson Correct.

26:44 Chair Ellis Alright. I believe there was a motion. Was a motion actually made?

26:50 S. McCrea No.

26:50 Chair Ellis I am awaiting that. If anyone is so motivated.

27:01 S. McCrea For approval of the service delivery plan for Lincoln County?

26:59 Chair Ellis Correct.

27:00 S. McCrea Okay. I will move for it.

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

Attachment 3

**Public Defense Contracts Recommended for Approval by the Public Defense Services Commission
at its September 15, 2011 Meeting**

County	Proposed Contractor	Total	Total Value
Statewide	O'Connor & Weber*	192	\$278,400
	Oregon Appellate Consortium LLC	312	\$438,000
	Oregon Post-Conviction Consortium	600	\$1,740,000
Baker	Baker County Consortium	928	\$431,520
	Daniel L. Cronin PC	168	\$111,120
Benton	Benton County Legal Defense Corporation	3,960	\$1,645,920
Clackamas	Clackamas Indigent Defense Corporation	14,484	\$6,070,080
	Independent Defenders Inc	6,120	\$2,653,680
Clatsop	Clatsop County Defenders Association	3,072	\$1,380,480
	Mary Ann Murk	1,224	\$466,960
Columbia	Columbia County Indigent Defense Corporation	4,118	\$1,577,400
Coos	Coos County Indigent Defense Consortium	2,288	\$1,032,800
	Southwestern Oregon Public Defender Services, Inc.	4,012	\$2,302,320
Crook	Crabtree & Rahmsdorff Defense Services, Inc	972	\$488,160
	Twenty-Second Circuit Defenders	1,780	\$808,560
Curry	Curry County Public Defense LLC	2,204	\$966,120
Deschutes	Bend Attorney Group	4,236	\$1,649,040
	Crabtree & Rahmsdorff Defense Services, Inc	7,482	\$4,099,440
	The DeKalb Group	3,040	\$1,732,160

Douglas	James A. Arneson, P.C.	2,238	\$1,015,680
	Richard Cremer, P.C.	1,288	\$552,560
	Umpqua Valley Public Defender	7,228	\$3,783,720
Grant/Harney	Markku A. Sario	–	\$435,600
Harney/Grant	John B. Lamborn, Attorney at Law, PC	–	\$713,600
Hood River/Wasco	Morris Olson Smith & Starns PC	4,392	\$2,211,240
Jackson	Jackson Juvenile Consortium	4,960	\$2,026,240
	Los Abogados	2,072	\$1,190,240
	Southern Oregon Public Defender	9,064	\$5,358,800
Jefferson	Madras Consortium	1,812	\$733,680
	Twenty-Second Circuit Defenders	900	\$475,440
Josephine	Josephine County Defense Lawyers	3,840	\$1,709,280
	Southern Oregon Public Defender	4,280	\$2,688,640
Klamath/Lake	Klamath Defender Services, Inc.	15,878	\$5,612,160
Lane	Lane Juvenile Lawyers Association	13,200	\$5,287,200
	Lane County Defense Consortium	3,768	\$2,158,320
	Public Defender Services of Lane County	13,912	\$7,960,200
Linn	Linn County Legal Defense Corporation	5,736	\$2,716,800
	Linn County Juvenile Defense Corporation	6,960	\$2,304,480

Malheur	David R. Carlson	720	\$340,000
	Douglas J. Rock	396	\$161,160
	Rader Stoddard & Perez	2,640	\$1,444,920
Marion	Andrew P. Ositis	240	\$45,600
	Harris Matarazzo	1,056	\$343,200
	Marion County Association of Defenders	11,928	\$5,492,400
	Public Defender of Marion County	4,108	\$2,379,440
	The Juvenile Advocacy Consortium	15,900	\$5,527,000
Multnomah	Brindle McCaslin Lee PC	2,376	\$957,840
	L & S, Inc.	4,392	\$1,267,968
	Metropolitan Public Defender Services Inc	14,196	\$10,488,840
	Multnomah County Indigent Defense Consortium**	28	\$61,600
	Multnomah Juvenile Defense Consortium	8,088	\$3,280,800
	Multnomah Defenders Inc	13,968	\$7,114,224
	Native American Program/Legal Aid Services of	1,464	\$790,320
	Portland Defense Consortium	4,248	\$4,032,960
	Troy & Rosenberg, PC	2,040	\$786,480
	Youth, Rights & Justice (formerly JRP)	7,412	\$4,329,360
Polk	Chris L. Lillegard PC	3,168	\$1,336,320
	Polk County Conflict Consortium	1,320	\$623,040

Tillamook	Campbell & Popkin, LLC	1,232	\$410,760
	North Coast Defense Consortium	600	\$331,200
Umatilla/Morrow	Blue Mountain Defenders LLC	2,472	\$1,284,000
	Intermountain Public Defenders Inc	4,264	\$2,265,440
Union/Wallowa	Grande Ronde Defenders	1,908	\$1,068,720
Washington	Brindle McCaslin Lee PC	2,088	\$765,120
	Hillsboro Law Group (Burton McCaffery PC)	2,316	\$947,040
	Karpstein & Verhulst	3,516	\$1,351,680
	Metropolitan Public Defender Services Inc	11,056	\$6,828,740
	Oregon Defense Attorney Consortium Inc	4,016	\$2,751,432
	Ridehalgh & Associates LLC	4,848	\$1,371,480
Yamhill	Justice Alliance Center* **	2,148	\$1,143,600
	Total	302,872	\$150,128,724

* New contractor

** One-year contract

Attachment 4

PDSC meeting schedule and agenda items for 2011

March 10, 2011, Newport, Oregon

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

May 5, 2011, Salem, Oregon

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

June 16, 2011, Bend, Oregon

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

June 30, 2011, Portland, Oregon

- PDSC Interviews of ED Candidates

July 8, 2011, Telephone Conference

- PDSC Discussion of ED Candidates

July 13, 2011, Telephone Conference

- PDSC Discussion of ED Candidates

July 21, 2011, Salem, Oregon

- PDSC Supplemental Interviews and Discussion of ED Candidates
- PDSC Selection of ED

July 28, 2011, Salem Oregon

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

Review of Statewide Service Delivery Plan Draft
Approval of Statewide Service Delivery Plan

September 15, 2011, Salem, Oregon

Commission Review and Approval of Non-Capital Contracts for 2012-13
Review and Approval of Contracting Plan for Capital Contracts
PDSC 2011 Schedule of Meetings and Topics
OPDS Monthly Report

October 21, 2011, Pendleton, Oregon

Update on Umatilla/Morrow Service Delivery Plan
Approval of Capital Contracts
Review and Approval of OPDS 2011-13 Compensation Plan
Update of Agency Strategic Plan
OPDS Monthly Report

December 8, 2011

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