

**Members**

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



**Ex-Officio Member**

Chief Justice Thomas Balmer

**Executive Director**

Nancy Cozine

**PUBLIC DEFENSE SERVICES COMMISSION**

Tuesday, September 24, 2013  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

**MEETING AGENDA**

- |   |                                    |
|---|------------------------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meetings held on July 17 and July 31, 2013 ( <i>Attachments 1 &amp; 2</i> ) | Chair Ellis                        |
| 2. Annual Performance Progress Report and Discussion of Key Performance Measures ( <i>Attachment 3</i> )                      | Nancy Cozine                       |
| 3. October Conferences**  | Nancy Cozine<br>Commission Members |
| 4. Clatsop County Peer Review - Final Report ( <i>Attachment 4</i> )  | Paul Levy<br>Commission Members    |
| 5. <b>Action Item:</b> Approval of 2013-15 Compensation Plan ( <i>Attachment 5</i> )  | Nancy Cozine                       |
| 6. OPDS Monthly Report  | OPDS Staff                         |
| 7. Executive Session* - Commission Review of Contracting Plan for Capital Contracts   | OPDS Staff<br>Commission Members   |

***\*The Executive Session will be held at approximately 12:00 p.m. pursuant to ORS 192.660(2)(f).***

***Please note: Lunch will be provided for Commission members at 12:00 p.m. The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.***

***Next meeting: October 25, 2013, 10:00 a.m. – 2:00 p.m. at the Salishan Lodge, in Gleneden Beach, Oregon. Meeting dates, times, and locations are subject to change; future meetings are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>***

**\*\*Links to October Conference Agendas:**

**JLTA:** <http://www.ocdla.org/seminars/shop-seminar-2013-juvenile-law-training-academy-seminar.shtml>

**Management:** <http://www.ocdla.org/seminars/shop-seminar-2013-public-defense-management-seminar.shtml>

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Wednesday, July 17, 2013  
9:00 a.m. – 2:00 p.m.  
Astoria City Council Chambers  
1095 Duane St.  
Astoria, OR 97103

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Amy Jackson  
Shelley Winn

---

---

The meeting was called to order at 9:00 a.m.

**Agenda Item No. 1 Approval of minutes – PDSC meeting held on June 13, 2013**

Commission members unanimously approved the minutes.

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

**Agenda Item No. 2 PDSC Budget Update**

Nancy Cozine provided an update regarding the PDSC budget, contained in House Bill 5041, and end of session changes to the PDSC budget through House Bill 5008. She explained that when 5041 passed out of the Ways and Means committee, the PDSC budget included an amount close to current service level and policy option package funding to apply toward increasing compensation for our public defenders statewide, and for hourly attorneys and hourly investigators. She went on to explain that House Bill 5008 contained reductions to the budget, including a 2 percent “holdback” that may be restored depending upon statewide economic circumstances, and a 5 percent reduction to services and supplies. She explained that the reductions need to be implemented in a way that does not reduce funds granted to address specific policy option package purposes.

Chair Ellis noted that the policy option package created to address compensation for public defenders did not provide funding to help consortia, and asked that future policy option

packages address consortia providers' needs. Ms. Cozine noted that it is almost time to start discussing budget plans for the 2015-17 biennium and expressed an intent to start those discussions at the October Public Defense Management Conference.

Ms. Cozine mentioned that the OPDS compensation plan is still in development. She explained that the compensation plan approved by the Commission for the last biennium froze merit increases through June 30, 2013, and that because other state agencies are not freezing merit steps at this time, the Commission is not being asked to continue the merit increase freezes into the new biennium. She also noted that it was unlikely that any state agency would be imposing furlough days, but that union negotiations were still underway, and that since OPDS has always drafted a compensation plan similar to Executive Branch agencies and the Judicial Department, the compensation plan for OPDS would be included for PDSC discussion at a future meeting.

## **Agenda Item No. 5**

### **Clatsop County Peer Review – Report and Testimony**

Ms. Cozine provided an overview of the Clatsop County Peer Review, explaining that while there were concerning findings at the time of the initial visit in September 2012, both the consortium and court were very responsive and took steps to address many of the concerns. She noted that the consortium group membership has changed significantly since the initial visit, and that when she, Paul Levy, and Billy Strehlow visited in May of 2013, everyone agreed that representation had improved since the September 2012 visit. She also mentioned that District Attorney Marquis was with his elderly mother and unable to attend, but did convey his view that both Kris Kaino and Mary Ann Murk are providing very good management and that public defense clients are receiving quality services in Clatsop County. She concluded by noting that Clatsop County is in the midst of the eCourt Odyssey roll out.

Judge Nelson offered his opinion that, while there are occasional complaints about lack of contact by court appointed attorneys, those situations are addressed through a court hearing, and on the whole, things seem to be working well. He also noted that one consortium member had a significant health incident and is no longer providing representation, but that Mr. Kaino handled the in-custody cases and made arrangements for representation in the other cases. Judge Nelson provided a positive review of the lawyers who have been taking cases for the consortium.

Chair Ellis recollected a visit to Clatsop County several years earlier, when providers were encouraged to explore the possibility of an Early Disposition Program (EDP). Judge Nelson provided some history, explaining that it is difficult for defense attorneys to participate because of the short timeline and lack of discovery, so the EDP in Clatsop County is held on Monday afternoons and involves the court and two prosecutors, but no defense attorney. Judge Nelson explained that he does his best to advise people of their rights before accepting the plea. Chair Ellis encouraged Judge Nelson to consider revising the process so that defense lawyers could participate and Judge Nelson expressed a willingness to do so. He noted that he is meeting with public defense providers and the district attorney more regularly, and that he has good communication with Mr. Kaino and Mr. Kaino's new administrative assistant, who does very good work.

Judge Nelson concluded by saying that public defense would benefit from having additional providers; that it is difficult when all of the lawyers are already scheduled for court appearances and an urgent matter arises. He also noted the need for succession planning within the consortium, which might be starting to happen now as a result of recent changes within the group.

Judge Brownhill, who handles the vast majority of dependency cases in addition to other case types, began her conversation with the Commission by thanking them for sponsoring this review, saying that she is already seeing improvements in dependency cases. She explained

that there were two attorneys in the consortium who, if they were appointed to represent children, didn't talk to the kids, and many times they didn't meet with the parents they represented. She said that those two lawyers are being phased out and Jeremy Rust, Katrina Penfield, and James Von Beckman have started taking cases and seem to be doing well. She indicated that she is confident that Clatsop County's children and parents will be better served. She also expressed support for Judge Nelson's decision to hold quarterly meetings with judges, the district attorney, and Kris Kaino and Mary Ann Murk, stating that this is an improvement.

Commissioner Welch asked about contact between attorneys and their clients following disposition, and reliance on Citizen Review Board (CRB) hearings. Judge Brownhill said that her impression is that there isn't a lot of interchange between the attorneys and the parents after disposition and before the permanency hearing, but that it is difficult to fix the problem when attorneys don't get paid for that time. She said that they really do rely on the CRB for review hearings because there isn't enough docket time, but she is aware of other jurisdictions that hold 90 and 60 day reviews. She notes that this would probably help the parents keep on track, and expressed a willingness to look at that issue. Commissioner Welch also asked about appointment of counsel in delinquency cases, and the waiver of attorney process. Judge Brownhill said that the advice of rights is typically at the detention hearing or the first appearance, but that there is room for improvement. Chair Ellis suggested that it is at least helpful to have a lawyer advise the youth on the issue of waiver. Judge Brownhill commented that they are now including lawyers at shelter hearings, and there is no reason they can't get lawyers there for detention hearings, as those hearings are at the same time each day. Commissioner Welch encouraged Judge Brownhill to also consider appointment of counsel at the time a petition is filed and to ensure that counsel is appointed in more serious case types.

Commissioner Lazenby asked about the Family Drug Court and how parents qualify for that program. Judge Brownhill indicated that the parent must have admitted or been found within the jurisdiction of the court on a drug or alcohol basis. She went on to explain that there are at least three specialty courts in Clatsop County, and sometimes parents are in one program, but before a different judge on an unrelated matter, and there isn't any coordination in those instances. Commissioner Lazenby agreed with Judge Brownhill that it would be better to find a way to coordinate those cases.

Kris Kaino, administrator of the Clatsop County Defender's Association, addressed the Commission, explaining that his consortium had consisted of the same four lawyers for the last 12 to 15 years. He noted that the September 2012 peer review report provided the information they needed to make significant changes, and that by the end of the current contract cycle, he will be the only member left of the original consortium group. He provided an overview of outgoing and newer members, two of whom came from the coast, and one of whom worked for the public defender's office in Eugene. Mr. Kaino was able to do some background checking, and was pleased with the feedback on the lawyers who are new to the group. He is going to start sending out an annual survey to system partners to get feedback regarding the quality of representation each year, and he will use those as a tool for reviewing the lawyers in the consortium. Chair Ellis remarked upon the importance of these kinds of efforts as a way to professionalize the practice, particularly for small consortia in more remote counties. Commissioner Lazenby added that the Legislature is also a factor; legislators want to see from all state agencies that dollars spent are yielding a quality outcome, and providing quality services is therefore critical to preserving funding resources. Mr. Kaino said that he has increased his attention to quality assurance, and that as a result of the peer review they now attend at least one OCDLA conference each year. He and Ms. Murk are also meeting with the court regularly, which has been very beneficial.

Chair Ellis asked Mr. Kaino about the EDP in Clatsop County. Mr. Kaino explained that it was explored years ago, but that the District Attorney would not agree to get police reports to the defense far enough in advance to complete a conflict check and thorough review of the

information. Chair Ellis expressed concern about cases being processed without lawyers. Mr. Kaino indicated that the defense would participate if they could get the reports in advance so that they could adequately advise clients. Chair Ellis expressed hope that the DA and defense community could resolve this issue.

Chair Ellis then asked about waiver of counsel in delinquency cases, noting that the information provided in the report indicated that youth waive counsel in approximately 40% of delinquency cases. Chair Ellis asked whether it would be possible to have a lawyer advising the client regarding the right to counsel and waiver of that right, and indicated that the Commission would be following up on this issue. Commissioner Welch further recommended that Mr. Kaino explore the possibility of having a lawyer appointed automatically at the time that the petition is filed. Mr. Kaino agreed that immediate appointment would be the best system, acknowledging that there are instances in which the first time a lawyer is appointed is when a youth is looking at commitment to the Oregon Youth Authority.

Chair Ellis inquired about Mr. Kaino's addition of support staff to the consortium. Mr. Kaino described the new employee as very competent and noted that her work has improved the system by getting attorneys to shelter hearings with very short notice. Commissioner Welch asked Mr. Kaino about the extent to which lawyers are having contact with dependency clients after disposition. Mr. Kaino suggested that it depended upon the persistence of the client. Commissioner Welch asked whether lawyers are at CRB hearings. Mr. Kaino said that they do when there is not a conflict, and that they are working with the judges on that issue. Commissioner Potter asked whether there is ever a meeting that includes the court, DA, and defense lawyers. Mr. Kaino indicated that it does not happen as much as it should, noting that when he first arrived, the defense bar, prosecutors, and the judges met every six months; then no meetings for years. He expects they will start meeting more regularly again as eCourt issues arise. Commissioner Potter asked about the existence of a Criminal Justice Advisory Committee or Local Public Safety Coordinating Council (LPSCC). Mr. Kaino indicated that there is a LPSCC but those meetings are not a particularly productive forum for defense providers.

Chair Ellis asked Mr. Kaino what the Commission could do to improve public defense services in the state. Mr. Kaino responded by saying that the peer review was eye opening, and that he is going to try to replicate something like that, with the help of other consortia, so that the consortium gets an evaluation each year and he can use that to better monitor quality of services.

Chair Ellis commended Mr. Kaino for the work he is doing, and for taking steps to make improvements. Vice-Chair McCreath thanked Mr. Kaino for being prepared to speak to the Commission, and for responding to concerns in the peer review by making necessary changes.

Chair Ellis welcomed Mary Ann Murk, who provides public defense services but is not a member of Mr. Kaino's consortium. Ms. Murk confirmed prior information that defense attorneys are not able to get discovery early enough to allow for representation at EDP hearings. Commissioner Lazenby asked why discovery isn't provided earlier. Ms. Murk suggested that it might be an issue with law enforcement not getting it to the district attorney quickly enough, and that it might also have something to do with the discovery billing process. She also noted that the EDP offers are not always as good as the offers made later in the case.

Chair Ellis asked whether any headway could be made to ensure appointment of counsel in juvenile delinquency cases. Ms. Murk indicated that they had an extensive discussion with Judge Nelson, who was satisfied that his advice of rights was sufficient. She cited instances where juveniles are pressured by parents not to have an attorney, and where juveniles have parents who can afford to hire attorneys but will not hire an attorney, and those juveniles are

denied court appointed counsel. She expressed concern because youth often do not recognize the long term risk of admitting to an allegation.

Chair Ellis asked for Ms. Murk's observations regarding ways the Commission might improve. Ms. Murk expressed great satisfaction in working with Mr. Strehlow, the OPDS analyst assigned to Clatsop County. She also expressed a desire for more consistency in the review of non-routine expense requests.

**Agenda Item No. 3      Legislative Update**

Ms. Cozine gave a brief legislative summary, noting that there were approximately 275 bills considered by the legislature that were related to criminal law, penalties, procedures, or had other criminal law type provisions, and that 69 passed and have either been signed by the Governor or are awaiting his signature. She explained that very few will have a significant impact on public defense funding, but noted the PDSC budget was reduced by almost \$1 million in anticipation of savings through Senate Bill 40, which reduced marijuana crime classifications. She also noted that OCDLA successfully passed Brady bill legislation (codifying existing constitutional requirements). Commissioner Lazenby suggested that perhaps the Brady legislation could be helpful in gaining some leverage around early discovery to allow defense attorneys to participate in the Clatsop County EDP.

**Agenda Item No. 4      Authorization to Increase Guideline Transcriptionist and Interpreter Rate**

Ms. Cozine asked Commission members to approve an increase in the rate of payment for certified interpreters so that PDSC is paying those interpreters at the same rate as the Oregon Judicial Department.

**MOTION:** Commissioner Potter moved to approved; Commissioner Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 6      OPDS Monthly Report**

Ms. Cozine provided an update on efforts to examine OPDS's current structure and to create something that will serve the agency well in the future. She expressed hope for having a new structure adopted by December, and expressed gratitude for everyone's commitment to their work and the mission of the office. Ms. Cozine commended the work of the OPDS public defense analysts, all of whom worked very hard when creating the statewide contracting plan. She also expressed appreciation for Mr. Levy's work as interim director of CBS, as well as Erica Robinson and Kelly Ashton, who have provided excellent supervision of work within the accounts payable unit. She noted that OPDS would be posting a human resources manager position and filling that as quickly as possible, and that they would be investigating needs within the IT arena. Ms. Cozine also reported that the diversity seminar for OPDS employees was approved for 3.5 access to justice credits.

Ms. Cozine shared with Commission members Mr. Levy's report on a book called "Kids for Cash", written about the Luzerne County scandal where two judges were taking kickbacks and sending kids to the juvenile detention facility. She noted that the initial inquiry began as a concern about waivers of counsel. She explained that Oregon efforts to launch a Delinquency Task Force would be delayed, at least until the Judicial Department replaces Mr. Livingston, but might have to be abandoned altogether. Finally, Ms. Cozine mentioned that committees are continuing to plan for the October Management Conference and the Juvenile Law Training Academy, the latter of which again received a \$5,000 grant through the Juvenile Court Improvement Program to help cover expenses which will allow OCDLA to keep the tuition at a reasonable rate.

Mr. Gartlan provided a summary of cases being briefed and argued by the Appellate Division. He also indicated that an attorney recently left, so a Deputy 1 position will be posted.

**Agenda item No. 7 – Executive Session – Commission Review of Statewide Service Delivery Plan; Phase 1**

Chair Ellis read the following statement into the record in preparation for an executive session:

The Public Defense Services Commission will now meet in executive session for the purpose of reviewing contracts proposals to provide public defense legal services to cases beginning on January 1, 2014. The executive session is being held pursuant to ORS 192.660(2)(f), which permits the Commission to meet in executive session to consider information and records that are exempt by law from public inspection. Under the Public Record's Law contract proposals are exempt from public inspection until a decision is made to award a contract. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. The representatives of the news media are specifically directed not to report on any of the deliberations during executive session, except to state the general subject of the session being held. No decision may be made in executive session. At the end of the executive session we will return to open session and welcome the audience back into the room.

(Executive Session)

Chair Ellis provided the following statement: "This concludes the executive session. We will now return to our open meeting."

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

**Meeting Adjourned**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, July 17, 2013  
9:00 a.m. – 2:00 p.m.  
Astoria City Council Chambers  
1095 Duane St.  
Astoria, OR 97103

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Amy Jackson  
Shelley Winn

---

---

The meeting was called to order at 9:00 a.m.

**Agenda Item No. 1 Approval of minutes – PDSC meeting held on June 13, 2013**

0:02 Chair Ellis The first item is the minutes from the meeting of June 13, 2013. Are there any additions or corrections? If not, I would entertain a motion to approve the minutes.  
**MOTION:** John Potter moved to approve the minutes. Chip Lazenby seconded the motion; hearing no objection, the motion carried. **VOTE 6-0.**

**Agenda Item No. 2 PDSC Budget Update**

0:25 Chair Ellis Okay. Budget update.

0:36 N. Cozine Good morning, Chair Ellis, members of the Commission. As you know the session finally ended on July 8<sup>th</sup>. We had our budget bill, which was House Bill 5041, and then we had changes to our budget, through House Bill 5008, otherwise fondly referred to as the “Christmas Tree Bill.” When 5041 passed out of committee we had current service level and we had policy option package money to apply toward increasing compensation for our public defenders statewide, and for hourly attorneys and hourly investigators. When 5008 passed we had all of that with a few reductions. Through email, I did distribute the message that I sent to contractors statewide. I have a few more copies today as well. On the back of that memo, I also included a summary of where we are. So, the memo you may have already read. The summary on the flipside just shows within each account, Appellate Division, Professional

Service Account, Contract and Business Services, and then agency wide what the additions and subtractions were so that you get a better sense of where we landed in terms of numbers. At the very bottom – Angelique Bowers, who is helping us with budget right now, prepared this for me. At the bottom I asked her to include information about the holdback. So as you can see the last line that says, “Without 2% holdback the percent change from 13-15 CSL, which is current service level, it is very small if you don’t consider that holdback. So in other words if we get that 2% in February then we will be very close to what we built as a current service level budget heading into this biennium. We are told that that 2% may be restored. It depends upon the needs of the agency and upon statewide economic circumstances. So we have two factors in our statewide contracting plan, and we will talk about those before we get to contracting, but you have what is very close to current service level and you also have explicit instructions from the legislature to use certain pieces of the money that we got for compensation increases. So the 5% reduction in services and supplies really has to come out of services and supplies because you have this money that has been specifically earmarked for compensation. So we will talk more about how we want to work through that when we get to the contracting portion of our meeting.

- 3:45 Chair Ellis Let me make one observation. I know that the legislative bill requires that the comp goes to the defenders and the hourly. It does not include consortium members.
- 4:02 N. Cozine Correct.
- 4:02 Chair Ellis Correct me if I am wrong but I think the history of that we had been putting in policy option packages like that going way back. It just sort of happened last year without a whole lot of thought and then by the time, at least this commissioner realized we were still doing that we were told it was too late to change.
- 4:27 N. Cozine Right.
- 4:31 Chair Ellis So would you docket for the next session a review of our policy packages in time to make a change. It is kind of weird that 52% of the caseload is being handled through consortia but they don’t benefit from this kind of event.
- 4:54 N. Cozine Yes. I actually think it is time to start talking about our budget plans for 15-17 starting about October of this year. So, yes, we will be having those discussions and we will be talking about how we want to draft our policy option packages so that they best meet our needs moving forward. So within operations for the Office of Public Defense Services, consistent with past biennia, we are waiting to see how the labor negotiations settle out on the executive side and to see what the judicial department decides in terms of compensation increases. This Commission, for OPDS employees, approved a compensation plan in the last biennium that froze merit increases through June 30, 2013. So in July those merit increases began again absent action from this Commission to refreeze. Other state agencies are not freezing merit steps. Those are going forward. So we did not put an action item on this agency asking this Commission to continue the merit increase freezes. We will proceed with merit increases heading into this next biennium. If there is a need to freeze later we will. I don’t anticipate any state agency doing that. I don’t see any need for furloughs. No other state agencies are imposing furloughs. We will have to come to you with a complete compensation plan once everything settles out on the executive and judicial department side. Right now the negotiations have been around a 1% COLA each year, but SEIU has provided a strike notice. So there negotiations originally needed to conclude – they have extended the deadline to July 15<sup>th</sup>. That has now come and gone so we are in a posture where there may be a strike and we are waiting to see.
- 6:53 Chair Ellis A strike by the SEIU? How would that impact us?

6:57 N. Cozine It just delays the negotiations. So we need them to come to final terms so that we can decide what we are going to do. That is what we have always done. It is just hard to know where state agencies will land until that all gets work out.

7:03 C. Lazenby Inaudible

7:19 J. Potter But there is no statutory requirement.

7:35 N. Cozine House Bill 5008 included \$86.5 million for salary increases for state employees. They won't decide how to divide that up until after the labor negotiations are done and in fact we have reason to believe they have indicated that they may not decide until February of 2014. So we are in a waiting posture on some of the last pieces. We should certainly be able to have a comp plan – last biennium we had a comp plan to you by October. I am hoping that we can get it to you this time by September. Our meeting is September 12, but much of it will depend on how things resolve.

8:16 Chair Ellis Okay.

8:20 N. Cozine Any other questions?

**Agenda Item No. 5 Clatsop County Peer Review – Report and Testimony**

8:25 Chair Ellis Should we shift over to the Clatsop County review?

8:27 N. Cozine I think that makes sense. We have Presiding Judge Nelson is here. Before the Commission asks him to come and provide information I wanted to give you a very quick overview. The peer review team, as you probably read in your report, made its initial visit in September of 2012. I am sure when you read the report you were struck by the fact that there were some pretty concerning findings in that peer review. Those concerns ranged from direct quality of representation issues to system issues. During the time between September and now, I think both the contract administrators and the court have been responsive to those concerns. They have been working together and meeting. We came back in May of this year and were told that things were moving forward. Within the adult consortium there have been significant changes. One of the lawyers had a health incident and is no longer able to practice. Another resigned from the consortium and is planning a move out of Astoria, and the other is not going to be a part of the contract that begins next year. Kris Kaino will be here later today at 10:30. He has other lawyers that he has added including one who is providing services on an hourly basis within this county, so there is a lot of movement and change and I am sure that Judge Nelson can tell you a bit more than I can about that. I spoke with District Attorney Marquis. He is with his elderly mother in California right now and cannot attend. He did want to convene that he feels that both Kris Kaino and Mary Ann Murk are providing very good management of the consortium and the services and that public defense clients are receiving quality services in Clatsop County. I also wanted to mention, and, again, Judge Nelson can offer more information this, that Clatsop County is currently in the midst of their eCourt Odyssey roll out. It is having an impact in this county as it was when we were in Linn County.

10:42 Chair Ellis Yamhill.

10:42 N. Cozine Well it was Linn but Yamhill has also gone through the transition. Those are the few pieces that I wanted to update you on.

10:56 Chair Ellis Judge Nelson, thank you. Do you want to come forward? Kind of a reversal of roles here.

11:03 J. Nelson I am looking up at you guys instead of looking down on people.

11:14 Chair Ellis Thank you for joining us. If you want to give some overview thoughts first that would be good. Then we have a few questions we want to ask.

11:23 J. Nelson If you have questions it would probably be better off answering questions. As far as I know we are doing what we need be doing. I think we get the usual complaints that defense lawyers are necessarily talking to their clients like the clients would like them, particularly if they are sitting in jail, but on the other hand we have those hearings because we get those letters. Usually it works out once you get into court and find out what the problem is. I think you mentioned that right now it is kind of difficult because one of Mr. Kaino's consortium members had some serious health problems and he is no longer in practice period.

12:16 Chair Ellis It sounded like...

12:16 J. Nelson It sounds like he is lucky to be alive. It has been a little bit of a delay on getting those cases resolved. Mr. Kaino, I think, has picked up the in custody cases that need to be dealt with right away, but he has made arrangements for somebody else to pick up those cases. It certainly takes awhile to get up to speed.

12:37 Chair Ellis We met with the provider community and the other participants and it was like five years ago. I remember there was one issue that was controversial at the time so I kind of want to get an update on it. It was the absence in this county of an early disposition program. I think some of the defenders felt that the district attorney was unwilling to give early discovery so they weren't going to participate in an EDP. What has become of that?

13:21 J. Nelson Do you want the whole history?

13:25 Chair Ellis About two minutes.

13:26 J. Nelson Years ago I tried to get that going in Clatsop County. There was a reluctance from the defense side, particularly the indigent providers, to do it. To show up for Monday arraignments and try to meet with the client and tell them this is a good deal. Then it was suggested that we set up something and I set it up and we had a whole jury room full of people here. The person from Lane County that was going explain their program wasn't available. The assistant came and said, "Oh, we hate it down here. We are not getting what we need to and it is difficult to represent people." That turned everybody off here. The indigent providers here are not interested in showing up at misdemeanor Monday afternoon arraignments, at least the last conversation that I had with them, and so the district attorney's office will send, I think, two prosecutors down. One to make sure that the judge isn't messing up and one to go talk to people that are interested in resolving their cases. When I do it I make certain to tell those people that they have the right to a lawyer and what the risks are of going forward without a lawyer. Then if they want to talk to the prosecutor about resolving the case there is somebody available to do it.

14:55 Chair Ellis So the way it is working now lawyers aren't participating but ...

15:01 J. Nelson Defense lawyers are not participating. But you have somebody over from Bend that was here on the weekend or vacation and got a DUII or game violation or whatever. They sometimes just want it resolved so they talk to the prosecutor and come back and say, "I'll take that offer." It takes a little while longer to make sure they are aware of the risks.

15:30 Chair Ellis I hear the history and the episode you describe of the Lane County person turning everybody off. Has it been revisited in the sense of people meeting and talking about it and trying to save it.

15:47 J. Nelson I can't say that it has been revisited in the last year but it has come up before. The indigent providers, particularly Mr. Kaino and Ms. Murk, are not interested in being involved in that

process. They are concerned that they are going to miss something or they are not going to have the time ...

- 16:07 Chair Ellis I remember the dialogue that they felt professionally comprised because they didn't have the information they felt they needed to give competent advice.
- 16:19 J. Nelson I would probably feel that way too. Meeting somebody on a Monday afternoon if I got a police report and pushing something through.
- 16:30 Chair Ellis It does trouble me in that what we have ended up is a lot of people going unrepresented and that is not a good thing. There are a lot of counties that have very successful programs and the defense lawyers don't have the feelings, I mean I think there are differences that they are getting access to discovery early. I guess I would like to see this revisited here. You do get the big summer influx of, I am sure what you described, the person from Bend who is not a permanent resident. There are other parts of the state that aren't as tourist intensive as Clatsop County is. We will just put this as one of the things that I would like to see revisited here. I think it could just be a decision was made five years ago and they just aren't rethinking it at all.
- 17:49 J. Nelson As judges we would dearly love to get our cases done earlier. That is where we are behind statewide on our numbers is getting it done in 90 days, or six months, those kinds of things. We are in pretty good shape with getting it done within a year. Early resolution of our cases has been a concern. It is probably part of the mind set here. It is always the way we have done it. It is difficult to get people to change that.
- 18:19 Chair Ellis Would it be helpful in terms of stipulating a revisit of that issue.
- 18:29 J. Nelson If you could have somebody come over from wherever that has a successful early resolution, or whatever you call it, program then I would take the initiative to invite prosecutors and the defense bar to that. The last time that I did it I felt it was a waste of time. It left a bad taste in my mouth and I haven't heard an interest from anybody doing it since then.
- 19:01 Chair Ellis I noticed it ....
- 19:03 J. Nelson If you want to push the local indigent people to do it, then maybe that is what it will take. Certainly when we got the last report from them it got their attention.
- 19:12 Chair Ellis I don't want to push them into something that they feel strongly that they are going in with two hands behind their back. I don't know whether this discovery issue is still as immovable as it was, but it does seem to me that EDP is a big part of a lot of other areas and it does surprise me that it doesn't seem to have gotten traction here at all. We will follow up on that. Are there other questions for the judge? You have had a chance to see the report, right?
- 19:58 J. Nelson Correct.
- 19:58 Chair Ellis And the supplement to the report.
- 20:01 J. Nelson I am not sure that I have seen the supplemental report.
- 20:08 Chair Ellis March of 2013.
- 20:11 J. Nelson I haven't seen that. I had to ask to get the one from September a couple of time before I got it.
- 20:20 Chair Ellis The report leaves me with the impression that there has actually been significant movement by Mr. Kaino since the November report. I wanted to get a sense from your perspective what

you are seeing. One is significant turnover in the consortium group. There were originally four and it seems like all four are turning over. Are there new members coming in?

- 20:53 J. Nelson                    There is a new person coming in that I have met. I have not seen him yet. He just came on board last week.
- 21:03 Chair Ellis                    Is he coming from outside the county?
- 21:04 J. Nelson                    I believe he is coming from Lane County. I talked with Judge Rasmussen and he spoke very highly of him. His name is James Van Beckman. Mr. Kaino has brought in a Seaside lawyer named Jeremy Rust that I have seen in court and he seems to be very prepared. Judge Matyas and I we talked yesterday a little bit about this. We think at least so far so good. We like what we are seeing with being prepared.
- 21:33 Chair Ellis                    So are there now two plus Mr. Kaino?
- 21:40 J. Nelson                    Two what?
- 21:40 Chair Ellis                    Two lawyers plus Mr. Kaino, or are there more.
- 21:41 J. Nelson                    Well there is still Mr. Haller and there is still John Orr but he is going to leave the area at the end of the year.
- 21:52 Chair Ellis                    So down to three?
- 21:56 J. Nelson                    If Haller stays on there would be four.
- 21:59 Chair Ellis                    Okay.
- 22:00 J. Nelson                    But I think the problem that Mr. Kaino is going to have is I don't think he is letting Mr. Haller do Measure 11 or major felony cases, and I don't think – he may get there but I don't think Mr. Rust is ready yet. He has been doing pretty much misdemeanors.
- 22:26 Chair Ellis                    We are told that there are now quarterly meetings with the court. Is that accurate?
- 22:35 J. Nelson                    Yes. I think we have had a couple of different meetings; ones with just the judges and ones with the DAs and the judges. I don't know if they are quarterly but we are meeting more regularly.
- 22:50 Chair Ellis                    So do you feel like there is good communication between the court, the defense provider community, and other justice system components?
- 23:03 J. Nelson                    I am not sure what you mean by "other."
- 23:07 Chair Ellis                    That would include the DA. That would include law enforcements. Victims.
- 23:13 J. Nelson                    I don't know how much communication there is between the defense bar and law enforcement. I think we talk if there is an issue from our side. I will talk to either Ms. Murk or Mr. Kaino if it is regarding indigent defense. If they have an issue Mr. Kaino is not bashful about coming in and talking to me about it.
- 23:35 Chair Ellis                    We are told he has brought in a new staff person to facilitate appointments and scheduling and all of that. Do you have any observations about that?

- 23:51 J. Nelson I ask a couple of our staff people how that is going and they told me much better. There is one person they can call if there is an issue. I know who she is because she use to work for me and she is a very competent person. He made a good choice.
- 24:09 Chair Ellis So one reason we go around the state and meet in communities like this is to give people in those communities a chance to tell us how we can do our job better. So this is your opportunity. We are obviously very concerned about quality and effectiveness of the defense function. Any thoughts or observations how we could be more helpful?
- 24:42 J. Nelson I think I have said all along that I think we need more people providing indigent services. Judge Brownhill last week had a contested dependency case that I think had either two or three of our indigent lawyers involved. I know a lot of the things that I had scheduled for one of those lawyers we had to take off. He had people in custody that wanted to make a plea because they got a deal to get them out of custody. We had a couple of juveniles. One of them is in a residential program. I think we have made arrangements to have her appear by phone with the program. Just with the numbers it is sometimes logistically difficult if you have something going like that dependency case upstairs. Those people are tied up then. If we had more to spread around we could certainly do other things. It certainly limits what we can do on other cases. The other concern that I have is some of these people are my age or a little bit older. We are getting up there where we have health issues. The consortium just experienced this and forced them to start bringing in some younger people to learn what it is like to go to a court room and argue before a jury.
- 26:10 Chair Ellis So are there younger lawyers attracted to this area? Some parts of the state had some problems and some parts not so bad.
- 26:22 J. Nelson I don't know. I am a long time out of law school. I wanted to come back because I grew up here. I don't know what attracts people or not. We have younger lawyers in the community that are opening up offices. I would think they would be interested in indigent defense. I haven't asked them if they are or not. Mark Lang used to be in the DA's office. He does some of the overflow. I don't know if he is interested in taking on more or not.
- 26:55 Chair Ellis Are there minority populations here? Native American or Hispanic?
- 27:04 J. Nelson Certainly Hispanic. I know people that are Native American, but the Clatsop and Chinook tribes in this area are not recognized by the federal government. When we get like a dependency case where you might issues, unless they are also affiliated with the ....
- 27:33 Chair Ellis Do they find their way into the court system very often?
- 27:36 J. Nelson Once in awhile. Not a lot.
- 27:39 Chair Ellis And the Hispanic population is that significant?
- 27:50 J. Nelson What is significant?
- 27:50 Chair Ellis Significant to the point we ought to be concerned whether there are Spanish speaking lawyers?
- 27:59 J. Nelson I don't know the answer to that one. We have pretty good interpreters. To be honest with you years ago when I was in St. Helens they had a Spanish speaking lawyer, but I don't know that he was any better at representing people than the non-Hispanics. I don't see a change in the representation level, in my view, whether someone is Hispanic or not.
- 28:38 Chair Ellis Other questions for the judge? Thank you very much. So, Nancy, we are back and have completed the budget. Do you want to update us on the legislature?

### Agenda Item No. 3

### Legislative Update

29:09 N. Cozine

So the legislative update. There were, I think, about 275 bills that were considered by the legislature this session that were related to criminal law, penalties, procedures, or had other criminal law type provisions. Of those 275 bills 69 made it through and are either signed by the Governor or awaiting his signature. Of those 69, about 50 had low or no impact on public defense services. So we didn't expect that they would have a significant increase or decrease in our costs. There were a few that had some level of increase but the changes were really obscure and so the ultimate cost to us is likely to be very low. There were a few that had some increased penalties or provisions that were a little more common. One was they added a chargeable offense within the prostitution statute so that they can now capture attempt not just prostitution. That could be somewhat significant. Another one was unlawful tethering or an animal. It is interesting because someone who puts their dog on a lease outside of a store while they go in to get something could technically, under the law, be cited with a misdemeanor crime depending upon the circumstances. We will have to see how it plays out. I think there is room there if there is over charging there will be a backlash against it. Ultimately, I think it is likely that it is probably going to be obscure, but, yes, it will be very regionally interpreted. Then the other one was a change to the civil commitment statutes such that when someone is charged with a crime and they are unable to aid and assist and they come to the end of the time for which they can be incarcerated, there is a mechanism for actually continuing incarceration. This came up in Washington County. It was actually a subject of a bar complaint. The lawyer had agreed with the district attorney to have the person civilly committed because they couldn't be held any longer on the criminal case. This change codifies that. There may be some increase, again, to the work required for defense attorney but, again, I don't think it will be that common so not a huge increase in costs. The other bill that past and ended up having quite an impact on us was Senate Bill 40. Legislative fiscal office deducted from our budget almost \$900,000 in anticipated savings. We don't think our savings will be that significant. We will just have to watch and see how that goes. It really decreased the crime categories for different delivery of marijuana offenses. An A felony is now a B felony. A B felony is a C felony and there is a misdemeanor crime as well. We will have to see how that plays out. We will keep watching it. There was another bill that I thought I would mention which was House Bill 2205. This bill addresses elder abuse. It added some provisions. It amended ORS 124.050. It lists those individuals who are responsible mandatory reporters of elder abuse. And interestingly that list included public officials prior to this legislative session. So everyone on this Commission was a mandatory reporter of elder abuse. They changed it. They took off public officials and they added legislators and lawyers and a few others. So members of this Commission who are not lawyers, unless you fall in one of the other categories listed, you are actually no longer a mandatory reporter of elder abuse.

33:27 Chair Ellis

Potter maneuvered that ....

33:29 N. Cozine

So skillfully. Also in that bill they amended ORS 9.114. It now requires the bar to adapt minimum requirements for CLE credits on elder abuse. I thought that was a bill worth mentioning.

33:54 Chair Ellis

So that means every lawyer has to do with elder abuse much like child abuse.

33:59 N. Cozine

It means that the bar has to adopt some minimum requirement standards for elder abuse. We will see what the bar comes up with.

34:00 Chair Ellis

I use to laugh (inaudible).

34:12 N. Cozine

Yes. That is the legislative update that I have for you unless you have any questions. Gale should give her own OCDLA update because OCDLA was successful in getting some

significant legislation passed regarding the Brady bill, so that district attorneys are required to share exculpatory information. They always have been under the constitution, but this is a statutory provision that codifies that requirement. I think it was a big accomplishment by OCDLA that will have an impact, certainly, potentially on public defense cases.

34:46 Chair Ellis

But we didn't have a rash of (inaudible).

34:58 N. Cozine

There weren't a lot of bills that did not, no. But we also didn't have the big legislation that would have decreased penalties, which was what we were hoping we would have with 3194. It simply didn't make any changes to Measure 11. There are some prison savings there but not the types that would affect us other than very minimally.

35:23 C. Lazenby

So this Brady bill that was past and I am sort of reflecting on that conversation about the expedited disposition situation here in Clatsop County. My read on that is that the reason why the defense lawyers are not participating is that they can't get discovery in time to accurately advise their clients. Is that kind of the core of the problem?

35:50 N. Cozine

You know I am actually not sure about that. When I came in May we didn't talk specifically with Mr. Kaino or Mary Ann Murk about that. I think it is worth asking them when they are here.

36:04 C. Lazenby

Because if we now have a statutory Brady bill that could throw this process into a lot of question about the validity of those bills and that process (inaudible). It might be worth kind of reviewing after the local practitioners see whether or not that is the problem. If so, they may want to raise that there is now a statutory requirement that prosecutors provide them with all the materials in advance before anything happens.

36:50 J. Potter

We will ask them as well if there was any coercive aspects to the agreements that the prosecutor was proposing. It seemed like that was part of the problem to.

37:07 C. Lazenby

That is just kind of combat rules. My point is it really is a problem of not having discovery. I would be very uncomfortable advising a client to aspect plea if I hadn't been able to read the police reports or other observations. There might be witnesses that might be available to do that. If we have this process that exists it seems in this county where the person from Benton has a DUI and wants to just get it out of the way. Then they get another one a couple of years from now and there are lots of consequences because it is their second one. The lawyer might actually have a better reason for not participating when we now have a statutory requirement that the prosecutor provide exculpatory materials. It is really trying to make sure the process is ...

38:16 N. Cozine

Right. You probably noticed in the report that there was an issue with having lawyers at arraignment and at shelter hearings and at preliminary hearings.

**Agenda Item No. 4**

**Authorization to Increase Guideline Transcriptionist and Interpreter Rate**

38:32 Chair Ellis

Are you ready for action item authorization to increase guideline transcriptionist and interpreter rate. Paul was going to present on that. Are you able to substitute for him?

38:49 N. Cozine

I am. In your packet of materials you will see that there is a modified version of our policies and procedures that would increase those rates. That rate change was actually granted by the legislature during this legislative cycle. The day the bill past was specific to the Oregon Judicial Department, but we have historically preserved their rates and adopted the same rates so that interpreters who are paid by the judicial department are paid the same rate by OPDS.

39:31 Chair Ellis

And somebody looked at this and said this is correct and what we ought to do?

39:34 N. Cozine                    That it is consistent. The one question and I don't have my pulled up rate this minute, but the one - there are two rates that you will see there. One is for qualified and one is for certified. I may be getting my terms incorrect because I am not looking at it. The qualified interpreters we could have chosen to bump that \$25 up to a higher amount, but we did not put that in the proposal. There isn't any other sort of guideline rate that we look at when we are setting that. We feel we need to be responsive to the certified interpreter. Changes that are being enacted on the OJD side and I think it is an open question as to whether or not we should keep the qualified interpreter at \$25 an hour. It is a low amount. But we are not required to change it in the same way that we aren't required to change it on the certified side either, it just creates problems if we don't.

40:42 Chair Ellis                    So this one requires a motion?

40:46 N. Cozine                    It does.

40:46 Chair Ellis                    Is there a motion to approve attachment 2 with the indicated change?  
**MOTION:** John Potter moved to approved attachment 2; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

41:05 Chair Ellis                    Why don't we go back to Clatsop County.

41:11 N. Cozine                    Yes. Judge Brownhill is here and see is the primary dependency law judge. Good morning. How are you?

41:18 J. Brownhill                    Good.

41:18 Chair Ellis                    Good morning, judge. Thank you for joining us. We would invite you to make any observations that you think would be helpful to us in our effort to try to be a good steward of our resources and provide good defense here in Clatsop County.

41:43 J. Brownhill                    Well primarily I want to say thank you for sponsoring this review. We have limped along with some pretty - well not excellent lawyers for many years and finally we are seeing changes, which is really good. Although in reading the reports, and I was just reading them this morning because I just got a copy of them, it made me wonder why we hadn't done something years ago. Why did we tolerate this for so long?

42:17 Chair Ellis                    Well we were here. I am a taxpayer in Clatsop County, so I am very sensitive. We were here about five years ago. I remember the meeting and I am agreement with you. I think our follow up wasn't as good as it should have been. But the team that you had here last November is really our A team.

42:48 J. Brownhill                    They were great.

42:48 Chair Ellis                    I know most of them and they are really good.

42:52 J. Brownhill                    And I think Kris Kaino and Mary Ann Murk have responded well to the recommendations. They have made some changes. I think they have been working really hard at making changes, so I am already seeing improvements in dependency cases.

43:10 Chair Ellis                    You know how to find us, don't you? So if you have any as we go further, observations you want to share, call our office in Salem.

43:28 J. Brownhill                    I can find Nancy.

43:28 Chair Ellis                    She would be exactly the right one. Any questions for Judge Brownhill?

43:38 Hon. Elizabeth Welch Did you get to say everything that you wanted to say?

43:46 J. Brownhill You know, don't you, the changes that Kris and Mary Ann have made as far as attorneys.

43:47 Chair Ellis Maybe it would be helpful. Fill us in and make sure we are on the same page.

43:59 J. Brownhill So we have two attorneys in the CCDA who really weren't very good in dependency cases. If they were appointed to represent children they didn't talk to the kids. They didn't meet with the kids. Many times they didn't meet with the parents when they represented parents. Those two lawyers are being phased out. Then Ty Settles had health issues so he is retired. But Kris has replaced those lawyers with Jeremy Rust, Katrina Penfield, and he brought in a lawyer from Eugene, James Von Beckman. They seem to be doing well. I was a little concerned about Katrina at first because she is new. She hasn't been in court much, and she seems really reluctant to speak up. But then the last shelter hearing that I had she was great. She did really a good job. I am confident that our children and parents will be better served.

44:59 Chair Ellis Had she been in the community but just not part of the consortium?

45:02 J. Brownhill She was down in Cannon Beach as the director of the Children's Program or something, non-law, and now she has joined the Bob Milbrink firm. She is new to the practice and really new to the courtroom. But I think it is a great change. I think all three of those lawyers are doing a good job so far even though none of them had much experience in dependency cases. But we now have attorneys for parents at shelter hearing. We didn't and that is something the report noted that we should. It is a little more difficult for court management purposes because the shelter hearings are lasting so much longer, but we can live with that. I think it is better for the parents to have lawyers and us have to adjust the docket than the way we were doing it before.

45:59 Chair Ellis Do you specialize in the juvenile side, or do you do everything?

46:01 J. Brownhill I do everything but I do most of the dependency cases in addition to most everything else.

46:14 Chair Ellis The timeliness of appearances. Are they doing okay on that?

46:16 J. Brownhill Do you mean coming to court on time?

46:16 Chair Ellis Right and being present when arraignments take place.

46:23 J. Brownhill Yes. With the exception of Don Haller but he is being phased out. He is rarely on time.

46:33 Chair Ellis In some parts of the state, not recently, but we have had issues in the past of poor communication, poor time management, and that is just not acceptable because that hurts everybody. How about the communication between the defense community, the court, the DA, DHS? Do you feel like that is working satisfactorily, or are people kind of standoff?

47:02 J. Brownhill I think it is working okay. I don't think we are every going have really great communication just given the personalities. But Judge Nelson has scheduled quarterly meetings for the judges and the DA and Kris and Mary Ann, so that will be an improvement, I think.

47:22 Chair Ellis Has that happened so far?

47:22 J. Brownhill We had one meeting and we meetings scheduled throughout - well one in September and one in December.

47:35 Chair Ellis I talked with Judge Nelson when he was here. This county does not have an early disposition program.

47:40 J. Brownhill We actually do. It is just that the defense lawyers don't participate.

47:49 Chair Ellis They don't participate because they feel they are denied adequate discovery and they are not able to do their job.

47:55 J. Brownhill They might have conflicts. That is something that the Commission looked at when you were here before.

47:57 Chair Ellis That is why I am bringing it up. I remember focusing on that. A lot of counties have successful EDPs. The defense lawyers are okay with it. I am not trying to push a defense lawyer to do something that the lawyer feels really is not right. That is just not what we do. It feels to me like there has been no progress, no communication, and no change since we were here five years.

48:37 J. Brownhill Right. Didn't Ingrid bring in Rush Hoag from Eugene? He met with the defense lawyers, but he didn't persuade them. The other problem with our program is that theoretically the DA will make the best offer ever at this early disposition phase and that doesn't happen. The offers get better as we get closer to trial and usually at docket call they come in with their best offer. So even though we have talked to the DAs about it and asked them to flip it, it doesn't happen. I think a lot of it is they don't look at their cases really carefully until right before trial and then, oh, maybe we don't have a victim or whatever.

49:30 Chair Ellis Do you think the client is right to revisit the issue, or is everybody kind of done with that?

49:36 J. Brownhill I don't know. I really couldn't tell you. I don't do the program. I don't know if it might be better to wait until we have a different district attorney. I am not sure if that would help either.

49:48 Chair Ellis Is that likely to replace Josh who has been here forever.

49:52 J. Brownhill He has been here since 1993. That is forever. Yes. Someday he is going to retire or take a different

50:05 Chair Ellis I think he thinks he is immortal. It may not happen.

50:18 Hon. Elizabeth Welch In the material that we got and my questions are all about juveniles. One concern was the ongoing representation of parents after jurisdiction has been established. We have run into that as a problem. People were pretty much just left to .... to hearings or whatever. I can really picture how that works. You are aware of what I am referring to?

51:02 J. Brownhill Yes.

51:03 Hon. Elizabeth Welch Let me ask you about that with another piece with it. It appears that in this jurisdiction the CRB is relied on more heavily than it is in places as a substitute for review hearings in the court. I am sure there are a lot of good reasons for that. My concern always was that CRBs have no authority. They can't do anything. They can't change anything. They can't tell DHS to do something different. You know what I am talking about. Those two practices are concerning. I am just wondering how you feel about it as an old pro?

52:05 J. Brownhill Okay. As far as the ongoing representation by the attorneys, I think you are right there isn't a lot of interchange between the attorneys and the parents after disposition and before the

permanency hearing. I think those parents are pretty much on their own. I am not sure how to fix that. I am not sure how the payment works with the juvenile cases. If the attorneys are not being paid during that period of time? That might be a place where you could help if that is the case. Then as far as relying on the CRBs. We really do rely on the CRB for review hearings just because of the docket and how little court time we have. But as I talk to other judges in other jurisdictions and some of them are having 90 day reviews, 60 day reviews, that probably would really help the parents keep on track and understand the timelines and I will definitely look at that.

53:13 Hon. Elizabeth  
Welch

The combination of not getting before the judge and not having a lawyer at the CRB is (inaudible). If they had anything going for them nobody is at (inaudible). It is kind of a traffic crash. The other question is a delinquency matter. We were in the same room and had a discussion (inaudible) about counsel for kids. It appears from the information that we have gathered that that continues to be a big issue.

54:14 Chair Ellis

We are told that 40% of the juvenile delinquency cases there will be a waiver of counsel.

54:20 J. Brownhill

I bet that is true.

54:20 Chair Ellis

My question is who advises the youth on that issue? Whether to waive counsel?

54:33 J. Brownhill

Usually the judge at the detention hearing or the first appearance. We don't use the script that OJD has. I don't know that we are doing as good as job at advising these youth of their right to counsel as we could. I think we could improve there.

54:52 Chair Ellis

One thing we have encouraged is to at least have a lawyer advise the youth on the issue of waiver.

55:05 J. Brownhill

That is a good idea. So we would have to a attorney there.

55:10 Chair Ellis

You would have to have a lawyer there. But this is a very uncomfortable situation from our perspective. You have a vulnerable, potential individual. There is a lot of pressure from parents who think they are going to have pay money. DHS who kind of likes to run the show and so there is a lot of implied pressure to just go along and waive and the notion that if you are good to us we will be good to you kind of thing. But it is just very uncomfortable and so at a minimum we would like to see it set up so that at least a lawyer is involved on the issue of waiver of counsel. I am sensing from you encouragement on that.

56:01 J. Brownhill

I think it is a great idea to have a lawyer there advising the youth. The juvenile department employees are not good people to be giving the advice.

56:08 Chair Ellis

I am not trying to criticize them. There is this tension in juvenile that has been there forever between paternalism and the more adjudicated.

56:27 J. Brownhill

I have a related concern about that. On probation violations, I just discovered this the other day, but a youth may waive at the detention hearing, waive counsel, and admit to the probation violation and then the juvenile department is recommending eight days in detention on every count on which the youth is on probation. So it can add up to 56 days on one probation violation.

56:52 Chair Ellis

Chief Justice De Muniz, I think, sent a letter to all the judges encouraging this. I always wished it was a lot stronger....but maybe other know, or maybe Nancy you know, what do we have to do to put in place here? We have Judge Brownhill here who is encouraging us and would like it. I want this to not just be one of those things we say nice words and go home and nothing happens. How do we get from here to there?

57:37 N. Cozine In terms of how do we ensure that we have a lawyer at the detention hearings?

57:44 Chair Ellis Should we ask Judge Brownhill to work with your other judicial colleagues and make it clear to the community that this is a requirement? We will provide the lawyers. We will pay the lawyers, but we need a system where it just becomes part of what happens.

58:06 J. Brownhill We are doing it at shelter hearings now. We are getting the lawyers there. There is no reason we can't get lawyers there for detention hearings. They are the same time everyday.

58:14 Hon. Elizabeth Welch But are all kids in detention?

58:18 J. Brownhill No. There are many that come in for their first appearance.

58:21 Hon. Elizabeth Welch So there isn't any judicial officer involved until the kid enters a plea at some point. I assume that is when the colloquy happens between the judge and kiddo. It happens at the time that they are scheduled to take a plea.

58:42 J. Brownhill Right. If you just go along with this. I think the detention hearings are doable. The other piece, which is probably most of the kids, is ....

58:56 Chair Ellis I think there will probably be a lower percentage of waivers. Nancy, what more do we need to do.

59:13 Hon. Elizabeth Welch One of the frustrations that I had with the statistics that were in the report was that it didn't deal with misdemeanors, infractions and felonies. So the real first question for me is under the US Supreme Court case law, the first question of kids who could be institutionalized or at least removed from home, what percentage of the kids are waiving counsel? If it is all MIPs or something like that it is one thing. It is another thing if it burglaries and car thefts and so forth where it gives a kid a record. So it would be good to dig a little deeper in terms of those classifications. There are lots of counties we have gone to where they say any kid with a felony (inaudible). We don't let them waive on felonies. It is still a problem with the misdemeanors, but it is not anywhere as a terrific problem as it is with kids with felonies. I think that would be a good place to start.

1:00:25 J. Brownhill So just trying to find out who is waiving and what the charges are? I think we can do that from OJIN.

1:00:38 N. Cozine It is hard to pull aggregate data on waiver. I would certainly be happy to follow up with you in a meeting. I have met with Michael Livingston who has retired.

1:00:59 J. Brownhill It was a big disappointment to those of us who worked with him because he was fabulous. They are advertising for a replacement. Maybe we can work together and figure out who is actually waiving counsel and at what stage.

1:01:21 Chair Ellis Other questions for Judge Brownhill?

1:01:21 C. Lazenby Judge, the Family Drug Court that you run. I read the description and it sounds like it is wrap around program involving parents with drugs and children who are also involved. How does that work in terms of the family unit? Do they need to have kids who are involved in the juvenile system as well?

1:01:46 J. Brownhill Yes. They have to have admitted or been found within the jurisdiction of the court on a drug or alcohol basis. It is voluntary. They can ask to be part of the program. One little problem we have is that we have at least three specialty courts, maybe four, and just today I have a mom whose child is in foster care and I have her dependency case. She is just pleading to a criminal charge and she is going into Judge Nelson's adult drug court. I have several moms who are Judge Matyas' treatment court and we don't have any way to coordinate that. That is a system problem, but, yes, they have to have a child in DHS custody and have admitted to or been within the jurisdiction on alcohol or drug basis. It is the most fun that I have all week long. I really, really enjoy that court. Sometimes I get very frustrated with the parents but it is fun.

1:02:55 C. Lazenby It would be really great if you had a way of coordinating all of that within the system.

1:03:13 J. Brownhill Right.

1:03:17 C. Lazenby It keeps coming up and we keep hearing that that one of the - for long time there has been this conversation in Multnomah County about a continual care to take care of the folks. Multnomah County has grandfathered in their (inaudible). Mom and dad are in drug treatment in criminal court and they have no unified piece to kind of deal with the family unit around all these issues. It is sort of the Holy Grail. I am preaching to the choir. I can tell, Judge. In a smaller theatre like this if you could make it happen it might be something that we could take around the state.

1:04:13 J. Brownhill We will work on it.

1:04:20 Hon. Elizabeth Welch In my experience the problem is either with district attorney's office that refuses to have any sort of plea over and a war on the defense bar. We would ask can we have lawyers who will both do juvenile dependency work and do misdemeanor adult criminal war.

1:04:48 J. Brownhill We have those people here. We have lawyers who will do it all. I think it is more on the judge level. Where I want this person. No. I want this person. That is our problem.

1:05:00 C. Lazenby And that is kind of what I mean by this being a small community. A smaller lab in which you could work out the details.

1:05:11 J. Potter Can I go back to the waivers just for a moment. You acknowledge that there is a possibility that fewer waivers would take place and that would be good. What does it do to your court system, your workload, if we have more lawyers in these cases? Does it change anything much for you?

1:05:34 J. Brownhill I don't think so. Keep in mind Judge Nelson handles most of the delinquency cases, but all of those cases at first appearance are set for a settlement conference, maybe not the violations, but I know the misdemeanors and felonies are set for settlement conference. So it really isn't going to make too much difference if the kids are represented are that settlement conference as far as time. I don't think it will make too much difference. They will still resolve a lot of the cases at the settlement conference, but at least the youth will be represented and know what they are getting into, I hope. With these new lawyers I think that will happen.

1:06:20 Chair Ellis Okay. Thank you. Nice to see you.

1:06:21 J. Brownhill Thank you.

1:06:58 S. McCrea Are you getting kicked under the table?

1:06:59 Chair Ellis So why don't we take about 10 minutes.

(Break)

- 1:09:02 Chair Ellis Nice to see you. Thanks for coming.
- 1:09:05 K. Kaino Thanks for having me.
- 1:09:05 Chair Ellis There has been a lot going on so why don't you summarize for us where things are and your progress since the November report.
- 1:09:13 K. Kaino My name is Kris Kaino. I am one of the attorneys here who does indigent defense work. I have the consortium. I am the administrator of the consortium. There are two consortiums. Mary Ann Murk is just her own consortium. I don't know if the consortium is the right term for her. She has her own contract and then there are four of us, at least there were four of us for the last 15 years or 12 years. I was in Marion County for about seven or eight years before I came here. I have been here for probably 15 or 16 years. I have administered the contract here for probably the last eight or 10 years. Obviously we had our peer review which was a sobering experience for us when it came back. Some of the issues that were brought up in that peer review were issues that we had frankly been dealing with for a few years in regards to different issues with different attorneys in our consortium. That probability gave me as consortium administrator a little more of a ability to deal directly with those issues, because it was pretty clear we are either going to deal with them or we or not going to have a contract. It allowed me as administrator to tell the folks in our consortium that you are either going make these changes or you are going to go a different direction or we are not going to be in a consortium together. I will say that I think we have made some significant changes. Some of them have happened kind of ironically. The four of us have been in the consortium for 12 years and I think - or 13 years together, maybe longer. At the end of this year there won't be anybody but me left in the consortium.
- 1:11:00 Chair Ellis Of the original.
- 1:11:00 K. Kaino Of the original four attorneys. We have had some new attorneys come in. One of the things, as the report had indicated, to have some new blood if you will. Some new attorneys join our consortium and we have had two new attorneys join about six months ago. They are younger. They work for a firm down in Seaside. They are somewhat limited in they can't take co-defendants and that sort of thing. It has actually worked out pretty well because Katrina Penfield wants to do a lot of dependency work and I think will very good at that. She is new but she is coming long. Then her husband, Jeremy Rusk, is more interested in doing criminal work. So they have kind of split those up between the two of them. That has actually worked very well. One of the attorneys who was in our consortium, Ty Settles. Ty was a very sharp attorney and did a very good job. He had some hygiene issues that he actually came - it is just a fact. I don't know how to say it other than that. He did. He just didn't take care of himself as good as someone should that is going to represent people. But I will say that Ty made some substantial changes in regards to that. It is a difficult issue to talk to a 60 some year old man who is practicing law about that issue. But anyway Ty had made some substantial progress in that direction. It was bad enough that even during time period before peer review I had talked to him about it. I knew our presiding judge had talked to him about it. Again, it is not an easy subject to broach with someone. Once the peer review came out it actually discussed it in the peer review also. It made it more appropriate to talk to him about it. Ty made substantial progress in regards to that. It somewhat surprised me because of his personality but he really cleaned up for lack of a better term. Unfortunately Ty then had substantial heart problems and was up at OHSU for about two or three weeks and he has basically quit practicing law. So in the last 60 days I have gotten his entire files on my desk. I talked to Billy Strehlow our analyst and I got a local attorney here to take about 25 cases. We had enough money in our consortium that I could have him come and take those cases. I went through all those and talked to our presiding judge and we gave that block of cases to

this one attorney. That attorney is not going to be an attorney in our consortium, but it was a way of getting through - I mean he didn't die, but for all intensive purposes as far as doing criminal work he is done. We have taken care of that. His dependency cases I have gone through all of those and we have dealt those out. That went smoother than I thought it would. The Oregon State Bar was less help than I thought they would be. That has actually worked out pretty well and that has been going on for the last probably six or eight weeks. That was kind of a significant thing for us. Then one other attorney in the consortium he has been phased out and will not be in the consortium next year. He has some health issues and other issues and, frankly, he is doing C felonies and misdemeanors only now. I am mentoring him. He is older than me so that doesn't always sound good, but as far as just being on time to court and different issues that he has had. I think he is doing better but he is not going to be part of our consortium at the end of this year. He is done at the end of this year. He will probably be done in October or November doing cases. Then one of the other attorneys that I set out some things that he needed to do decided that he didn't want to be part of the consortium next year. If he didn't want to make those changes, than I would rather not have him as part of the consortium. So we actually got fortunate enough to have a lawyer join our consortium that was a lawyer down in Lane County. He just came up here. James Von Beckman is his name. He is an attorney down there. He is Measure 11 qualified. He has practiced probably 10 or 11 years.

- 1:15:24 Chair Ellis Was he in Lane PD?
- 1:15:25 K. Kaino He was in the Lane County Consortium with and I might need some help here. There was a PD office and then there was a group of about a dozen attorneys and a gentleman by the name of Brad Kessler. I talked to Brad. I also talked to the gentleman who runs the PD office.
- 1:15:43 Chair Ellis Greg Hazarabedian.
- 1:15:43 K. Kaino That is him and then I talked to probably five or six other attorneys who were in his group that he ran that he was a member. He was part of the consortium. What happened with him is he ended up about a year and a half ago he moved to Washington because his mother got cancer and he was kind of the only one that could really take care of her. So him and his wife and two children moved up to take care of his mother. Then when he moved back to Lane County that consortium had dropped the number of cases that it had significantly. They just didn't have room for him to come back into the consortium.
- 1:16:21 Chair Ellis Lane County has shrunk a lot. They are timber dependent and the cases aren't there.
- 1:16:31 K. Kaino I hopefully had some pretty frank conversations with these folks. I think they would have told me if geez you don't want the guy. Our presiding judge talked to their presiding judge, Judge Rasmussen, and then Judge Brownhill talked - she is from Lane County or her family is.
- 1:16:47 Chair Ellis Half of this Commission is from Lane County. They know all about it.
- 1:16:49 K. Kaino She talked to a couple of the judges down there. I don't know the judges she talked to but everything came back very positive. He was willing to come up and he just started her about - he technically started July 1, but he really started about a week ago. So he is on board and is part of our consortium.
- 1:17:08 Chair Ellis So do you have a consortium agreement, articles, bylaws, boards?
- 1:17:11 K. Kaino We do.
- 1:17:11 Chair Ellis Tell me about that.

1:17:16 K. Kaino We have bylaws just as far as our administrator and then we have our monthly meetings. There is an oversight procedure and, frankly, I am changing those. If I am going to speak frankly I think the most difficult thing for small consortiums or even big consortiums, when this peer review started with us I didn't know what to expect. Then when I got the evaluation I will be honest with you it was much worse than I thought it would be.

1:17:42 Chair Ellis It was not a pretty picture.

1:17:55 K. Kaino No it was horrible, frankly. I didn't agree with everything in it but there were enough things in there that I knew were true that we needed some changes in. The thing that small consortiums - and I am probably not answering your question about what is in our process, but I won't tell you that I talk to every consortium in the State of Oregon, but I talked to probably 85% of them just finding out what do you do. What is your process for going through and making sure things are done correctly? Kind of an oversight process. What do you do? Some of them had boards of directors. That seems to be a big push, but I frankly don't know what a board of directors does for most consortiums.

1:18:25 Chair Ellis We have a rule that you have to have them.

1:18:34 K. Kaino Either a board of directors, or my understanding is a smaller consortium ...

1:18:35 Chair Ellis There is a slight carve out for satisfy us some other way.

1:18:43 K. Kaino Correct. But when I even talked to groups that have boards of directors, I am not sure there is really any oversight procedure that they have with those boards if I am going to speak frankly.

1:18:56 Chair Ellis We encourage that.

1:18:56 K. Kaino I don't really think there is. I think the best oversight there is a couple of smaller consortiums and my thought about what we are going to do here in our county is the evaluation that is sent out yearly, such as the one that went out with the peer review. Kind of an anonymous review where you send out and it has a questionnaire about the attorneys. I think that is the most valuable thing you can do is let the players in the county, you know you have the DA's office. You want to look and see who is doing the comments. It is anonymous, but there is a spot where they can check they are either DA's office or from parole and probation or a CASA member. Then probably set up a board where maybe one of our judges and then two attorneys in the county that have done criminal defense work or do criminal work, are willing to review those with the consortium administrator, i.e., me, and at least go through that process and then can sit down and talk to the members of the consortium.

1:20:07 Chair Ellis The delicate line that you are trying to walk, we don't want just a old informal rolodex consortium kind of arrangement. On the other extreme, we cause ourselves a lot of trouble if we push you to become so much like a law firm that all of sudden rule on conflict attribution applies. We are trying to find ways to have the consortium model that keeps the lawyers sufficient and independent to avoid the unit rule, but elevates their professionalism. So the things we are looking for, and you as the administrator are the key to this, is there training? Is there case assignments appropriate to the skill level of the individual? Is there some peer review going on? Is there good communication so that people show up for arraignments and show up for the appearances and not slowing the system down. Are people attending the conferences so they are part of the statewide defense community? We have these remarkable statewide defense program. They work with each other. A lot of this is OCDLA, which is unique to the country at the level they do it. We want to make sure particular in areas like Clatsop, which some would say a little bit isolated from the valley. We don't want you to be isolated. We want you to be integral and involved in getting the benefit - Pete Gartlan's group on the appellate side are a role model for legal help. Some of the other PD offices, Multnomah and Lane, they are really willing to help and share. A lot of what we are doing is

trying to professionalize the practice and get consortia, the particular the small ones in the counties that are on the perimeter, to get the benefit of what is out there.

1:22:43 C. Lazenby

If I could just jump in. We also serve as a little bit of a political buffer too. Part of what is going on is the pressures this Commission is under from the legislature. They are now impressing upon us, along with other agencies, to come up with for lack of a better term, "Bang for the buck," kind of measurements. So quality of representation and the more feedback that we get about the higher quality of services, the better we are going to be in a position to protect our funding sources and not have reductions. We need everybody to help us around quality.

1:23:18 K. Kaino

I think as far as quality assurance what I try to do as administrator and I think we frankly do a very good job. One of the things changed as a result of peer review is we do now at least once a year we will go to the OCDLA - and we went to the last one together as a group. Everybody in our consortium attended the three day conference. That was a more of a delinquency oriented and I wanted to go to the dependency one is in October and usually the delinquency one is in April. That is what we are going to do on a yearly basis. We are going to start in October because I want to go to delinquency. I want everybody to go to the delinquency one. So we do that. We meet monthly as a consortium. We are a small county so, frankly, you probably have lunch even more than that. We meet as a formal group with an agenda to go over things that we want to go over and the different issues that we have. Mary Ann and I now meet with all of the judges on a quarterly basis. That has been hugely beneficial. We just started it for about the last - I think we have had three meetings now. The DA's office isn't there, but just talking about consortium issues and how we can most effectively represent our clients. The different issues whether it is juvenile issues or adult court issues. We had an issue here just within the last couple of months regarding - now that we have James on board it has helped because we have got another person that is Ballot Measure 11 qualified. He does a good job in regards to those types of cases, but assigning out cases that the attorney is appropriately qualified for. We have one attorney that is fairly new that I am mentoring. He also has an attorney in his office that has done criminal work. He is an older gentleman that still practices who is also mentoring him. He is only doing C felonies and below and misdemeanors. Those are the only cases that he is getting because he is just not qualified. He is sitting on some major felony cases here. I think he is doing one here in the next couple of weeks if it goes to trial where he is going to be a co-counsel with one of the attorneys in the consortium just to get the experience in doing those things. I think we do pretty good job of communicating with the court. We have now got a woman who is working for my consortium, working for me that is kind of a liaison between the court for dependency cases for shelter hearings. One of the issues was we weren't having parents represented at those shelter hearings. I think that has changed dramatically. I think we are getting attorneys there at those shelter hearings on very short notice and getting folks to represent the parents at those hearings. I think the communication with the court I think is thousand percent better than it was just six months ago. I think that is helping our clients tremendously because we are there at those types of hearings and representing those folks.

1:26:11 Chair Ellis

Do you attribute that to the report?

1:26:14 K. Kaino

I do.

1:26:15 Chair Ellis

There were two subjects that we talked with particularly Judge Brownhill about, but some we talked with Judge Nelson. One is the early disposition program here, which as we understand it the defense providers are unwilling to participate in which was true five years ago.

1:26:40 K. Kaino

When you say unwilling to participate.

1:26:49 Chair Ellis

I didn't want to phrase it negatively.

- 1:26:49 K. Kaino We had a meeting and this has been seven or eight years ago. There were a couple of difference issues that came up during those. We said we are willing to participate in that under certain circumstances. I think as defense attorneys, if we are going to do an effective job for our clients you want to be able to have 1) all the reports so that you can cover over reports and read those. Mr. Marquis was reluctant to give those to the defense even a day ahead of time where we could in and maybe get those reports a day or two ahead of time so we could look at them. If it is Tuesday mornings that we are doing them then Monday afternoon provide us those reports. They would not do that. Then we had a meeting and I can't remember whether it was our TCA that this kind of came through or whether it was OPDS at the time, or whether it was even called ODPS at the time, but there some impetus, and I can't remember where it came from, to try to get this program going.
- 1:27:56 Chair Ellis I think it came from us.
- 1:27:56 K. Kaino It may have. They said call somebody in another county and I can't remember if it was Lane or Linn or somewhere. We actually got the guy on the phone because it was supposed to be a great program and how is it working and the guy says, "It doesn't work very well down here at all." I can't remember who the person was but it was somebody who was dealing with that program in that county.
- 1:28:21 Chair Ellis The reason I bring this up is I do remember this was a hot issue when we were here before. I respect the defense position that if you don't get meaningful discovery you can't counsel somebody and you just don't want to be a piece of furniture. You have a professional standard. Do you think the climate is such that this issue is suitable for revisit? My worry is this particularly with the summer population that comes in and out. There is an awful lot of people being run through the system without lawyers. They want early disposition. They can't have a lawyer because the lawyer doesn't want to just dip their toe into the water. They want to do it or not do it. I think the result is quite a number of cases being processed without lawyers.
- 1:29:22 K. Kaino I think that is true. I don't like that. I would tell you that we are more than willing to participate in it. I know Josh is not here and I get along with Josh. I don't know if his views have changed on that issue. I am more than happy to have our consortium participate in an early disposition program as long as we getting reports. You don't need them a week ahead of time but you need them a day - there are some pretty minor cases. You get your nickel - dime theft charges. People down here on vacation, or disorderly conducts. They come down here and get drunk and something happens. Those sorts of cases can be resolved in a fairly quick manner for a client. But with that said, I think any of us that would want to participate in it, yeah, we need to have the reports ahead of time so at least we can adequately advise our clients.
- 1:30:15 Chair Ellis We are going to try to follow up on this and hopefully find a way to get the DA community and the defense community to talk through. I know Josh also. It does seem to me and it is not true that it not working elsewhere. I think it is working in a lot of other places. Alright. That is one item. The second one on delinquency cases about 40% of those the child waives counsel without benefit of counsel advising the child on the issue of the waiver.
- 1:31:05 K. Kaino Correct.
- 1:31:05 Chair Ellis That to us is really not a healthy situation. What is your reaction if we work with the court to make it clear that the active waiver will be done with a lawyer counseling the youth on the wisdom or not of waiving?
- 1:31:27 K. Kaino I think it is a great idea. I think Mary Ann and I have talked to our judges about this.
- 1:31:42 Chair Ellis At least one of judges agreed with it. To be honest we didn't address it with the other.

1:31:48 K. Kaino I don't know how to answer this question. Maybe turn off the tape recorder. Our bench has some interesting dynamics to it. We have discussed - Judge Nelson does 99% of the delinquency matters. Judge Brownhill does 99% of dependency matters. That is just the way our judges have set it up. We have talked, particularly even after the report came in, to Judge Nelson that this is a concern and we will have an attorney there. We want to get involved in this. We want to do that and it hasn't happened.

1:32:37 Chair Ellis Alright. We are going to follow up on that one. One role we can play. We are not trying to be dictatorial, but we can come into a community and simulate action and issues like that and we are going to try.

1:32:57 K. Kaino I can tell you that we know that that is true. Mary Ann and myself and we have discussed that with the court. There just seems to be - I don't want to say reluctance. We are more than willing to be there. We are more than willing to participate at any sort of arraignments. We are there at 1:15 arraignments. We have a pretty good setup there. I think it works real well with our consortium here and the courts and having adult clients represented right away. We always have somebody there. They are there. They are on time. We cover for folks if somebody else isn't there. I think we do a good job of that. I think we could do that at juvenile arraignments too.

1:33:43 Chair Ellis How is your new administrator doing? You brought in a person to ...

1:33:50 K. Kaino I had her before. She works with Billy. She does a real good job with the courts. She has everything now set up where we have got everybody's email addresses. The first couple of times there were a little bit of hiccups because the court was emailing her instead of just also doing a phone call, especially on shelter hearings. Sometimes you will get a call at 10:00 in the morning and there is a shelter at 1:00 and there are two parents that need attorneys. The court was just emailing that. Well if you are not sitting right at your computer and if an hour goes by that can be a huge hour in a time period of getting two attorneys available. That was the first couple of months but we have worked that out. Now there is an email and a phone call. She has done a real good job. She is a lady that actually worked for the DA's office years ago. I don't want to say she is elderly. If she was here she would hit me. She is real sharp and she does a real good job of lining that up. I think that has helped and I think the court would say that as far as dependency cases that - a lot of these changes are just happening.

1:34:58 Chair Ellis She is experienced.

1:34:59 K. Kaino She is experienced. She does an exceptional job, though. I think she works with the court real well. In fact, it's a small county, her daughter is the judicial assistant for Judge Matyas. She was in the DA's office years ago. She hasn't worked there for probably 15 years or 20. She didn't work with Josh but she worked for our prior DA.

1:35:26 Chair Ellis So we had a question. We are very thorough on our review.

1:35:38 K. Kaino Now we will turn that off. I told my clerk to make sure that gets put away somewhere where nobody saw that. That is the one other thing that I do. I do the needy court judging here. It is a change of pace for me, which I enjoy. Sometimes there are conflicts because it is a small county. The pro tem judge is Judge Matyas' husband who does the pro tem work for this court.

1:36:00 Chair Ellis You know we don't miss anything.

1:36:00 K. Kaino I could see that.

1:36:05 Hon. Elizabeth  
Welch

A concern that I have from the report relates to (inaudible) caseload is that the parents that you all represent in dependency cases are representing through the jurisdiction, but basically not after that until there is permanency proceeding. That certainly is not the standard practice. Kids are found within the jurisdiction of the court. They are probably in foster care and DHS in managing things. The cases are reviewed in the CRB and not in court until permanency. That is not because of anything you guys are doing or not doing. The issue is representation of parents during that critical period of time between jurisdiction and when the decision is made whether or not they are going to be allowed to be with their kids. We have run into this elsewhere, okay, so this is not unique. I am very concerned they probably need your services more during that interim period in terms of what are you doing? What does DHS got to say about you? How are you going to clean up your act? Are you going to stay in treatment? All that stuff that needs to happen. It is my understanding that it is not happening. I don't think that has changed as a result of the report.

1:37:54 K. Kaino

When you say they are not represented.

1:38:03 Hon. Elizabeth  
Welch

The lawyers aren't involved.

1:38:03 K. Kaino

I don't think that is true. At least the dependency cases that I have the lawyer is not taken off the case and we have talked about this to have more - we do have judicial review hearings, but we don't probably have as many judicial review hearings in a case that I know a lot of other counties have. But the attorney stays on the case the entire time.

1:38:27 Hon. Elizabeth  
Welch

Are they having contact with their clients? That is the issue.

1:38:27 K. Kaino

I think they are. I don't know how to answer that in a sense that I get a certain percentage of parents, let's be honest, usually when you get these cases you have issues with parents. There are some parents that are very good about staying in contact with the attorney. There are some criminal defendants that fail to appear. They don't show up. Or they show up for the first time at their ERC date and they say, "What have you done for me?" Well I have sent you letters. I have tried to call you 10 times. You have never responded. You have missed three appointments at my office. I find that parents have those same issues. But I have got a substantial number of parents that I represent and you are going over what programs they are in and the things they are doing and need to do. What other issues we need to address from maybe their psychological evaluations and the recommendations that have been made. If you are asking me do I think particularly the members of our old consortium is the area we needed to improve on the most is dependency cases, yeah, it is.

1:39:40 Hon. Elizabeth  
Welch

Do you go to the CRBs?

1:39:43 K. Kaino

Yes. We do now. Do answer that question honestly; CRBs are almost always set Tuesdays and Wednesdays. We have talked to Judge Nelson and Judge Brownhill about this. They are set on the last Tuesdays and Wednesdays of the month. For me personally, they set my ERCs on Wednesdays. Every Wednesday I have ERCs that morning. So we have tried to talk and see if we could move of us our CRBs to Tuesdays, and if the court is willing not to set criminal cases on the last Tuesday of the month other than maybe in custody where you have an in custody 60 day issue. Then the lawyers can attend probably 95% of those CRB hearings. But I will tell you that we had made a concerted effort as a consortium to say that we are going to be at those CRB hearings and attend those. Did we prior to this peer review attend as many as we should have? No. I know I didn't say it and they quoted me it said, "Well even if I didn't have court I still wouldn't go to the CRB hearing." I never said that and that is absolutely not true. I went to CRB hearings, but probably 75% of the CRB hearings

that I had would conflict with a court hearing. We tried to address that and I think we have done a much better job at that. I don't think since the peer review that I have missed a CRB hearing. But is there one in the future that I could miss? Yeah. But you try to send somebody or a letter or something to that. But are we trying to attend those much more with the attorneys we have now? I think are much more active in doing those and much better at doing dependency cases. But is it an issue? Yeah. It needs to be addressed. I think we have got more work to do on it.

1:41:39 Hon. Elizabeth  
Welch

Thank you.

1:41:40 Chair Ellis

Other questions?

1:41:40 J. Potter

Kris, I didn't quite hear you when you were talking about the meetings with the judges. You said you had three meetings. You said the DAs were not present there?

1:41:50 K. Kaino

They are not present at those hearings. If you get the DA's office at a hearing – if there are issues particularly dealing with the DA's office, but 90% of the things we are dealing with issues are maybe judges have concerns, particularly with me and the consortium. I have three or four other attorneys. They can address those to me and I can deal with those issues. It can happen a lot quicker than letting something go for a year. Other things about scheduling issues and different things that Mary Ann and I find it is beneficial just to meet with the three judges and deal with indigent defense issues. If there are issues that involve the DA's office, obviously they are a player in any sort of things we do, but there are just a lot of issues. Sometimes the dynamics of our judges is nice to be able to sit down with all three of them in a room and talk about issues of indigent defense issues that we can address.

1:42:52 J. Potter

So is there an opportunity for all the players to get together?

1:42:59 K. Kaino

Yes there is.

1:42:59 J. Potter

Does that happen on a regular basis?

1:43:00 K. Kaino

Not as much as it should. When I first came here we probably had meetings every six months, where the defense bar and the prosecutors and the judges were there. We had no meetings for years, for three or four or five years. Again, I think it gets back to the dynamics of our bench.

1:43:34 Chair Ellis

You have quarterly meetings now with the court?

1:43:35 K. Kaino

Yes. We have quarterly meetings set up with the judges. All three judges. I think they have either weekly or monthly meetings, but we ask to come in once a quarter and for even half an hour just to address issues. Concerns that we have about how things are being done. Now we are going to eCourt and I am sure that is going to have some issues that we are going to be dealing with as far as procedural issues and different things. It has actually helped quite a bit. We have addressed the delinquency issue about being present at these hearings. We have talked about that specifically. Trying to make progress in that we are willing to be at all delinquency arraignments and have a lawyer there. We think kids should be represented. Kids shouldn't be making decisions, in my opinion, to represent themselves in a criminal matter. It shouldn't happen. And reading them a waiver and asking if they understand these rights. I am not sure most adults understand it, let alone a 15 or 16 year old guy.

1:44:41 Chair Ellis

There are a lot of pressures on the youth at that point.

1:44:48 J. Potter            Isn't there a statutory requirement to have a Criminal Justice Coordinating Counsel or something very similar to that in each of the counties so that players do get together on a regular basis?

1:45:05 K. Kaino            I can not think of the initials for it.

1:45:09 J. Potter            So the LIPSIC ?? gets together on a regular basis?

1:45:14 K. Kaino            Yeah. They do. I think it is probably the most dysfunctional group of people – not people – you get nothing done at it. We get 10 times more things done at our quarterly meetings with judges than you will ever get done at one of those meetings. You have got the sheriff's office there. There are so many players and to me it is such a waste of time. Do I wish it was different? Yes. I have talked to Mary Ann that I think it would benefit us every six months to have Josh to come to these meetings. So maybe every other one is just us, but every other one is also with Josh at the meetings with the judges. There are a lot of things that Josh and I agree in regards to things that would things better. Frankly, we agree on a lot of things that we could step in and just make things better from both the defense and the prosecutions perspective and how to handle things. I don't think it would be a bad idea to have him at him at some of those meetings. We talked about trying to get him to come to it and I think he will. There is just a lot of politics with all that stuff too.

1:46:33 Chair Ellis            So one reason we go around and come to the communities to meet like we are doing here is to give the participants in that community a change to tell us how they think we could do our job better. Got any suggestions?

1:46:51 K. Kaino            I think the biggest thing I have struggled with in running a small consortium is how to make sure each attorney in the consortium is delivering the best indigent defense work they possibly can for their clients. How do you monitor that? I don't think a board of directors does that, frankly, I just don't think that happens. I don't think it does. I think a board of directors can monitor some things, but I really think this peer review has frankly been an eye opening thing but it has been a very good thing for us in regards to providing the best defense work we can.

1:47:39 Chair Ellis            (Inaudible).

1:47:41 K. Kaino            Yes we did.

1:47:43 Chair Ellis            You may regret that.

1:47:49 K. Kaino            I think if consortiums do that on an annual basis. That is something that I am trying to work on to do some sort of evaluation process where we set up a committee to look at those things. To me that is the direction – especially for small consortiums but even big consortiums. Just a process for an annual or a bi-annual evaluation process. The peer review hopefully doesn't happen every year.

1:48:25 Chair Ellis            It won't. It is volunteer.

1:48:26 K. Kaino            I don't think you need it to that level. Some sort of survey or process to evaluate how you are really delivering work. You have five attorneys and is one of those five attorneys doing substandard work? If that attorney is doing substandard work, what are the problems? Let's identify them. Let's try to help that attorney. If we can't then let's get somebody else to do that work. How do you really do that unless you have an evaluation process? That is really what needs to be done in my opinion.

1:49:04 Chair Ellis            But a lot of that you are talking about external evaluation of the consortium. We are also interested in the internal evaluation by the consortium including the administrator.

1:49:20 K. Kaino                    Yeah I go into court. I see these people, but I think most small consortiums are run by an attorney who is one of the members. I am in court or somewhere else most of the time. It is a hard to have a lay person in charge of that. Are they going to come and look ...

1:49:42 Chair Ellis                    The risk is you end up with kind of a buddy relationship with the other consortium members and nobody is prepared to take steps to make change.

1:49:57 K. Kaino                    I understand. You have lunch with them everyday. That is why I think if you have an evaluation process and you a board or some sort of group that oversees that that is not part of the consortium. Maybe one of the judges and two or three local attorneys that when they read an evaluation they know what they are looking at, then they can say, "Hey, these are the changes based on this evaluation that need to be made by this attorney or your whole consortium."

1:50:29 Chair Ellis                    I do want to commend you. I think you really did take to heart what was said last November. At the least the information we are getting is you have taken a number of steps to improve and we appreciate that.

1:50:45 K. Kaino                    We are working on it. We have a ways to go but we making progress. I think. I hope.

1:50:50 Hon. Elizabeth  
Welch                                    I want to go back and if I am stating the obvious forgive me. One of the excuses that I hear in the juvenile – experienced juvenile system person, one of the reasons why this phenomenon of the juvenile court counselors really talking to kids about having lawyers is because they perceive, in my experience, they perceive lawyers as interfering with what needs to happen with kids or doing nothing. Those are very common perceptions in Multnomah County and everywhere else that I have had personal experience. So when they talk to kids about what – they do talk to the kids about when they want a lawyer or not and they don't tend to push that because in their minds it isn't a positive thing. They are critical when they are asked to evaluate lawyer's performance because they perceive lawyers as just gumming things up or being invisible. So it is kind of a funny treadmill. I am not saying there is an obvious way to resolve that. One other point is that most kids do not have a detention hearing because they are not in detention.

1:52:40 K. Kaino                    Right.

1:52:41 Hon. Elizabeth  
Welch                                    Judge Brownhill confirmed that. So the hearing you need to be at is a plea hearing that the kid is there to make without an attorney and it is between the judge and him what gets said and what gets done. It is really late to say there is this really capable lawyer in the back room and I am going to stop this hearing now so you can go talk to this lawyer. This is a very, very challenging thing to change. There is nothing unique about the situation in Astoria.

1:53:23 K. Kaino                    I agree with you. I think what happens in a lot of juvenile cases, I think juvenile kids could be appointed just as adult are. They could come in and apply. Or if they are in custody and they are making a first appearance they should be appointed an attorney as soon as they – or at least given that opportunity. What I think happens in juvenile cases is I think you get a juvenile counselor that talks to the kid and – I don't want to say it is treated more like a social worker and as long as you do these things, Billy, this thing is going to go away for you. All of sudden Billy goes in and says, "I will waive an attorney and I will enter an admission to this allegation." All of sudden then Billy tests positive for marijuana and now maybe three steps down the road all of a sudden an attorney is appointed and you come in and the kid is looking at going to OYA. The attorney should be on from the get go. Maybe it was defendable case, or maybe it could have been negotiated for the youth. But you are a day late and a dollar short. The attorney should be appointed for the youth at the outset, immediately, in my opinion.

1:54:35 Hon. Elizabeth Welch Automatic when the petition files.

1:54:36 K. Kaino It should here. I think we are in favor of that. We have had some discussions about it but it hasn't gone very far.

1:54:50 Chair Ellis Thank you, Kris.

1:54:51 S. McCrea Can I say one thing. That is I want commend you also because you prepared to talk with us, which doesn't always happen when we go to counties and I really appreciate your attitude, Kris. A lot of times we get people are defensive and make excuses. You haven't done that here. You have just really taken to heart the things in the report and are obviously making a big effort and we really appreciate it.

1:55:20 K. Kaino Thank you.

1:55:32 Chair Ellis It is a public meeting.

**Agenda Item No. 6 OPDS Monthly Report**

1:55:55 Chair Ellis Are we ready for the monthly report?

1:55:57 N. Cozine Sure. OPDS monthly report. A few things to report on then Pete can provide an appellate update. We had our office debriefs with Sue Wilson. We had three separate meetings. We had one meeting for our CBS staff. We had another meeting with legal secretaries, and a third meeting with lawyers to review the findings that she had made during her review of our office. It certainly distilled down to a few separate points. Some of them being the need for knowledge, succession planning, communication, and those were some themes that she shared with all three groups. All three groups received the same information. We are working within the management team to try and talk about the next steps. What happens after sharing this information? Of course as all of you know we really spent the last two months in an interim structure that was rather sudden. As we work through the different components of where we want to be in the next five to 10 years, we continue to operate under the interim structure but with an eye towards where we want to land. We are hopeful that we will have that established by December. Everyone right now is doing a really phenomenal job. We have two analysts in the room and I will share with you that all four analysts have really jumped into this contracting process with an energy and enthusiasm that really must be commended. Every single one of them has spent late nights in the office. They have all spent weekends working because they want to get this contracting process done correctly and they care about their work. It has been really, really wonderful to have them and to work with them on this project. Paul has been doing a phenomenal job as interim director and general counsel. Erica Robinson and Kelly have been working within the accounts payable division and doing an amazing job. We are very fortunate and things are going well.

1:58:26 Chair Ellis That is good to hear. I think this is very positive.

1:58:38 N. Cozine Thank you. It has been a challenge, but I think rewarding in many ways for many people. We will be posting this week for a human resources position. That is being circulated statewide to agencies and to human resources associations. We would like to have that person on board as quickly as possible. We will also start investing different opportunities to have someone with a IT background who can help us with our databases that we already have so that we can establish some programming manuals, user manuals, and investigate whether or not our current databases are the best platform, or do we create a plan for in the future moving toward a different platform. Those are the objectives in that region. Additionally providing a little more training and support for our office staff with regard to use of our existing databases

and increasing our ability to do analysis of the data within our databases. We reported at the last meeting that we had held a diversity seminar for our staff and I had promised to send you the materials. I think I did and I apologize. I will do that after this meeting. I wanted to let you know that we received 3.5 access to justice credits for that seminar. I think we got really good feedback and some CLE credits for our lawyers. If Paul were here he would have shared his book review of a book called "Kids for Cash." This book is written about the Luzerne County scandal where two judges were taking kickbacks and sending kids to the juvenile detention facility. So Kids for Cash is about that phenomenon. In April of this year we heard from Marsha Levick who is one of the lawyers who was involved in uncovering that situation.

- 2:00:50 Chair Ellis           Where did this occur?
- 2:00:50 N. Cozine           Luzerne County. It is in Pennsylvania. I have a book report for you. So Paul read it and felt it was an important enough book that he wanted to share the information with all of you. It really does highlight our waiver of counsel issues because it started out really as a concern about the waiver of counsel. I am following up on that. I already mentioned it briefly when we had Judge Brownhill. Michael Livingston did decide to retire and it has thrown our delinquency task force, as slow moving as it already was, into yet another stage of hiatus. He and I met earlier this week. He is going to be talking to Leo McKenzie who runs the juvenile program for the courts about how that could be possibly be staffed. They lost their analyst position which had been part of the staffing many, many months ago and hadn't replaced that person yet it has been vacate and now Michael is leaving. So we need to revisit whether or not it is a feasible project moving forward without anyone from the OJD side able to participant. That is that unfortunate news. We are continuing to plan for the Juvenile Law Training Academy. We did receive the \$5,000 grant that we used to help fund that program. We also began planning for the management conference in October. Any questions for me?
- 2:02:43 Chair Ellis           Sounds like things are going pretty well.
- 2:02:44 N. Cozine           It is busy.
- 2:02:52 ??                   (Inaudible)
- 2:02:52 N. Cozine           I have not ever looked at the Oregon Community Foundation.
- 2:03:00 ??                   (Inaudible)
- 2:03:11 Chair Ellis           We obviously know their director pretty well. We happen is very supportive of what we do. I don't know how much discretion he has.
- 2:03:27 Hon. Elizabeth  
Welch                   Nancy, just one thing. Back to Livingston and all that. There was – I will be nice. There was an effort to develop some data about the level of waiver some time last year.
- 2:03:45 N. Cozine           They began but then the analyst left on emergency leave.
- 2:03:52 Hon. Elizabeth  
Welch                   Is there any chance of getting that material so that somebody can look at it?
- 2:03:56 N. Cozine           We did the survey and I can certainly circulate those results. The return rate was so low that I don't know if it is terribly meaningful information. The analyst wasn't able to do the kind of digging through OJIN that we needed, but that is part of the conversation that Michael is having with Leo this week, today in fact, so I should hear back from him about what the possibilities are hopefully next week. Then he actually leaves on an extended vacation. We shall see.

2:04:40 Chair Ellis Bon Jour.

2:04:48 P. Gartlan For the record Pierre - Peter Gartlan, Appellate Division, Office of Public Defense Services. I have a couple of things to report on. Paris is beautiful in June is the first thing. Second is a personnel report. One of our attorneys who has been with us for a little over two years left at the beginning of this month, July, so we will posting this month to fill that vacancy.

2:05:25 Chair Ellis Left because?

2:05:27 P. Gartlan He wanted to do trial work and he is returning to Ashland where he is originally from.

2:05:40 Chair Ellis But not an event that we need to worry about?

2:05:40 P. Gartlan No. Only the really other update from the report that Shawn had given last month in June is that we have three cases being briefed right now in the Supreme Court.

2:06:01 Chair Ellis Oregon?

2:06:01 P. Gartlan Yes. The real interesting one is Zolotoft. It is an interesting question because there is statute that directs jurors to consider the charged offense and reach a verdict on that and before considering a lesser offenses. There is also a line of cases, common law and statutory in Oregon, that says that a juror shall be instructed on all lesser included offenses. So the question is if a jury returns a verdict on the charged offense but the judge has failed or has refused to instruct on the lesser included offenses, has defendant been harmed in any way because the state's argument is there is no harm because the jury considered the charged offense first as per the statute and therefore there is no harm because the jury rendered a verdict on. So our argument is going to be no. The statute that says, "Consider" really means "vote upon." The way that humans consider things is they consider things in context as well as just pure text. So for instance when you make a decision typically you are comparing things and that is what juries do. That is what their function is. That is how they arrive at whatever verdict they arrive at. The statute was not intended to straight jacket them with respect to how the state is arguing the deliberations are supposed to go. There are actually three cases. Two are from our office and one is outside. The Supreme Court again addressing an issue that has been rattling our Supreme Court for decades, it is so simply but has given everyone fits. That is what the proper analysis when the police engage in an unlawful seizure or an unlawful search and then request consent to search. The police have seized somebody without reasonable suspicion and then they ask that person for consent to search. The person consent and low and behold there is something incriminating that the police find. Our argument has been since Wong Song back in the 60's that evidence is excluded unless and until the state can show some exceptional circumstances to disprove the presumption that that illegal stop has affected the person's decision to consent. Our Supreme Court has gone back and forth and they issued an opinion in January, *State v. Hemenway*, and in *Hemenway* they kind of opened the floodgates and said we are just going to look at that consent and we are going to look at all of the totality of the circumstances around that consent, and if the consent was a voluntary plus, kind of a super voluntariness test, then that evidence is admissible. I have personally been involved with this issue since 1991. It is amazing that it really hasn't been nailed down and resolved. Why the court has taken these three cases is that Mr. Hemenway died and so the court vacated that opinion, Mr. Hemenway's opinion, and now that issue is open again and the court wanted to revisit the issue and I think, once and for all, lay down the rule of law that is going to control Article I, section 9 analysis of this kind of situation. The third case is a post conviction and you know that we do not do post conviction cases. The court has asked us to step in as amicus.

2:10:40 Chair Ellis I did not know that we did not do PCR.

2:10:40 P. Gartlan            Sorry. The appellate division but OPDS does. So the court has taken review of a case. The question in that case is really statutory interpretation and that is a statute in the PCR scheme that says, "The petitioner shall attach to the petition evidence to support the allegations." The question is what level of evidence is sufficient to support the petition. Because PCR courts are dismissing petitions when they are based upon typically affidavits by the petitioner saying my attorney did not do this. The question is what is the quantum of evidence that should go, or is supposed to go, is intended to go along with that initial petition for review. That was an opinion issued in favor of the petitioner reversed in the trial court who had dismissed – the trial court had dismissed the petition for failure to satisfy that statute. There was a Judge Duncan who wrote that opinion. We have been asked to at least file an amicus and help out with the statutory interpretation. That is about all I have.

2:12:24 Chair Ellis            Mary Ann

2:12:26 M. Murk                I am sorry. I was in the wrong courthouse.

2:12:32 Chair Ellis            We have been doing other things. Thank you. Welcome. Do you have any thoughts you want to share with us?

2:12:48 M. Murk                I just got out of a five day permanency hearing. I have very few thoughts.

2:12:59 Chair Ellis            Do you have the observations on the process and the report that was done since the November report?

2:13:07 M. Murk                The process of the audit?

2:13:12 Chair Ellis            Right. We call it a peer review. It was very complimentary of you.

2:13:14 M. Murk                I don't have a lot of thoughts on the process of the peer review. I mean they asked us to do it. We worked on getting everything set up and they did the peer review.

2:13:32 Chair Ellis            Two issues we have been talking to the others about. One is the early disposition program and this has been an issue in this county for quite awhile. We are not happy the way things are because a lot of people going through a process without representation.

2:14:00 M. Murk                That is correct.

2:14:00 Chair Ellis            We understand the concern of the defense providers that you don't want to be part of a process where you don't get adequate information to do your job. We would like to help broker or facilitate or somehow get movement so the constitutionally appropriate program can occur. Any observations on that?

2:14:26 M. Murk                Well when we first looked at setting up an early disposition program in this county, there were a lot of different items that were reviewed, including early disposition in other counties. You know obviously no defense attorney is going to want to walk into court and look at a client and say, "You have just arraigned on menacing. The DA's offer is probation and two days jail. Go home and do some treatment," without having information. That is basically the position.

2:14:58 Chair Ellis            We understand that. Do you think there is a climate where the DA would be more flexible on that?

2:15:13 M. Murk                You are asking me to comment whether Mr. Marquis would be flexible in the manner in which he handles that program?

2:15:21 Chair Ellis            We would like to see progress made on this. I think that does require movement on his side.

2:15:27 M. Murk We have revisited this issue. When this program was first introduced we tried diligently to come up with a way that would satisfy the concerns raised by him as well as the concerns raised by the defense bar and he was not willing make any concessions. I don't personally believe that he would make any concessions and let somebody else, who had more authority, require him to make those concessions. I think the person that could broker that would be our presiding judge. I don't see him doing that at this point. He is going to be retiring at the end of this term and I think that his focus is on doing what he is doing at this point.

2:16:15 Chair Ellis When you say the end of this term what is the date?

2:16:17 M. Murk I don't know. He told me the exact number of years and months and days and I have forgot them. It is somewhere in the three or four year range at this point.

2:16:25 Chair Ellis From here?

2:16:25 M. Murk Yes.

2:16:26 Chair Ellis That is an eternity. Okay. The other subject and I know you do more dependency than delinquency, but this is the issue of youth waiving the right to an attorney and doing that without an attorney advising them on the waiver. We are not happy that that process being handled that way.

2:17:00 M. Murk Once again, we did meet with the judges and we met specifically with Judge Nelson who is not only our presiding judge but he is the judge that handles the majority of the delinquency cases. There are a few that are set in front of Judge Brownhill because they are companion cases with dependency cases. Judge Nelson indicated at that time that he was satisfied that his advice of rights was sufficient. It didn't sound to me like he was inclined to make changes in the manner in which he handled the appointment of attorneys in juvenile cases. I can tell you that I have been somewhat concerned as well because I have seen some cases where juveniles are essentially being pressured by parents not to have an attorney. I have also seen cases where juveniles have parents who can afford to hire attorneys but will not hire an attorney. Those juveniles are denied court appointed counsel. I don't believe that that is what the court appointed statute contemplates. That simply because the parents can afford and refuse that the youth is not entitled to court appointed counsel. Those are the other two concerns that I have with regards to the way that the waiver of attorney goes. You have a youth sitting there who waives counsel because his parent is putting a great deal of pressure on him to do so and just get the case resolved and move on, which I don't always think is the wisest thing. I don't think that youth often recognize the long term risk of just going in and admitting something to get it taken care of.

2:18:50 Chair Ellis One reason we go to communities instead of sitting in a silo in Salem is to get the benefit of your thoughts and your observations how we can do our job better. Anything you want to share with us?

2:19:09 M. Murk Right now I think that our county is very happy with our analyst, Billy Strehlow. He does an excellent job. He is available. He answers questions. He is responsive to emails. If we run in to some kind of sticky thing where we can't figure out the answer, we can just send him an email and say, "I have this weird situation. Can you tell me what your guys of response would be in terms of whether or not we take credit for this? We don't take credit for those types of things." I sometimes have difficulty with the process of requesting extraordinary funds and I think some of that the difference between how I think as an attorney and how the people looking at the applications interpret them. I don't know if there is a way to fix that. I don't know if the people that are looking at those applications are attorneys or not. I just know that there are times when I submit something and it seems self-evident to me the reason

I want to pursue this. Yet I get a response back saying, “Well you have to explain why you want to pursue it.” I am like..

2:20:21 Chair Ellis

I could be wrong but I think the process is the initial review (inaudible) but there is an advisory group that is available to consult.

2:20:34 N. Cozine

This is one of the recent changes. I use to be almost explicitly Lorrie Railey and Kelly Ashton. Probably almost a year ago we started a process where Kelly and Lorrie had some review, but analysts also reviewed within their counties. Then any one of those six individuals if there was a complex request that wasn't necessarily clear to them they would forward to Paul Levy who would perform a final review. So one of the processes we have been engaged in, in the last many weeks, is trying to create some guidelines so that all of the analysts have consistent rules to follow. There had been some effort to create that already, but they have been spending a lot of time refining it so that everything is clear and consistent from county to county. I would say a work in progress but Paul is now very much the guiding hand in establishing the criteria that needs to be met.

2:21:45 Chair Ellis

So the answer is yes there is a lawyer involved on the complex ones if there is an initial.

2:21:54 M. Murk

And it sounds like they are working to establish more consistent guidelines. For me that has been one of the only issues that I have run into. It is sometimes difficult for lawyers to explain to lay people what their thinking is. I have that same problem when I am talking to my clients sometimes. If that process would be a little bit more transparent.

2:22:26 C. Lazenby

(Inaudible)

2:22:37 N. Cozine

We have not had sort of a task - I think what you might be suggesting is a task force that includes providers. We haven't done that yet. We have had it on the management conference agency several times where we take input from providers. We are intending to put it on there again this year, and maybe we want to actually structure it so that there is a chance for feedback. One of the difficulties that we have is that as you know there have been inquiries in the past from the legislature. We want to be careful that on our side that we have the documentation we need to demonstrate both reasonably and necessary. Sometimes when we have a lot of conversation about the fact that there are things that should seem somewhat self-evident, but unless we have the documentation there I think we could run into problems later. That has been a lot of conversation at the management conference with providers. We know that it can seem repetitive or self-evident, but we really have to have the documentation.

2:23:44 Chair Ellis

Okay. Other questions.

2:23:44 C. Lazenby

I just want to go back to the piece about the discovery problem. Is it your sense that it is a logistical problem in providing you timely police reports? Is there a legitimate fiscal problem doing it, or is it just a matter of we don't have time.

2:24:06 M. Murk

You are asking me to speak on behalf of the DA's office.

2:24:12 C. Lazenby

I am asking your perception of what the obstacle is to providing discovery to defense counsel so that they could possibly participate in early disposition.

2:24:21 M. Murk

I think there are several answers to that. I know that there are cases where I show up for arraignment and the discovery is in the file and the DA could conceivably just hand the discovery to me and we could make a discovery change that way. Because of their own internal procedures of how they distribute discovery and how they bill for discovery, they will not do that typically at arraignment. A few of the DAs will but most of them will not. The other issue that arises and it arises very frequently, is our DAs tend to – those early disposition promises tend to be on cases that are on what I call our “Cattle call,” although

other people are offended it that. You basically have a group of individuals who have been issued a citation and the DA files the citation as is and does not have complete copies of the police reports at the time that the citation is filed or arraignment is held. So even if they were able to provide the probable cause statement and whatever else they have in their files, frequently when defense attorneys read the first found of discovery, this happens all the time in my practice, I see that four other cops were there. Well I don't have anything at the point that indicates to me what those other cops observed, saw, noticed, and so for me as an attorney looking at that and looking at maybe the initial discovery, I am not comfortable making a recommendation to a client without looking to see whether or not other reports exists. If other reports don't exist can an investigator get to these officers and talk to them and see what they can tell me. Frequently what we have seen is conflicting information from different officers depending on what their perception of events is. I think there is the issue maybe the DAs just aren't comfortable preparing it because of their own internal billing processes, but I think there is the other issue of the police officers are not getting complete discovery to the district attorney's office by the time of arraignments. Maybe there is a defense attorney out there who would feel comfortable making a recommendation on a pretrial offer without looking at complete discovery, but I am not one of them. The other issue that I see happen all the time is I get these guys who have turned down an early disposition offer. They ask for an attorney. They come to my office and by the time I am done with the case I have gotten them a better deal than he got at the early disposition. I personally don't think the DAs are making the best offers at the early disposition hearing.

2:27:01 C. Lazenby That is helpful for us. We have gotten different views on this and whether it is working or not working the way it should. That is helpful.

2:27:15 Chair Ellis Okay. Thank you.

2:27:22 M. Murk Thank you.

2:27:22 Chair Ellis So are we at the point that we can go into executive session. Paul usually hands me the script that says something about the press can stay but they are not to write about what they hear. I am trying to incorporate that script from memory.

2:27:50 N. Cozine I have that for you. I think lunch is arriving at 11:45. I think we will need to connect the visual aids. I don't know if we want to take a break before reading the script.

(Break)

2:28:45 Chair Ellis The Public Defense Services Commission will now meet in executive session for the purpose of reviewing contracts proposals to provide public defense legal services to cases beginning on January 1, 2014. The executive session is being held pursuant to ORS 192.660(2)(f), which permits the Commission to meet in executive session to consider information and records are exempt by law of public inspection. Under the Public Records Law contract proposals are exempt from public inspection until a decision is made to award a contract. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. The representatives of the news media are specifically directed not to report on any of the deliberations during executive session, except to state the general subject of the session being held. No decision may be made in executive session. At the end of the executive session we will return to open session and welcome the audience back into the room.

(Executive Session)

4:20:38 Chair Ellis This concludes the executive session. We will now return to our open meeting. We are at the point where is there anything else for the good of the order? If not, I would entertain a motion to adjourn.

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

**Agenda item No. 7 – Executive Session – Commission Review of Statewide Service Delivery Plan; Phase 1**

**Meeting Adjourned**

# Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Wednesday, July 31, 2013  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
Per Ramfjord  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Paul Levy  
Caroline Meyer  
Shawn Wiley  
Billy Strehlow

---

---

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

**Agenda Item No. 1      Review of Compliance with Best Practices for Boards and Commissions**

Nancy Cozine reminded Commission members that one of the agency's key performance measures is that the Commission adheres to the best practices for boards and commissions. She directed Commission members to the list of best practices included in the meeting materials. Commission members reviewed the list of best practices and discussed ways in which they achieved compliance, concluding that each of the best practices had been met. Commission members expressed an interest in hearing more about the practices and efforts of public defense commissions nationally, and encouraged Ms. Cozine to collect that information. Chair Ellis expressed appreciation for the attendance, interest level, and meeting preparation by Commission members.

**Agenda Item No. 2      PDSC representative for Work Group on Juvenile Dependency Proceedings, HB 3363**

Ms. Cozine directed Commission members to section 4 of House Bill 3363, which creates a juvenile dependency task force, to which the Chief Justice must appoint a representative of the PDSC. Commission members discussed the task force and appointment options, and Commissioner Welch expressed great interest in participating. Ms. Cozine agreed to keep

Commissioner Welch informed as she learned information about the timing and work of the task force, and to update the Commission members regarding the appointment process at a future PDSC meeting.

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

#### **Clatsop County Peer Review – Discussion of Report and Testimony**

Paul Levy provided background information regarding the revised peer review process, which no longer includes a confidentiality component, and is being augmented with components of a system delivery review. Chair Ellis commented upon the dramatic impact that this peer review seemed to have on the quality of representation in Clatsop County, and expressed support for the decision to remove the confidentiality component from the peer reviews, noting that the consortium did make tremendous improvements following the peer review. Commissioner Welch expressed appreciation for the significant improvements accomplished between the peer review and the Commission's visit.

Mr. Levy summarized some of the information explored during the July 17<sup>th</sup> meeting in Clatsop County. Chair Ellis offered his impression that people are communicating in that county more than in the past. Mr. Levy agreed, and both expressed hope that this improved communication would result in renewed discussion regarding the county's Early Disposition Program (EDP). Chair Ellis requested that the final report include information on how the EDP program could be modified to meet PDSC standards so that defense attorneys could provide representation without violating their professional obligations. Commissioner Lazenby asked whether an EDP was as critical in Clatsop County, as opposed to a county like Multnomah County where the court system is clogged, given the fact that the court gets about 1,500 cases a year (with no increase in about five years), and a declining actual crime rate. Mr. Levy pointed out the risk of EDP creating an environment where people are charged with low-level crimes because there is an easy way to resolve the cases, and expressed doubt that there was a compelling need for it. Commissioner Lazenby noted that it was explained as creating a mechanism for tourists who don't live in the area to quickly resolve their charges. Commissioner Ramfjord commented upon the initial report which cited Clatsop County as one of the fastest court systems for resolving cases within the entire state, concluding that the primary concern should be the absence of representation associated with the current program, rather than the absence of an opportunity to quickly dispose of the case. Commissioner Potter expressed great frustration, analogizing the Clatsop County EDP to waiver of counsel in delinquency cases, where adults are being pushed through the system without the benefit of counsel.

Chair Ellis suggested that something should also be included on the subject of juvenile waiver of counsel. Mr. Levy acknowledged that while the 40% waiver rate was an estimate by the juvenile department, and it is not clear whether waivers are accepted in all case types, it is clear that there is a significant issue. Mr. Levy suggested that the remedy would be a Chief Justice order or a court rule, as has been done in other states. He also noted that Mr. Kaino indicated that they would try to have lawyers at first appearances in delinquency cases, and that the mere presence of lawyers could have a salutary effect. Commissioner Welch reminded Mr. Levy that in many juvenile delinquency cases, the plea hearing is the youth's first time in court – many do not have a detention hearing - so the appointment needs to happen at the time the petition is filed. Commissioner Welch suggested that it is time to take a new approach on this issue, and after further discussion, Commission members requested additional information on the range of options available for addressing the issue.

Mr. Levy continued by discussing other areas of concern in the report, including very limited judicial time for court reviews in dependency cases. He reminded the Commission that in most cases there is no court review until the permanency hearing, and that with a very zealous child's attorney and minimal representation for parents, it creates a situation in which the permanent plan is likely to be changed early in the process. He did note that Judge Brownhill expressed a willingness to consider increasing the number of reviews. Commissioner Welch

added that the absence of an Assistant Attorney General at permanency hearings exacerbates the problem because a case can proceed to permanency without sufficient legal review. Mr. Levy suggested that this dynamic is one that will have to be monitored.

Mr. Levy also commented upon Ms. Murk's mention of having difficulty with non-routine expense requests, and her comment that it seemed that the necessity of her requests would be self-evident. Mr. Levy explained that for every expense, the lawyer must demonstrate in the request that there is a reasonable likelihood that the defense will benefit from the expenditure.

**Agenda Item No. 4**

**Executive Session – Commission Review of Statewide Service Delivery Plan; Phase 2**

Chair Ellis read the following statement:

The Public Defense Services Commission will now meet in executive session for the purpose of reviewing contract proposals, to provide public defense legal services in cases beginning on January 1, 2014. The executive session is being held pursuant to ORS 192.660(2)(f), which permits the Commission to meet in executive session to consider information and records that are exempt by law from public inspection. Under the public records law contract proposals are exempt from public inspection until a decision is made to award a contract. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session we will return to open session and welcome the audience back into the room.

Chair Ellis later ended the executive session and re-opened the public meeting.

**MOTION:** Vice-Chair McCrea moved to adjourn the meeting; Commissioner Potter seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, July 31, 2013  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
Per Ramfjord  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Paul Levy  
Caroline Meyer  
Shawn Wiley  
Billy Strehlow

---

---

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

**Agenda Item No. 1      Review of Compliance with Best Practices for Boards and Commissions**

0:11 Chair Ellis      Why don't we begin. First of all I understand the minutes from the Astoria meeting are not ready, so we will defer on that. Have you passed out this memo you did on the best practices?

0:35 N. Cozine      I have it right here.

0:51 Chair Ellis      Maybe you want to introduce the subject.

0:55 N. Cozine      Chair Ellis, members of the Commission, Nancy Cozine for the record. Every year we take a little time to review the PDSC's compliance with Commission Best Practices. It is one of our key performance measures that the Commission adheres to all of the best practices. So our last review was in 2011, excuse me 2012, so this is our 2013 review. In your Commission materials you will see the check list. What I have handed out to you is a narrative explaining how the Commission has met each of the required best practices.

1:43 Chair Ellis      Now my recollection is once we did this we had to ding ourselves because we weren't getting training. And you have now, Paul, provided us training.

1:55 P. Levy Yes.

1:55 Chair Ellis And so we don't need to self-criticize ourselves on that point this time.

2:03 P. Levy Correct. The training will be ongoing. I principally have to talk to the Commission about Public Records Law, Public Meeting's Law, and Government Ethics Law. We will continue to talk to you from time to time. For a little education right now, in the last session there were a number of bills having to do with public meeting laws responsive to the *Handy v. Dundee* case out of Lane County that I talked to the Commission about at length. None of those bills went anywhere. It is a topic that we will continue to talk about, so there is some more education.

2:52 Chair Ellis You have thought about this and we are thinking about it kind of spontaneously. Anything among the 16 points that you either have a concern about or you think we ought to be thinking about in terms of improvement?

3:12 N. Cozine No. It seems to me that the Commission has met all of the best practices. We have a directive from LFO to review our key performance measures and report back to the legislature in February, 2014, so that will be a separate conversation. I think at that time we will have a more detailed discussion about each of our key performance measures and whether or not we want to adopt any new key performance measures.

3:38 Chair Ellis The meeting before last, I think there was a discussion of impact evaluation which is a great buzz word but not easy to apply. You were going to craft a questionnaire to our constituents to try to get a baseline on that. I was hoping you would take the initiative to do a draft we could comment on, but I do see that as an area that LFO and the legislature generally are trying to get agencies to respond to that.

4:26 N. Cozine Yes.

4:26 Chair Ellis I have expressed my own skepticism about how that we will work, but I have also expressed my support to try hard to do what we can to do a meaningful respond to that.

4:38 N. Cozine Yes. We did have our Public Defense Advisory Group meeting last Friday. We talked with them about the directive from LFO to look at our key performance measures, and we had a discussion about trying to define something at the trial court level. We will continue to work on that both in that group and through a survey and report back to this Commission on that subject.

5:02 Chair Ellis Okay. Any other areas that you or Paul see that we ought to be seeking to improve our hopefully already good performance?

5:13 P. Levy Well back on the education component, I think not the last time but the time before when we reviewed these the concern wasn't so much that the Commission was lacking education on how to operate as a Commission and in compliance with public law, but that the Commission might not be receiving education on public defense management and especially more about what is going on the national level outside of Oregon. I think that is an area where we could do more to enlighten the Commission about what is going on elsewhere in public defense management.

6:03 Chair Ellis I would encourage that. We used to get the Spangenberg report. I have not seen that for quite awhile. I am not even sure they still issue it.

6:14 N. Cozine Right. I think that is the issue. There are other organizations now who do issue reports on public defense management.

6:24 Chair Ellis I know Nancy you and Peter went back to – I can't remember...

6:35 N. Cozine Michigan.

6:35 Chair Ellis Which we encouraged because I think we ought to do what we can to contribute to how other states do it, but I would agree with that. I would like to know more. I have every reason to believe we are viewed as a successful management of the function. We could certainly learn from others and I would like to know more comparison.

7:03 N. Cozine Right. Actually later this year the NLADA is putting on a public defense management conference and I have looked at those materials. They are really focused quite heavily on some of the data components. Looking at data and how you use data to improve performance management. I will look more closely at that and share that with this Commission.

7:29 Chair Ellis Will you be going to the conference?

7:29 N. Cozine That is an open question mark at this time. Part of it depends on budget. There is a cost associated with this conference. It is, as I recall, not an easy distance.

7:45 Chair Ellis I would encourage you to go. I think particularly in your position it is helpful. Okay. Anything else on Action Item 1.

7:59 J. Potter Since Shaun is not here, No. 12, Shaun's name is spelled incorrectly.

8:15 N. Cozine Thank you.

8:20 Chair Ellis Now this is described as an action item. I am not quite sure what action we are being asked to take? The action is to review?

8:30 N. Cozine Or to find that we are in compliance.

8:38 Chair Ellis Let me just make a comment. As Chair I have been very appreciative of the attendance level and the interest level and the preparation in advance of meeting level. I think this Commission is extraordinary and I am very proud of it. I think people are doing a great job. Anything else on Item 1?

9:05 J. Potter Do you need a motion to accept the best practices report?

9:13 N. Cozine Last year what we did is we actually orally reviewed each and every one of them. At the end we concluded that the Commission was in compliance. I don't know that we need a motion as long as everyone has reviewed it and are in agreement that we are in compliance.

9:37 Chair Ellis This memo just came around. Let's take a minute and let people review that and if they have any questions, fine, otherwise I think it is not necessary.

10:42 J. Potter Nancy, what time period does this cover? Is it June through July?

10:47 N. Cozine Last year we reviewed it in October. I advanced it a touch this year.

10:57 J. Potter I see Peter Ozanne is still listed here.

11:03 N. Cozine I did take this off of last years. I apologize for that. I will make that change as well.

11:22 J. Potter Is there anything higher than a gold star certificate?

11:27 N. Cozine                    There is nothing higher.

11:34 Chair Ellis                    Platinum. Alright any other comments on this subject?

11:39 C. Lazenby                    Do we get to see the gold star?

11:41 N. Cozine                    We use to frame them and hang them on the wall.

11:46 P. Ramfjord                    I would just say that as a recent member of this Commission that I have been extremely impressed with its function. I think it fully satisfies these criteria and does a great job and the staff has done a marvelous job keeping the members informed. As somebody who is relatively new to this process, I am greatly appreciative of that and I think that you are doing a great job. I would echo Barnes' comments on getting more information on how other organizations perform their functions, but overall I think the organization is performing very well.

**Agenda Item No. 2                    PDSC representative for Work Group on Juvenile Dependency Proceedings, HB 3363**

12:18 Chair Ellis                    Alright. Let's move to Item 2. House Bill 3363. There is a provision in there – this is on juvenile dependency, provision that creates a body called the juvenile court dependency or the work group on juvenile court dependency proceedings. This is section 4. The Chief Justice is to appoint six members, one of whom is to represent this Commission. I am assuming that you are asking whether we have a recommendation to the Chief?

12:59 N. Cozine                    I did send the Chief an email pointing out this responsibility, though I am sure he is aware of it already, and asking whether or not he would be interested in having this Commission's recommendation. We have not had a conclusion of that correspondence, but I don't think it would be a bad thing for this Commission since it is a representative of this Commission to weigh in on that.

13:25 Chair Ellis                    Any thoughts? It occurs me to there are two people I would think of. One is you, Nancy, and one is Judge Welch. I am not trying to foreclose other options. Those two sound to me like ....why don't we hear discussion about it. This is just recommending to the Chief. He is going to do what he does. First of all, any thoughts as to anyone other than the two I have mentioned?

14:05 J. Potter                    I wonder can it be somebody other than the two you suggested? Can you have a staff person from your office, a lawyer that does juvenile work representing this Commission?

14:18 N. Cozine                    I will say that we have asked the Oregon State Bar to include our juvenile appellate section, or a representative from the juvenile appellate section, in one of their two appointments. The Oregon State Bar can appoint two practitioners. Whether or not the Oregon State Bar will ultimately make that appointment but we have forwarded that request.

14:47 J. Potter                    I would like to hear willingness to serve.

14:51 S. McCrea                    That is what I was going to say.

14:47 Hon. Elizabeth  
Welch                    Do you have any sense how this is all going to come together at all? I appreciate it is very early.

15:05 N. Cozine                    That is the problem. It is very early. We are all sort of trying to figure out who is going to end up staffing this. We know it will be someone from the legislature, but no one has been assigned yet. So we have not been able to get any details in terms of frequency of meetings,

timing, it is all very amorphous at this stage of the game. I am, of course, happy to serve and be a liaison. Whatever this Commission wishes.

15:34 Hon. Elizabeth  
Welch

I guess my question to you is should you be on it? Do you think you should be on it or not? I am willing to do it. I could make a short speech about how much I have been thinking about this.

15:52 Chair Ellis

Why don't we do this. Let's suggest to the Chief the two names and guess what, he gets to decide which is what happens anyway.

16:03 C. Lazenby

Is this something that can be deferred?

16:06 N. Cozine

It can be deferred.

16:06 C. Lazenby

It sounds like it is still in progress. I understand your willingness to do it, but there are time constraints that I think you would have to know about. So maybe until the logistics of it get sorted out. Mr. Chair, I think we could do both things that you and I are talking about. We could tell the Chief that our suggestion that it be one or the other of these two folks, but that we need to get more details about the logistics of it before we can make a determination and we can make a firm suggestion.

16:43 Chair Ellis

And the other thought I had is you are still a member of the bar?

16:47 Hon. Elizabeth  
Welch

Barely. Do I need to be?

16:48 Chair Ellis

I am thinking the same thing you had about the appellate lawyer. You might put Judge Welch's name in their head. I would like to see both of you on this, personally.

17:10 C. Lazenby

That is a good idea.

17:10 Hon. Elizabeth  
Welch

I intend to cease to be a member of the bar at the end of this year, if that is a consideration. It didn't even occur to me that it would be.

17:25 C. Lazenby

They will make you take the bar exam again if you change your mind.

17:30 Chair Ellis

Alright. Anything else we need to do on that item?

17:31 N. Cozine

No. It did remind me that I was somewhat remiss in our last meeting I had legislative overview and I really only focused on criminal bills. There were a few juvenile bills, this being one of them that I did not talk about. Another important juvenile bill was Senate Bill 622, and Shannon Storey and I both served on that work group and it dealt primarily with juvenile records. It was started late. It was an Oregon Law Commission late meeting. There wasn't a lot of time before session to get a final product to the legislature, but it was ultimately past and I think that Senate Bill 622 work group will actually take up some of the issues that weren't fully resolved. There is still pending litigation on access to juvenile records. In Senate Bill 622 they attempted to clarify who can access juvenile court records in anticipation of implementation of eCourt. Because things are electronically available it changes the way that people can view records and they wanted better clarification about who and how could access those records. I will share Senate Bill 622. It is very long and dense, but I will share that with the Commission as well.

**Agenda Item No. 3**

**Clatsop County Peer Review – Discussion of Report and Testimony**

19:00 Chair Ellis           The next item is the Clatsop County Peer Review. You have circulated a revised report.

19:12 P. Levy                It is not revised. It is just to make sure that you had the report with you. I am sitting here because my name is on this. What we intend to do is revise it after this meeting. If I can just give a little context here, this is sort of brave new territory for this process because what we have is a peer review in the old fashioned sense where I think the Chair called “The A Team” at the last meeting, which I did listen to, and I appreciated both the Commission’s comments and compliments of the providers there. It was interesting to hear what was being said. We did have a group of peers go into the county with the view of conducting a peer review as we traditional have, which is to assist providers achieve excellence and that was the focus. We provided a report to the two contractors there that actually has significantly more detail in it than what you received. You received a distillation of that report and an update based on both what Kris Kaino and Mary Ann Murk have responded to us with and the visit that Nancy, Billy, and I made there. So what we will do now is finalize the report with a section summarizing the testimony from two weeks and the Commission’s discussion.

21:02 Chair Ellis           Which is what we have done historically.

21:08 P. Levy                This is kind of hybridizing the two processes. What I was prepared to do was to outline some of the issues as I saw them and listened to them and then get out of the way and let the Commission talk about this. I wanted to respond to some of the things that I heard. The first thing is that I heard a lot of focus, especially from the Chair, about the absence of a formal early disposition program in the county. In fact that wasn’t a focus of the report that we made because of the somewhat different purpose of peer reviews from the traditional service delivery. We were aware of the history with EDP there, or the absence of EDP there, and we also were well aware of the concerns that the lawyers there had about that process. I think Mary Ann Murk articulated those concerns very well and her hesitancy to become involved in a program where you don’t have access to discovery, you have very little time to meet with your client, and you are making a recommendation to accept an offer or not in circumstances that, frankly, don’t meet the Commission’s own guidelines for early disposition programs. The concern of the peer review team is helping providers do their job as well as possible. We will make recommendations, and often do, and did in this report, about system issues to the extent that there are barriers to good defense work and to the extent that the system is frustrating representation of persons entitled to appointed counsel, as in the case with the high rate of juvenile waivers in that county, and the absence of an early disposition program. But we didn’t focus on it because it wasn’t anything that the providers were doing wrong.

23:25 Chair Ellis           I hope my comments weren’t misunderstood. I didn’t mean to say they should succumb to what I think is reluctance on the district attorney to provide enough information that EDP can work.

23:38 P. Levy                I certainly heard that. I just wanted to explain why that wasn’t a focus of our recommendations. We had plenty of recommendations, obviously, but it was interesting to hear Judge Nelson say, “Well, I wouldn’t participate either under the circumstances the program would have to operate under,” and Judge Brownhill say essentially the same thing because offers get better. It wasn’t a case of the lawyer disserving their clients. The concern is that because these lawyers are not participating in the program, people are resolving their cases quickly without the benefit of any counsel. That is something that needs to be the focus of our efforts with the provider community. What I heard is good from our review and your discussion is that at least some people are starting to talk in that county. Obviously it is a county that was referred to as the “dynamics” of the bench. I would like to think of it as thermo-dynamics. Lots of people don’t talk to each other there.

25:17 Chair Ellis           I had a feeling that it is better that way now than it was when we were there several years ago but maybe I am wrong.

25:29 P. Levy                   It certainly seems to be improving. All three judges sat down in one room with some of our providers. So people are talking and that is a good first step on making some changes on the EDP. It is too bad that the DA couldn't be at the meeting. He is the one that really needed to hear the concerns. We can follow up with him too. It may be that nobody is talking to him.

26:08 Chair Ellis               In some ways he has mellowed in the last few years. There is hope.

26:14 P. Levy                   When you are in Clatsop, the district attorney there, when he is operating as the district attorney in Clatsop County, is somebody that you can have a very nice conversation with. He is generally complimentary of the public defense lawyers there. He doesn't have complaints about our management of public defense in the county. Discussions are entirely civil and possibly can be productive. It is something that we should continue.

26:52 Chair Ellis               Maybe what we can do is when you modify the report to include that meeting have a section on this. It doesn't have to be severely critical of him, but just say what needs to happen to make an EDP program functional so that you don't have this what I think is a bad situation. The lawyers clearly don't want to participate because they don't think they get adequate information to do their job, but apparently a lot of people charged will rush in and do it without lawyers. That is not a good thing and we ought to point that out. Same thing on the other subject that I think you are coming to which is the waiver of counsel in juvenile cases. There is a very high rate of that there. I do think the current presiding judge likes it the way it is. It may be hard to change, but I would point it out. I think that is a real system flaw.

28:01 P. Levy                   And on that I thought that was how we would proceed with the EDP. On the juvenile waiver I should note, as I think was in the version that you got, that the presiding judge didn't agree that 40% was an accurate number. Judge Welch questioned that is 40% of what? Does this include minor MIPs and I am not sure we know the answer to that either.

28:43 Hon. Elizabeth  
Welch                            It sounded like it was just a plain out pulled out of the air number from what the defense providers...

28:49 P. Levy                   No. In fact it came from the juvenile department. At least that is my recollection. Because of our new era of peer reviews, where we no longer have clothed them in confidentially, I can tell you that. It is very refreshing. It is why we can share the report with you. This effort did not seem to suffer at all from removing....

29:15 Chair Ellis               It not only didn't suffer, but what is impressive to me is the team goes in and makes a preliminary report and for the first time in five years significant movement happened as a response to the draft report. I thought it was a system working.

29:36 P. Levy                   I think so. I would perhaps take issue with the first time in five years. You don't know about some of the other changes because it was all confidential. In fact, as a result of peer reviews there have been in other counties some very dramatic changes. There have been instances where the response has been zip and business as usual continues. That is very frustrating. This as our first experiment with the new process is encouraging because we had a very responsive provider. His group then sort of imploded.

30:25 Chair Ellis               Which is probably a good thing.

30:25 P. Levy                   Yes. Although we didn't wish bad health on anybody.

30:32 Chair Ellis               No. The change.

30:33 P. Levy

So on the juvenile waiver we are not highly confident that we know the percentage and what it applies to. We do know it is a significant issue there. The Chair asked during the meeting what can we do about this? Really, ultimately, the answer is we need a statute or a Chief Justice order or a court rule. That is what other states have done. The Kids for Cash that I commended to you that is Pennsylvania proceeded with a court rule. Other states have done one or the other. But what we can do in the short term is our recommendation was that the providers need to be at shelter hearings or first appearance or prelim, whatever they call them in delinquency cases. Lawyers should be there and in fact Mr. Kaino said that they were working on having lawyers at juvenile first appearances in delinquency cases. The mere presence of lawyers could have a salutary effect.

31:58 Hon. Elizabeth Welch

Remember though and this is one of the other questions I asked, most juveniles charged in juvenile court do not have a first appearance before the court. If they are pleading the first time a judge sees them and would have the opportunity to appoint, is when they enter their plea. I am not going to pull a number out of the air because I don't know what it is, but you will remember that Judge Brownhill agreed with that when we had the interchange. We are talking about a little part of the issue there.

32:40 P. Levy

Yes. I really think that ultimately it is a rule change or statute. Nancy talked about the efforts that had begun looking at that and that are sort of stalled now for a variety of reasons. A couple of other things that I just wanted to touch on that I heard and seemed significant and that were highlighted in the report. We were concerned when we did the peer review that there were very limited judicial reviews in dependency cases. There essentially was no review until the permanency hearing. I heard Judge Brownhill say that is largely because the availability of judicial time. But I also heard her say that she would open to increasing the number of reviews. What we found in doing the peer review was there was a highly regarded, zealous lawyer for children in that county, Mary Ann Murk, at least at the time we did our review a fairly ineffective group of lawyers who were largely representing parents. That combined with the absence of judicial review, meant that parents were sort of left to fend for themselves. Permanency hearings were happening and they were happening early because the parents weren't making progress. The child's lawyer would say, "This is going no where. We need to start working on changing the plan in the case." So it was sort of a perfect storm of problems.

34:45 Hon. Elizabeth Welch

There is another problem that we didn't talk about in Astoria that is in your report. That is the attorney general who does termination cases does not appear at permanency hearings. That is, frankly, the worst thing of all of it. What that means is that there is no one looking out for the quality of the case. Whether it meets legal standards or the rights of the parents or the children as far as that is concerned. That is really a big problem.

35:23 P. Levy

Yes. Sort of the rush to permanency was – the fact that DHS isn't represented is a problem because they don't necessarily want to rush to permanency and they did not have an effective voice in the process. The good news, I suppose, that the consortium group is committed to strengthening its dependency practice and has now at least one lawyer who that will be her focus. Judge Brownhill complimented her progress and hopefully there will be others. It is something that we need to continue to pay attention to. We did ask Ms. Murk in our peer review to review whether she was in deed, because she has such a strongly held philosophical view about children and their need for permanency and the importance of having a biological parent, which is not as great as having permanency for her. We asked her to review the extent to which she was being driven by her own views or those of her clients. She gave us a thoughtful response to that and said that she had checked with the system partners and would be mindful of that. I think the real answer is to have a strong bar there for the parents.

37:22 Hon. Elizabeth



43:07 Chair Ellis Then it is used as a negotiation tool because it is not going to come into evidence.

43:12 P. Levy No. Correct. There are plenty of cases where defense and prosecutors have discussed the case and the prosecutor has said, "If your guy passes the polygraph we will dismiss." We are told about those. If we are told that or based on my experience or based on my knowledge of how this DA's office works that a past polygraphs likely leads to a dismissal, and we are given some reason to conclude that there is a reasonable likelihood that the client will pass then we will approve it. But we are often just told my client adamantly denies. That word appears in all of these. They adamantly deny the offense and want a polygraph. Those are a couple of examples.

44:12 Chair Ellis Okay.

44:17 P. Levy I want to stop talking and hear if there is anything else.

44:19 J. Stevens Could I ask for a clarification? I assume that once you denied because there is not an adequate explanation they can re-ask.

44:30 P. Levy Correct. Under our policies and procedures there is an opportunity for reconsideration with additional information. Under the statute then an appeal goes to the presiding judge in the county. There are surprisingly few appeals but they do happen.

44:59 J. Stevens Okay. Thank you.

44:59 C. Lazenby I wanted to return to the early disposition piece to ask a question. As you were doing you're on site reviews, I know like in Multnomah County and some of the more populist counties there is a real need for it because the court system is clogged with folks, but I am looking at what you said that the court gets about 1,500 cases a year. That hasn't gone up in about five years and the actual crime rate has gone down. So is there really a need for an early disposition program in Clatsop County in terms of is the court system overwhelmed by these cases and they need to clear them quickly, or is it just sort of trying to establish a best practices piece in your sense?

45:46 P. Levy I think that is an excellent question. I don't know if there is a need as far as court congestion. The whole concept of an early disposition program is sort of fraught because the easier you make it to convict someone, the easier you make it to charge someone. I have seen this when I was practicing in Multnomah County with the start of drug court. I was the first lawyer in drug court there. We didn't have enough people participating in the program and so the solution was to start charging people on residue cases where the DA had abandoned that practice. If you can have one DA and one lawyer and take a cover of court where you are charging, arraigning, and pleading lots of people it makes it real easy to prosecute and convict. It is a complicated issue. In answer to your question we didn't see a compelling need for it, except for the fact that they have three judges...

47:23 C. Lazenby The one thing that I heard them say when we were there that made some sense to me was you get tourist folks who don't live there and aren't going to come back. They want to resolve what happened to them over the weekend. It is a matter of convenience for everybody to resolve those matters. Walking into that courthouse when we were there meeting I didn't really get the sense that they were .... by the way I want to commend your secretary ....

47:58 P. Ramfjord Just to follow up the report itself suggests that as a county it is among the fastest resolved cases within the entire state. I think the issue really does come down to more of one of absence of representation associated with the current program than the absence of an opportunity to dispose of the case early on.

- 48:24 P. Levy I agree. It is a concern that people are pleading without the advice of counsel. I think whether it is docket congestion or not, people who are charged with a crime, whether they are on vacation or not, generally, if they can get done with it quickly and with what appears to be at the time relatively painlessly, they will want to take advantage of that. You sometimes have to persuade people not to do that and that is why a lawyer would be helpful. I don't know if I put it in the report, but locally they are fond of saying, "Come on vacation, and leave on probation."
- 49:09 P. Ramfjord That is where the problems lie. What appears to be relatively painless might be more painless if there was actually representation. What appears to be a good deal might not appear to be such a good deal with discovery that is obtained through representation.
- 49:23 C. Lazenby And there are additional costs to stretching it out. If you are going to wait and get a better deal later on it is going to be more expensive for the system.
- 49:33 Chair Ellis Thank you.
- 49:37 Hon. Elizabeth Welch I have kind of a question. My sense when I read your report before the meeting. I was really blown away by lots of things, but the one I wanted to comment on is how productive the process had already been at that point. Because this is the first full blown peer review under the new rules, two part question: To what extent is the fact that other people were going to hear about whatever was found helpful in moving things in your experience as our guru on this subject, and 2) it was pretty clear both, in your written and Mr. Kaino's comments, that the threat of not being refunded was not off in the sidelines somewhere. I am not sure what was said and I am not necessarily asking. He said that the question was whether we were going to be able to continue to have this contract or words to that effect. So I am just curious about how you feel this process works.
- 51:05 P. Levy Interestingly, with peer reviews in the past, as much as we tried to stress with the providers both the confidentiality and the peer review nature of it, invariably it was viewed as Salem coming to look at us. As much as we tried to diffuse people of that, well, it was a little bit wasn't it. Because we said this is how it will work. You will have a period of time after you get the report to respond. We will report to the Commission. That, in combination with the timing of the process that was actually occurring right before the contracting season, in which case there could be an opportunity to rearrange the deck chairs there. It was a reflection that people knew there were problems there. It was just until somebody came and pulled – what do you pull back?
- 52:28 S. McCrea Curtin.
- 52:28 P. Levy Rug. Curtin. We pulled something back. We shined a light. So it will be interesting to see what happens next. We had a peer review site visit May 1, 2, and 3, here in Marion County. We looked at the criminal providers, MCAD and the public defender office. The May 10, Kathryn left. One of the reports is drafted. The other is not completed. The process got sort of sidelined and it has been very hard moving it forward. It will move forward with the same parameters but not the same issues. It will be interesting.
- 53:28 Chair Ellis I thought you had kind of a nice touch. It wasn't a heavy handed do what we tell you or no money. On the other hand, it doesn't bother me at all that providers that get reviews realize that my source of funding is looking at this and they are very interested in improvements and quality. I thought it was a nice balance.
- 53:56 P. Levy Thank you. Because it is a collaborative process and I am just the faithful scrivener for the team, we do remind ourselves that we are there to help and the tone should be reflective and sometimes they do have to be toned down. What we usually have are recommendations to the

providers and then recommendations to OPDS. Now we can have recommendations to PDSC. There is a tendency to get a little angry at times. I don't know if it made it into this but we did tell them that public defense was not a public entitlement program. The sense there was that lawyers enough though they were just not acknowledged to be capable even of doing the work that was expected of them, should just be allowed to serve out their days as public defense lawyers because that is who they were and what they did.

55:10 Chair Ellis

Thank you. Good job.

55:20 J. Potter

Mr. Chair? I have some degree of frustration. We now have talked about the waiver issue in juvenile for some time. It does back – my memory may need some help with this. We had a meeting in the House Judiciary Committee seemingly years ago when Ingrid was there. We had Washington State come down and talked about what they had done. We reviewed the various options available to us which included having the Chief Justice promulgate a rule, or send a letter, or make a statute, or Ingrid had suggested that maybe we already had the authority within the statute to prohibit this waiver process. What happens was a letter was sent. Some judges read it, maybe, and some judges complied, but I am not sure that we have made much progress. I could be wrong about that. My frustration is what are we going to do? There has been a problem identified. People look us to help solve it. Now, in my mind at least, a similar problem affecting the adult system on the waiver of counsel and it appears to me to be an abuse of process. I can be convinced that that is wrong, but sitting where I am sitting at the moment it is like now that it has been brought to light and to the Commission, we may become sort of the lightning rod as to well what did you do about it. Whether it was a strongly worded letter or a statute or whatever it might be. What do we do? What do you suggest?

56:57 P. Levy

First of all you are not mistaken. I don't think there has been much progress on this except where we have been able to have lawyers be more involved in the process even though I understand much happens before anybody hits court. I think Nancy can talk – well did talk to you at the last meeting about the work group that was looking at, and still is – can you talk about this, Nancy?

57:33 N. Cozine

Yes. The update at the last Commission meeting was brief. Michael Livingston and Leola McKenzie with the Juvenile Court Improvement Program had committed to working under the Chief Justice's direction, to convene a work group that would examine the waiver of counsel in juvenile delinquency cases. In order to let that work group meet and move very fluidly, Mr. Livingston wanted to make sure that we had all the data that we needed in advance. We sent out a statewide survey. We collected OJIN data. We collected all the statutes and then session hit and it was difficult to get a time scheduled. They lost their support staff during that period of time as well – actually prior to session starting. Then Mr. Livingston retired at the close of session. So while we have all the work group members recruited we don't have enough staff right now. We don't have anyone identified on the Judicial Branch side to participate as a leader for the Chief Justice to get that work group up and running. So the concept is there, but getting together the brass tacks is not. I have a meeting set up with Leola McKenzie who runs the juvenile court improvement program so that we can talk about how we want to proceed. She believes that they will not have Mr. Livingston replaced until late fall perhaps. She anticipates that is also when they might get staff support, but she hasn't confirmed.

59:24 Hon. Elizabeth  
Welch

I am glad that you brought this up because I was going to as well. I think it is time to change course. I remember that this colleague was homicidally angry about this whole subject. What we did was we deferred to the Chief Justice who said he would do something. I think I have mentioned this in a meeting before but you all may not know that the Chief Justice did not sign the letter that went to the presiding judges in the county. The State Court Administrator signed it. I think that is a very important distinction. The message is a different message

coming that way. I think that we wanted to try and make the system work. The issue is can a chief justice make trial judges do anything they don't want to do. The answer is probably, "No."

- 1:00:27 Chair Ellis But he can change presiding judges any time he wants.
- 1:00:32 Hon. Elizabeth Welch He can. I don't know why anybody would have that job because of the fact that every one of those trial judges and appellate judges too, but they are not relevant to this, are elected officials and they are not accountable to the chief justice.
- 1:00:46 Chair Ellis But hang on they are accountable on administration and he does have the direct power to change who is the presiding judge in a district.
- 1:00:59 Hon. Elizabeth Welch Absolutely, but the judge who sits in juvenile court and accepts the pleas probably isn't the presiding judge.
- 1:01:08 Chair Ellis But the presiding judge has a lot of influence on case allocation. He does have real leverage.
- 1:01:14 Hon. Elizabeth Welch I think if we look back to see when – and it took forever for that letter to go out. That was before your time and I don't know exactly how it long. The letter was written months, I mean months, before it was sent and it was sent at least two and a half years ago. January of 2011.
- 1:01:33 N. Cozine I have to review that letter. If I could further clarify it was actually sent by the Director of the Education Committee – Outreach and Education Director. We have a different Chief Justice. It was Chief Justice De Muniz. Now we have Chief Justice Balmer. I think I should have another conversation with him. But I also think that in conjunction with what is happening right now which is a review of Oregon's performance standards which includes a provision that really encourages system advocacy by all public defense leaders in each community. In conjunction with that I think that there is an opportunity to look at necessary statutory changes. I think that would be an exciting opportunity for us to explore. There are some other statutory provisions that this Commission will need to consider requesting in the upcoming legislative session. That is having to do with access to eCourt records. Our practitioners around the state are having a very, very difficult time accessing what they need. In my most recent conversations it does seem that we will be able to move more quickly if we get a statutory fix that grants all of our providers access to electronic case records. Those are two separate issues and would need to be two separate work groups. If we wish to proceed by starting to look at some legislative changes, I don't think that is outside of the scope of what this Commission should be considering.
- 1:03:22 C. Lazenby I don't see the need for more data collection. To the extent that we have been looking at this and it continues to happen and the waiver of counsel is happening in these juvenile matters, we clearly don't want that to happen. We think it is not proper. I think what we really need is not just legislative proposals but maybe a little bit of a review of what our options are? Is an order from the Chief Justice something? What is the effect of that? I don't know what all of our options are to sort of start to rein in this practice if not eliminate it. What tools are available to us or what other paths are out there besides just proposing legislation, which at this point would go into effect January of 2016.
- 1:04:17 N. Cozine Well we have a 2014 session.
- 1:04:18 C. Lazenby But it is a short session.
- 1:04:19 J. Stevens And they seem to make everything an emergency bill.

1:04:24 P. Levy In addition to legislation and a chief justice order, really a court rule, and I am not sure where that rule would live.

1:04:41 C. Lazenby That is what I am asking you to provide is that answer.

1:04:45 P. Levy That would be working through some trial court rule committee and kind of finding the right body where those originate. States have gone that way and done it successfully.

1:05:10 Chair Ellis I think there is consensus and has been for awhile. We feel strongly about this and I would ask you, Paul, to take it to the next level. If there is more we need to do lets do it. If that is legislative then fine. I think that is the best route. A court rule is fine. Let's do it.

1:05:37 N. Cozine I will also mention briefly that was I asked to present at the Juvenile Court Improvement Program Conference on August 12. That is at The Oregon Gardens. I will be presenting. I do have a slide, of course, addressing appointment of counsel. In that slide I suggest that in order to conform to current standards counsel should be appointed at the time the petition is filed. So whether or not there is an appearance that is the timing that should trigger the appointment. That can be worked out at the county level. I anticipate there will be some discussion around that and I will certain keep this Commission advised as to what that discussion is.

1:06:17 Hon. Elizabeth Welch You know there have been two dramatic improvements in practice that I have heard about. One was in Marion County and based on what I understand was the result of the former Chief Judge of the county raising hell. He is now the administrator of MCAD. The other one was in one of the counties between Portland and Salem; there was a change in who the presiding judge was, or the judge who did juvenile. I think it was a young woman who became the juvenile court judge. Ingrid was still working and she talked to this person who said, "Oh is that the way they do that here. That is going to end right now because I don't agree with that." That consciousness raising was what we were trying to do in round one. Is to say, "Do you realize that this is not an acceptable practice in lots of places. Courts don't do this." Maybe that would change some things and apparently it did a little good.

1:07:35 N. Cozine I did just discovered at the last meeting that Yamhill County then had a practice of not appointing. Judge Easterday has taken over that function and she has actually started appointing counsel. It was a very exciting conversation because it was movement.

1:07:56 Chair Ellis Okay. I am going to choose to follow that clock and not that clock. Following this clock, which happens to coincide with my own sense of what time it is, I am going to declare an eight minute recess. We will resume at 11:25. I would ask that you provide me with the script for executive session.

1:08:23 P. Levy Yes. I have the script for the executive session. At that time I just wanted to make a little introduction for anybody who is still here then and for commissioners who weren't here at the last meeting about the parameters of the executive session.

1:08:34 Chair Ellis I don't want to impose on our audience. Shall we do that piece now and then take the recess after we have done that?

1:08:40 P. Levy The law requires that the Chair read a statement prior to convening the executive session.

1:08:52 Chair Ellis Since we did all the training then I knew to ask, right?

1:08:53 P. Levy Essentially the announcement alerts those present to the legal basis for executive session, which in this case is to discuss records that are not yet subject to public disclosure and that is

contract proposals. What will happen in the executive session is responsive to a long standing Commission desire to when it is finally given a list of 100 or so contracts to say, “Yay” or “Nay” to that you understand what we did to arrive at these recommendations for you. So what we are doing is sharing with you our proposals and our plan for contracting. Half of that was two weeks ago and this is the other half today. We will not be talking about death penalty contracts today, at least not in any detail at all. We are sharing with you our plan. We are not asking you to make decisions, to debate policy, or even, for that matter, to give guidance. Policy discussions are not an appropriate subject for executive session, but discussions about contracting plans are. That is what we will be doing.

1:10:32 Chair Ellis Okay. Do you want me to read the script?

1:10:35 P. Levy Sure.

1:10:35 Chair Ellis The Public Defense Services Commission will now meet in executive session for the purpose of reviewing contract proposals, to provide public defense legal services in cases beginning on January 1, 2014. The executive session is being held pursuant to ORS 192.660(2)(f), which permits the Commission to meet in executive session to consider information and records that are exempt by law from public inspection. Under the public records law contract proposals are exempt from public inspection until a decision is made to award a contract. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session we will return to open session and welcome the audience back into the room. Now it says designated staff. I am sure the executive director and you, Paul, are designated staff and our contract analysts. Peter, if you wish, are also designated staff. Okay. Anybody else that I missed?

**Agenda Item No. 4 Executive Session – Commission Review of Statewide Service Delivery Plan; Phase 2**

3:11:17 Chair Ellis We need a motion to adjourn.

**MOTION:** Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

# Attachment 3

**PUBLIC DEFENSE SERVICES COMMISSION**

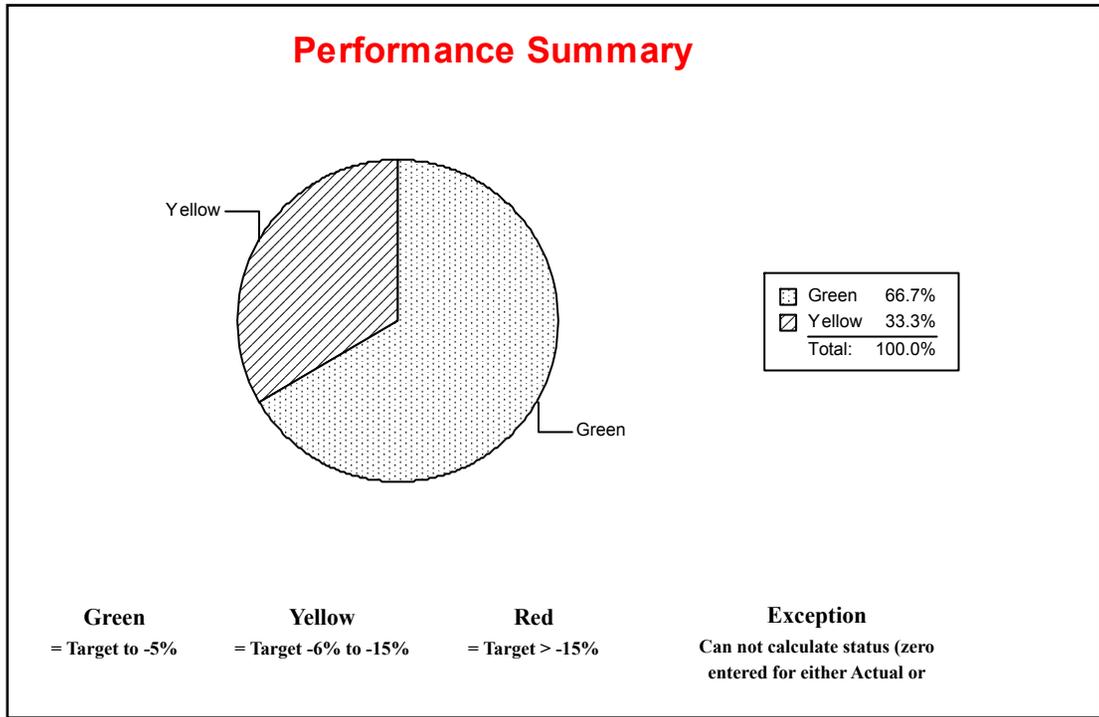
**Annual Performance Progress Report (APPR) for Fiscal Year (2012-2013)**

Original Submission Date: 2013

Finalize Date:

<b>2012-2013 KPM #</b>	<b>2012-2013 Approved Key Performance Measures (KPMs)</b>
1	APPELLATE CASE PROCESSING - Median number of days to file opening brief.
2	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
3	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>		<b>I. EXECUTIVE SUMMARY</b>	
<b>Agency Mission:</b> Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.			
<b>Contact:</b> Billy Strehlow		<b>Contact Phone:</b> 503-378-2512	
<b>Alternate:</b> Peter Gartlan		<b>Alternate Phone:</b> 503-378-2371	



**1. SCOPE OF REPORT**

Key performance measures address all agency programs.

**2. THE OREGON CONTEXT**

The Public Defense Services Commission is responsible for the provision of legal representation in Oregon state courts to financially eligible individuals who

have a right to counsel under the US Constitution, Oregon's Constitution and Oregon statutes. Legal representation is provided for individuals charged with a crime, for parents and children when the state has alleged abuse and neglect of children, and for people facing involuntary commitment due to mental health concerns. In addition, there is a right to counsel in a number of civil matters that could result in incarceration such as non-payment of child support, contempt of court, and violations of the Family Abuse Prevention Act. Finally, there is a statutory right to counsel for petitioners seeking post-conviction relief.

### **3. PERFORMANCE SUMMARY**

The agency is making progress in all of its Key Performance Measures.

### **4. CHALLENGES**

The primary challenge for the agency is that public defense in Oregon has been chronically underfunded. Prior to fiscal year 2008, the hourly rate for an attorney appointed on a non-Aggravated Murder case was \$40 per hour (the rate established in 1991). Over time, the skills, abilities, and experience-level of the attorneys willing and able to work at that rate had steadily declined. Although the 2007 Legislature provided funding to increase that rate to \$45 per hour, this still represents a decline in real dollars based on Consumer Price Index increases over the 17-year period. Contractors who are paid a flat rate under a contract are assigning excessively high caseloads to their attorneys in order to cover operating expenses. This combination of being either over-worked or under-paid, and in most cases both, prevents attorneys in some cases from being able to provide an acceptable level of representation.

Another challenge for the agency is that workload is driven by a variety of factors outside the agency's control. The enactment of laws that create new crimes or increase penalties for existing crimes impact the agency's expenditures and workload. Federal requirements have shortened the timelines and increased the complexity of cases involving abuse and neglect of children. If additional funding is not provided to address such changes, the quality of representation is further eroded.

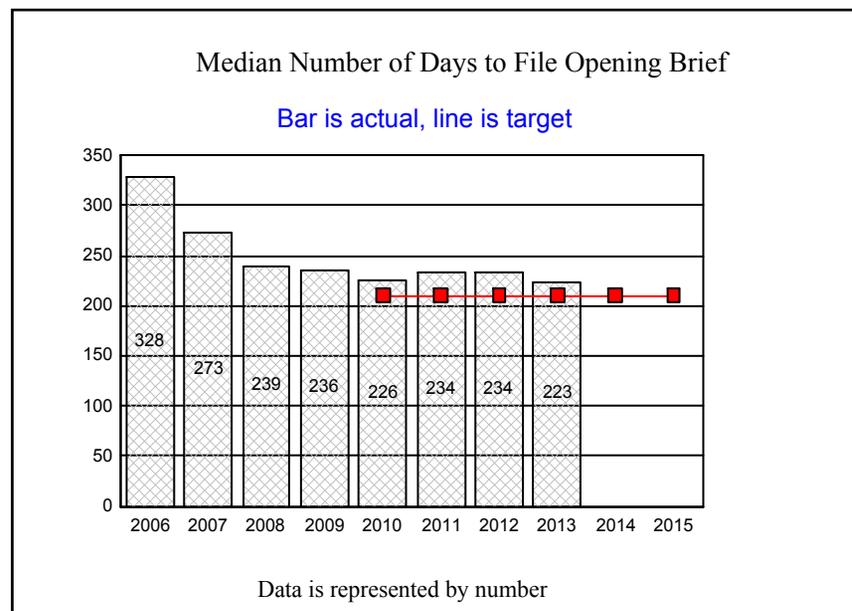
### **5. RESOURCES AND EFFICIENCY**

The agency's 2011-13 Legislatively Adopted Budget was \$223,717,479.

Within existing resources, the agency continues to convert to electronic storage and retrieval of documents; has further automated document production with improvements to the case management database.

With the implementation of e-filing, the agency continues to move toward a largely paperless office. In addition to saving paper and file storage costs, it saves attorney and staff time by having files instantly available at the click of a button.

<b>KPM #1</b>	APPELLATE CASE PROCESSING - Median number of days to file opening brief.	2009
<b>Goal</b>	GOAL 1: Reduce delay in processing appeals. GOAL 2: Ensure cost-efficient service delivery.	
<b>Oregon Context</b>	Mission Statement.	
<b>Data Source</b>	Case Management Database Reports.	
<b>Owner</b>	Appellate Division, Peter Gartlan, (503) 378-2371.	



**1. OUR STRATEGY**

Our goal is to reduce the delay in the appellate system. Reducing the number of open cases in the pre-briefing stage enables Appellate Division attorneys to address and resolve cases more efficiently, instead of "managing" – without resolving – an excessive caseload.

## 2. ABOUT THE TARGETS

The Appellate Division wants to file the opening brief within 210 days of record settlement. The 210-day target addresses several considerations. First, the agency considers it intolerable that an individual would have to wait more than seven months for an appellate attorney to advise the client concerning the viability of an appellate challenge to his conviction and/or sentence. Second, past budget reductions in the Attorney General's Office caused the Solicitor General to slow its briefing schedule in criminal cases, which causes additional delay in the appellate process and additional delay for the client. Third, federal courts have intervened when a state appellate system routinely takes two years to render decisions in criminal appeals. The 210-day target represents a reasonable attempt to meet various systemic considerations.

## 3. HOW WE ARE DOING

The agency has made significant progress. In 2006, the median number of days to file the opening brief was 328; in 2013 it was 223. Assuming adequate resources, the agency anticipates reaching or approaching the goal of 210 days in 2014.

## 4. HOW WE COMPARE

Appellate Division attorneys significantly exceed national caseload standards. Nationally, the appellate public defender workload ranges from 25 to 40 cases annually. For example, Georgia, Indiana, and Washington set the maximum annual appellate caseload at 25 cases per attorney; Nebraska sets the maximum annual appellate caseload at 40 cases per year. US Department of Justice, Compendium of Standards for Indigent Defense Systems, vol. IV, C 1-5 (2000). On average, an Appellate Division criminal defense attorney was assigned 48 cases in the fiscal year ending in 2013, which exceeds the maximum recommended standards and practices.

## 5. FACTORS AFFECTING RESULTS

The ability to meet and exceed the target correlates positively to the number of attorneys and negatively to the number of cases. The agency does not control the number of referred cases. Attracting and retaining competent attorneys affects progress toward the goal.

## 6. WHAT NEEDS TO BE DONE

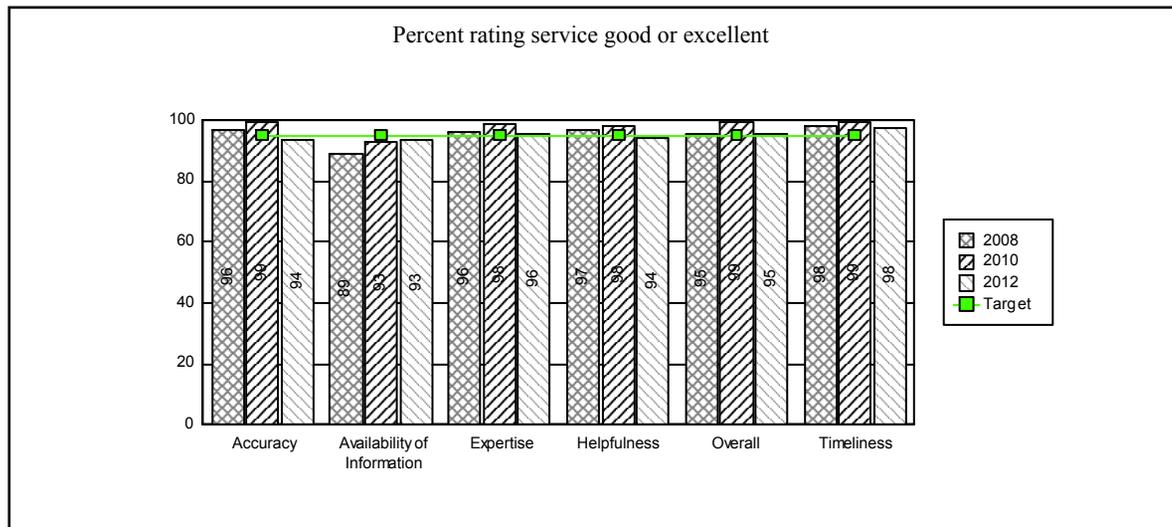
The agency continues to meet regularly and work cooperatively with the appellate courts and the Attorney General's Office to promote system efficiencies. The agency has made steady progress over the past several years to reduce the median brief filing date for its criminal cases (from 328 days in 2006, to 223

days in 2013). Barring significant caseload increases, milestone Supreme Court decisions that affect hundreds of open cases, or an atypical loss of talented and trained attorneys, the agency expects to approach its target of 210 days in criminal cases in fiscal year 2014

**7. ABOUT THE DATA**

The data is derived from the agency's case management database. The strength of the data lies in historical comparison with prior years. The weakness is attributable to the inherent difficulty in quantifying appellate caseloads. The agency continues to refine caseloads based on case type, transcript length, and issues presented.

<b>KPM #2</b>	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	2007
<b>Goal</b>	To provide greater accountability and results from government by delivering services that satisfy customers.	
<b>Oregon Context</b>	To maintain and improve the following category ratings of agency service: overall quality of services, timeliness, accuracy, helpfulness, expertise and availability of information.	
<b>Data Source</b>	Customer Service Surveys (survey and results stored on SurveyMonkey).	
<b>Owner</b>	Contract and Business Services Division, Billy Strehlow, (503) 378-2512.	



**1. OUR STRATEGY**

The general strategy is to utilize feedback to address cited problems and improve the general level of service provided by the agency.

## 2. ABOUT THE TARGETS

Targets for 2011-13 have been set at 95% of respondents rating the agency as good or excellent.

## 3. HOW WE ARE DOING

The survey results indicate a high level of customer satisfaction with the agency. Service was rated as good or excellent by more than 93% of the respondents in all categories. Although the standard reporting measure for state agencies groups both "good" and "excellent" into one category, the more telling aspect of the agency's results is the percentage of respondents who rated the service as excellent. In the categories of Timeliness and Helpfulness, over 70% of respondents rated the agency's service as excellent.

## 4. HOW WE COMPARE

Services and customers differ greatly among state agencies, so a direct comparison to other state agencies may lack validity. Similarly, comparisons to public defense systems in other jurisdictions would not be useful due to variations in the survey questions, the survey pool, and the types of services provided. Given the high percentages of positive ratings received by the agency, we would likely compare favorably were such a comparison possible.

## 5. FACTORS AFFECTING RESULTS

The ratings are somewhat lower this year than in prior surveys. The agency believes that the lower ratings are a reflection of cost-cutting measures the agency implemented. For example, in order to reduce the costs associated with processing payments, the agency grouped some categories of vendors so that payments were processed for that group one day per week rather than being processed throughout the week as submitted. Although this added an average of three days to the time in which payments were processed, the agency still processes payments within 10 days and did realize a savings as a result of this procedural change.

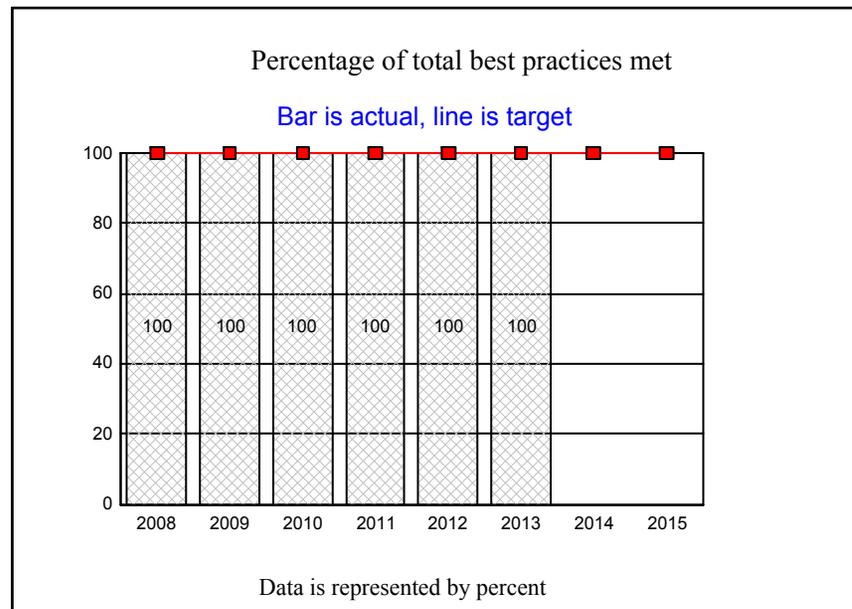
## 6. WHAT NEEDS TO BE DONE

In the 2008 survey, the agency's lowest satisfaction rating (89%) was in the category of Availability of Information. In order to improve this rating, the agency restructured its website so that information is better organized and easier to locate. The agency is pleased that the 2012 survey results show that 93% of the respondents now rate the Availability of Information as good or excellent. The agency will continue to make improvements in this area.

**7. ABOUT THE DATA**

A total of 886 contract attorneys, private bar attorneys, and service providers were invited to complete the agency's Customer Service Survey. The survey was administered in June 2012 as a snapshot for fiscal year 2012. There was a 29% response rate (255 responses) to the survey. The agency administers the customer service survey every two years to coincide with its two-year contract cycle. The next survey will be conducted in June 2014.

<b>KPM #3</b>	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.	2007
<b>Goal</b>	Best practices as a pathway to improved performance and accountability.	
<b>Oregon Context</b>	Required KPM for all Oregon boards and commissions.	
<b>Data Source</b>	Commission agendas and minutes.	
<b>Owner</b>	Contract and Business Services Division, Nancy Cozine, (503) 378-2515.	



**1. OUR STRATEGY**

The agency's commission currently follows all of the best practices.

**2. ABOUT THE TARGETS**

The agency anticipates meeting all of the best practices for boards and commissions.

**3. HOW WE ARE DOING**

The Commission's minutes provided in the materials for its July 31, 2013 meeting included the discussion of the self assessment confirming that the agency met all of the best practices for boards and commissions.

**4. HOW WE COMPARE**

The agency assumes that most boards and commissions will be able to implement all best practices.

**5. FACTORS AFFECTING RESULTS**

There are no factors that would prohibit the agency from meeting all of the best practices.

**6. WHAT NEEDS TO BE DONE**

No change is needed.

**7. ABOUT THE DATA**

The Commission continues to meet all of the best practices as documented in the Commission meeting minutes.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>III. USING PERFORMANCE DATA</b>
---	------------------------------------

**Agency Mission:** Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

<b>Contact:</b> Billy Strehlow	<b>Contact Phone:</b> 503-378-2512
--------------------------------	------------------------------------

<b>Alternate:</b> Peter Gartlan	<b>Alternate Phone:</b> 503-378-2371
---------------------------------	--------------------------------------

**The following questions indicate how performance measures and data are used for management and accountability purposes.**

<b>1. INCLUSIVITY</b>	<p>* <b>Staff:</b> The agency's Management Team drafted initial performance measures.</p> <p>* <b>Elected Officials:</b> The Joint Legislative Audit Committee and the interim Judiciary Committee assisted the agency in refining and finalizing its performance measures. After five years of data collection, it was apparent that some performance measures were not providing useful information and were eliminated by the Legislature during the 2009 session.</p> <p>* <b>Stakeholders:</b> Input was received from the agency's Contractor Advisory Group comprised of public defense service providers.</p> <p>* <b>Citizens:</b> The agency developed, discussed and revised its performance measures during two public meetings.</p>
<b>2 MANAGING FOR RESULTS</b>	<p>The agency's lowest customer service rating in 2008 (89% good or excellent) regarding availability of information caused us to restructure our website so that more information is available and is easier to locate. As a result, the rating for 2012 improved to 93%.</p>
<b>3 STAFF TRAINING</b>	<p>The agency has advised staff of the goals outlined in the performance measures and staff is directly involved in the data collection and/or direct daily implementation of the measures. The performance measures serve as important tools for the agency's managers as they identify and develop necessary staff skills as well as determine the best use of overall resources in order to attain the goals enumerated in the measures.</p>
<b>4 COMMUNICATING RESULTS</b>	<p>* <b>Staff:</b> The Annual Performance Progress Reports are available to staff online. The results and future plans are discussed at staff meetings.</p> <p>* <b>Elected Officials:</b> The agency communicates results to the Legislature through the Executive Director's biennial report to the Legislature, and by the inclusion of the APPR in the Agency Request Budget binder.</p>

\* **Stakeholders:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.

\* **Citizens:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.

# Attachment 4



## Report to the Public Defense Services Commission

# Clatsop County Public Defense Providers: Response to Peer Review Recommendations

September 24, 2013

## I. INTRODUCTION

**Background.** Beginning in 2004, the Office of Public Defense Services (OPDS) has conducted over 40 peer reviews of public defense contractors with the goal of assisting public defense providers achieve excellence through a collaborative process that relies upon volunteer review teams of public defense leaders from across Oregon. Upon the recommendation of the Quality Assurance Task Force (QATF)<sup>1</sup>, the specific objectives of each evaluation have been to determine the quality of service provided by a contractor; identify provider policies and practices that can be recommended to other public defense contractors; identify areas in need of improvement and assist the contractor in improving services; and acknowledge and commend practices by public defense providers that are especially deserving of recognition.

Until 2011, peer reviews were based largely upon confidential interviews and promises that the report would be shared only with the administrator of the contractor, the QATF, and a limited number of officials at OPDS. As a result, reports were not subject to disclosure under the Oregon Public Records Law<sup>2</sup>. But another consequence of this policy was that information gained from peer evaluations could not be readily shared with the Public Defense Services Commission (PDSC), even where reports recommended that PDSC consider significant changes concerning contracting in a county or region. Because the disadvantages of confidentiality were thought to outweigh

---

<sup>1</sup> The Quality Assurance Task Force (QATF) was established in 2004 to advise the OPDS executive director on the protocols for evaluations and how best to achieve the recommendations of each evaluation. In 2012, the QATF was incorporated into a new Public Defense Advisory Group that continues to advise the executive director on how best to achieve excellence in public defense and on other matters related to public defense services in Oregon.

<sup>2</sup> Because reports were based upon information submitted in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential and OPDS obliged itself in good faith not to disclose the information publicly, peer review reports were exempt from disclosure under ORS 192.502(4).

its benefits, the OPDS Executive Director, with the concurrence of the Public Defense Advisory Group, directed that peer reviews no longer rely upon confidential interviews.

With the change in peer review protocol, of which the PDSC was kept informed, OPDS also built a new step into the peer review process. Although staff follow-up to reports had long been a part of peer reviews, entities under review are now informed that a report will be made to the PDSC regarding contractor response to peer review team findings and recommendations. The report to PDSC will typically occur no sooner than six months following the finalization of the peer review report, allowing sufficient time for the contractor to undertake whatever response to the report they intend to make. Thus, this report follows a September 2012 peer review visit to Clatsop County, reports to the providers there that were finalized in November 2012, a follow-up visit to the county by OPDS staff in May 2013, a Commission hearing in Clatsop County in mid-July 2013, and further Commission consideration of a draft of this report later in July.

**Clatsop County Evaluation.** The review in Clatsop County looked at the work of the two public defense contractors there. The Clatsop County Defender Association (CCDA), which was a four-person consortium at the time of the peer review, provides representation in adult criminal, juvenile dependency and delinquency, and civil commitment cases in Clatsop County. Mary Ann Murk, a solo practitioner, also contracts for the same case types.

The OPDS Executive Director assembled a review team consisting of Keith Rogers, who was asked to chair the team, and attorneys Jennifer Nash, Jack Morris, and Jennifer Kimble. Paul Levy served as staff for the team.<sup>3</sup>

The review was conducted in accordance with Paragraph 3.8.2 of the OPDS Model Contract which provides that any evaluation performed by OPDS of a contractor office adhere to the standards set forth in the American Bar Association's [Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor](#) (2002).

Prior to the on-site visit by the review team, stakeholders in the Clatsop County justice system, including judges, the District Attorney, probation and parole, the Juvenile Department, the Department of Human Services, the Citizens Review Board (CRB), Court-Appointed Special Advocates (CASAs), and others, received an online survey asking about the quality of representation provided by CCDA attorneys. A total of 14 people responded to this survey.

---

<sup>3</sup>Keith Rogers is the executive director of Multnomah Defenders, Inc. Previously, he has been the director of the Washington County section of the Metropolitan Public Defender, served as a circuit court judge in Washington County, and maintained a private practice for several years. Jennifer Nash is the administrator of the consortium of attorneys providing public defense representation in both criminal and juvenile cases in Benton County. Jack Morris heads a law firm that contracts to provide public defense representation in Hood River, Wasco, Sherman, Gilliam and Wheeler counties (the 7<sup>th</sup> Judicial District). Jennifer Kimble is a member of a four-person consortium that provides representation in criminal and juvenile cases in Crook and Jefferson counties (the 22<sup>nd</sup> Judicial District). Paul Levy is General Counsel at OPDS in Salem, and served as staff to the peer review. All team members have participated in other peer reviews.

Members of CCDA, except the administrator, received a separate survey about consortium operations and the effectiveness of the consortium administrator. There were no responses to this survey.

The CCDA administrator, Kris Kaino, also answered a detailed questionnaire about consortium operations. Mr. Kaino cooperated fully with the evaluation and, along with Mary Ann Murk, provided invaluable assistance in preparing for the evaluation and scheduling interviews for the site visit.

A three-day site visit to Clatsop County was completed on September 28, 2012. During the site visit team members met with judges, court staff, prosecutors, a state legislator, probation officers, mental health services providers, a private bar defense attorney, and others, conducting interviews with over 30 people. Other interviews were conducted by phone following the visit.

At the conclusion of on-site interviews, the team met to discuss preliminary findings and conclusions, and then met separately with Kris Kaino and Mary Ann Murk to provide initial feedback on the information it had received and some of the recommendations it was considering. Thereafter, separate draft peer review reports were provided to Kris Kaino and Mary Ann Murk on November 28, 2012. In January 2013, Mr. Kaino and Ms. Murk provided formal responses to the draft reports which were then finalized, with the responses attached.

On May 23, 2013, OPDS Executive Director Nancy Cozine, General Counsel Paul Levy, and Billy Strehlow, OPDS Analyst for Clatsop County, visited Astoria to conduct interviews with key justice system officials and the contractors to determine what changes had occurred in the county in response to the reports.

On July 17, 2013, the Commission held a hearing in Clatsop County to discuss a draft of this report with contractors and two judges. Later in July, the Commission met again and discussed the key issues raised during its meeting in the county.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews and meetings are related in the balance of this report.

## II. CLATSOP COUNTY

**Demographics.** Clatsop County has a population of about 37,000 people, which is somewhat more populous than its neighbor Tillamook County (approx. 25,000) but less than all other coastal counties except Curry (approx. 22,000)<sup>4</sup>. Like nearly every Oregon county, at the time of the peer review it was listed as an economically “distressed county” by the Oregon Business Development Commission, although its unemployment rate of 8% in August 2012 was among the lowest in the state.<sup>5</sup> Fishing, timber and

---

<sup>4</sup> <http://www.pdx.edu/prc/>

<sup>5</sup> <http://www.oregon4biz.com/Publications/Oregon-Economic-Data/>

agriculture, along with tourism, are the principal industries in Clatsop County. The U.S. Coast Guard is the largest single employer in the county.

According to U.S. Census data, the county is somewhat less racially and ethnically diverse than the entire state population, with 86.9% identifying as white persons not of Hispanic or Latino origin (78.1% statewide); 0.7% identifying as black persons (2.0% statewide); 1.3% identifying as American Indian or Alaska Native (1.8% statewide); 1.4% identifying as Asian persons (3.9% statewide); and 7.8% identifying as persons of Hispanic or Latino origin (12.0% statewide)<sup>6</sup>. Census data also show the county has a slightly higher than statewide percent per capita of high school graduates (91.1%; 88.6% statewide), but a lower percent of college graduates (21.6%; 28.6% statewide).

Oregon State Police profile of index crimes for Clatsop County shows little change over the past five years, with the number hovering right around 1500. Total reported crime for the county has dropped slightly over the same period.<sup>7</sup>

**Justice System.** The county courthouse is a majestic building constructed in 1904 and most recently renovated in 2007. It is located in Astoria's historic downtown and houses the county's three circuit court judges: Presiding Judge Philip Nelson, Judge Paula Brownhill, and Judge Cindee Matyas. The District Attorney, Joshua Marquis, and his six deputies also have their offices in the courthouse. Three of the four CCDA attorneys have their offices within a short walk to the courthouse; the other attorney is about 15 miles away in Seaside. Mary Ann Murk has her office at historic Pier 39, which requires a drive, brisk walk or trolley ride to get to the courthouse.

The county jail is also near the courthouse. Its capacity is capped at 60 beds, requiring frequent "matrix" (or forced) releases of prisoners. In July 2012, voters rejected for a third time in recent years a levy for construction of a new jail. The Juvenile Department and Department of Human Services also have offices in the downtown area. The Probation and Parole offices, however, are in a somewhat remote area several miles from town in Warrenton. The Oregon Youth Authority's North Coast facility, which includes detention beds used by Clatsop County, is at the same Warrenton complex.

**Case processing.** The county's three judges all handle some criminal and civil docket matters but have divided among themselves primary responsibility for particular case types, with Judge Nelson handling in-custody arraignments and juvenile delinquency cases, and Judge Brownhill handling most juvenile dependency cases. Each judge also presides over special courts, which are addressed further below.

The county does not have a formal early disposition program, as provided by ORS 135.941, or a similar procedure for routine early disposition of criminal cases. However, in criminal cases, the court will set an "early resolution conference" (ERC) 45 days after

---

<sup>6</sup> <http://quickfacts.census.gov/qfd/states/41/41007.html>

<sup>7</sup> Oregon State Police, 2010 Annual Uniform Crime Report, [http://www.oregon.gov/osp/CJIS/Pages/annual\\_reports.aspx](http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx). The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft and Arson. Total reported crime was 5,909 in 2006 and 5,213 in 2010, the last year for which data are available and a low for the five-year period.

arraignment (30 days for in-custody cases). It is DA office policy to provide a written pretrial plea offer at initial appearance in misdemeanor cases and at the indictment arraignment in felonies, at which time they also provide discovery. If a case is not resolved at the ERC, the matter is set for trial 60 days later (earlier for in-custody cases), or the case is continued for a “final resolution conference” (FRC), after which it is set for trial if there is no resolution.

In delinquency cases, the county Juvenile Department typically appears at arraignment without representation from the DA’s office, which only appears at jurisdictional hearings when requested by the Juvenile Department. At the time of the peer review, public defense attorneys were typically not present for arraignment in delinquency cases. The Juvenile Department estimates that youth waive their right to appointed counsel in approximately 40% of delinquency cases. The department also reports that 20 detention beds are available at the OYA North Coast facility, with between six and 13 youth typically in custody awaiting disposition.<sup>8</sup>

Shelter hearings in dependency cases can take place at any time during a court day, depending upon the judge’s availability and case exigencies. Mary Ann Murk is notified of these hearings and is typically present and appointed to represent children. CASA is also notified, and the DA’s office is present. At the time of the peer review, no one was notified to be present for appointment to parents, who were usually unrepresented at shelter hearings. After court jurisdiction is established, which is rarely contested, the court typically will conduct no further review until a permanency hearing is held a year later, or earlier in a significant number of cases. A Citizens Review Board hearing will take place at six months following the disposition on the petition. DHS is usually not represented at permanency hearings, even contested ones. An assistant attorney general appears for DHS if a case proceeds to a termination of parental rights petition.

As indicated above, Clatsop County employs a variety of special or “problem solving” courts. Judge Nelson presides over a drug court, served by a “team” that includes a deputy DA, a probation officer, a treatment provider and Mark Lang, a local non-contract defense attorney who bills OPDS hourly for his services. The program functions as both a “supervision court” for persons convicted on felony drug offenses and placed on probation and as a “conditional discharge court” for persons who can earn dismissal of drug offenses through successful completion. The court is not designed or funded, as with programs in some counties, to include “Measure 57” offenses. Judge Nelson also oversees a drug court and a “behavioral court” for adjudicated youth in delinquency cases. Typically, contract attorneys will not attend these post-dispositional delinquency proceedings after their clients have entered the programs.

---

<sup>8</sup> According to the most recent statewide detention trends report from the Oregon Youth Authority’s Juvenile Justice Information System (JJIS), in 2007 Clatsop County was somewhat above the average statewide rate for total juvenile detention admissions per 1,000 youth with 48.7 total admissions (27.8 statewide) and 20.3 unduplicated admissions (14.0 statewide) for youth ages 10-17. Data for 2007 also show that Clatsop County was slightly above the statewide average for length of stay for all admissions with an average of 10.7 days (9.1 statewide average). Although a statewide comparison report is not available for subsequent years, JJIS data for Clatsop County for 2008-2011 show that total admissions have declined somewhat from a high in 2007, and that average length of stay has remained about the same. [http://www.oregon.gov/OYA/Pages/jjis\\_data\\_eval\\_rpts.aspx](http://www.oregon.gov/OYA/Pages/jjis_data_eval_rpts.aspx).

Judge Matyas presides over a “treatment court,” served by a team that includes a deputy DA, a probation officer, treatment providers and, again, Mark Lang as defense counsel. The program is a supervision court, serving persons both on probation and post-prison supervision who have either a mental health disorder or other disorder, such as traumatic brain injury, which is a common diagnosis for veterans who have served in Iraq or Afghanistan.

Judge Brownhill manages a “family drug court,” which serves parents in dependency cases, who can earn a dismissal of the petition in their cases through successful completion of the program, which includes a variety of treatment providers. Again, a non-contract defense attorney, Stacey Rodriguez, who has her office in Cannon Beach, is paid on an hourly basis to represent parents in this program. If a parent who is represented by a contractor enters the program, Ms. Rodriguez will be substituted as counsel for that client. If a second (or subsequent) parent in the same case also enters the program, the original appointed attorney will remain on the case, although that person is not part of the court “team,” which includes the judge, a deputy DA, Ms. Rodriguez, DHS, a CASA, and treatment providers. Mary Ann Murk, who usually represents children in dependency cases, also attends family drug court staffings and court proceedings.

Data from the Oregon Judicial Department show that Clatsop County averages somewhat more trials in criminal cases than statewide. Data on age of pending cases and age of terminated cases show that the county is among the fastest to resolve cases.<sup>9</sup>

### **III. OVERVIEW OF CLATSOP COUNTY DEFENDERS ASSOCIATION (CCDA)**

At the time of the peer review, the Clatsop County Defenders Association was a consortium of four lawyers. Although the group has an “operating agreement” signed by all members, it does not otherwise have a formal business structure.<sup>10</sup> Kris Kaino, one of the members, has served as the consortium administrator for the past 10 years. The group does not have a board of directors, and no person outside of the group participates in the oversight or administration of its operations.

The four attorneys who were members of CCDA at the time of the peer review have each practiced law for over 20 years. At the time of the review, the group’s composition had not changed for many years, and it disclaimed any role in providing training or educational opportunities for its members, or in conducting any oversight or evaluation of the quality of its member’s services. There is no formal mechanism for members to share memoranda or other practice tools and aids. The operating agreement calls for quarterly meetings with topics ranging from financial and caseload matters to legal trends and developments in the court justice system. CCDA members report interacting

---

<sup>9</sup> <http://courts.oregon.gov/OJD/OSCA/Pages/statistics.aspx>.

<sup>10</sup> The operating agreement casts some doubt regarding the actual name of the consortium. The document is entitled “Operating Agreement of Clatsop County Indigent Defense Consortium,” but it identifies the entity it governs as the Clatsop County Defender’s [sic] Association. For simplicity and consistency, this report refers to the consortium as the Clatsop County Defenders Association, which is how it is named in its contract with PDSC.

with each other frequently in and out of court, along with frequent email exchanges about legal matters and consortium business.

At the time of the peer review, each consortium members had some office staff working for them except for Mr. Kaino, who shared a receptionist in the suite of offices where he shares space. Mr. Kaino had part-time assistance to help with preparing case reports for OPDS but no person other than Mr. Kaino was available to assist with day-to-day consortium administrative matters such as case assignment or resolution of client contact issues.

As consortium administrator, Mr. Kaino is known among court personnel as a contact person for concerns about consortium members or operations. Along with Ms. Murk, he had worked with the Presiding Judge, just prior to the peer review, to place primary responsibility with contractors for identifying and resolving potential conflicts of interests with new case appointments, a function performed until then by the court in advance of initial appointments. Mr. Kaino and Ms. Murk believe this may reduce the number of non-contract hourly appointments in potential conflict cases, which they saw as a major contributor to a recent decline in case appointments to CCDA and Ms. Murk. Under the new system, the contract attorney assigned to cover in-custody arraignments for a particular day, who ordinarily will receive the appointment on that day's cases, receives a list several hours before court of defendants to be arraigned and any identified alleged victims in their cases. If the attorney identifies a potential conflict, the appointment will go to another contractor. It is the responsibility of the assigned arraignment attorney to identify a new contractor to receive conflict appointments.

Mr. Kaino had also worked with the Presiding Judge to ensure that one attorney usually handles all of a defendant's pending cases and is appointed on any probation violations that arise from those cases.

Outside of ad hoc meetings to resolve specific matters, at the time of the peer review neither Mr. Kaino nor any other consortium member participated in regular justice system policy meetings. In fact, no such meetings were taking place in Clatsop County. There is a Local Public Safety Coordinating Council, but it meets infrequently and the defense attorney representative is not an active public defense provider.

#### **IV. THE MARY ANN MURK FIRM**

Mary Ann Murk has her office on historic Pier 39, a former cannery that is the largest and oldest waterfront building in Astoria, located on the Columbia River. The office is comfortably and professionally furnished to accommodate both adult and child visitors. Ms. Murk employs a full-time legal assistant. At the time of the on-site visit by the peer review team, Ms. Murk estimated that she had 60 open dependency case, mostly involving representation of children, in addition to open adult criminal and juvenile delinquency cases. She could not provide a number for her total open caseload.

Ms. Murk has contracted with OPDS for many years. In previous contracts, she managed a "consortium" consisting of herself and Dawn McIntosh. Ms. McIntosh now holds the contract to provide public defense services in Tillamook County.

## IV. PEER REVIEW FINDINGS AND RECOMMENDATIONS

### Clatsop County Defender Association

The Public Defense Services Commission (PDSC) conducted a service delivery review in Clatsop County in 2006, and identified a number of “significant concerns.”<sup>11</sup> The concerns included the imminent need to attract new public defense attorneys to work in the county; the caseload demands on the then six public defense contract attorneys, particularly in light of the quick rate at which the court processed cases and lack of communication among the county’s judges on judicial administration matters; disparity between contract rates in the county and elsewhere in the state; the absence of contract attorney participation in any early disposition program; the lack of organizational development and structures in the county’s consortia; and unsatisfactory representation by CCDA on behalf of parents in juvenile dependency cases. In 2008, as an update to the 2006 report, then-OPDS Executive Director Ingrid Swenson visited with Clatsop County judges, the district attorney, and defense providers and reported that most of the issues identified in the 2006 report had not been resolved. The peer review team also concluded in 2012 that little had changed since the 2006 report to the Commission.

The peer review team found that every member of CCDA had strengths in some areas of practice or type of cases and one member was said to be an excellent trial attorney in criminal cases. Each attorney was well-liked by their justice system colleagues, and were usually seen to care about their clients. But overall, the review team concluded, the group did not deliver consistently good representation, especially in juvenile dependency cases. This was a particular concern in such a small group, where the weaknesses of just one or two attorneys can have a significant impact on the clients entrusted to the consortium’s attorneys. The unsatisfactory representation was manifested in a variety of ways, from failure to establish timely and meaningful contact with clients, lack of preparation for court proceedings, tardiness for court, apparent ignorance of current or applicable law, failure to identify and zealously advocate for client objectives, confusion in the court and similar difficulties. The causes, too, were varied, from a simple lack of interest to large workloads and other less tangible factors, according to interviews. The peer review report recommended that OPDS should look to a different way of providing public defense services in Clatsop County if the group did not undertake meaningful changes to improve the quality of representation that it provided.

After providing detailed information about the information it gathered from interviews and the online survey, the peer review team made the following recommendations to CCDA:

1. **Contract Administration.** CCDA should carefully review the OPDS recommended Best Practices<sup>12</sup>, and implement quality assurance and other practices that seek to ensure that every public defense client receives satisfactory and appropriate representation. These recommended practices were assembled in part from the experience gained through other peer

---

<sup>11</sup> <http://courts.oregon.gov/OPDS/docs/Reports/clatsopfinalreport.pdf>.

<sup>12</sup> <http://www.oregon.gov/OPDS/CBS/pages/bestpractices.aspx>

reviews of Oregon public defense providers, where contractors of all types—including small consortia—have undertaken steps to assure quality representation. The fact that CCDA is composed of four seasoned attorneys is not a sufficient response to having no recruitment, training, evaluation or disciplinary processes in place. Clearly, as recommended below, the composition of CCDA should change, with the likelihood of adding less experienced members for whom appropriate guidance, mentoring and oversight may be essential.

OPDS should follow up, through its contract administration staff or other means, to ensure that meaningful improvements have been undertaken by CCDA to establish quality assurance protocols that bring about real change in the quality of CCDA services. If effective improvements are not undertaken, the peer review team recommends that OPDS seek to change the way it provides public defense services in Clatsop County by either contracting with a different entity, by providing a list of suitable attorneys to appoint to particular case types, or through other means.

CCDA should hire a staff person to work with the courts, clients and member attorneys to facilitate the timely assignment of appropriate counsel to new cases, and assist with the efficient transfer of cases among consortium members when conflicts of interest require a change in counsel. A staff person can work with court staff to ensure that attorneys are available to represent parents at shelter hearings in dependency cases. A staff person can also assist clients and attorneys in facilitating contact between them, in addition to other contract administration duties that do not require the attention of an attorney. Nearly all public defense consortia, of every size, have a staff person to assist with these and other tasks. The position is financed through a percentage “hold back” from the contract proceeds that otherwise would be distributed to member attorneys.

- 2. Member Recruitment.** In many interviews and on every survey conducted by OPDS regarding public defense services in Clatsop County, local justice system officials have stressed the need for new consortium members. If clients are not being visited in jail and detention, if attorneys are coming to court unprepared and without current knowledge of applicable law, if attorneys are not engaged with their dependency case clients after the court establishes jurisdiction, and if attorneys are not appointed to nearly half the delinquency cases in which youth are eligible for appointed counsel, then it is very likely that new or different members of the consortium are needed. A handful of potential members were mentioned in a number of interviews, and it is likely that these people are known to the consortium. If other options are desired, the group should undertake active recruitment efforts.

The peer review team is mindful that enlarging consortium membership, in addition to adding a permanent staff person, has the effect of reducing the compensation received by current members. However, it also appears that some current consortium members are not attending a number of proceedings—CRB hearings, Family Drug Court hearings and other post-

disposition proceedings—for which the consortium could be receiving case credit and, therefore, more revenue for the group from which to partially finance new positions. Moreover, as described long ago by the PDSC, it has always been expected that attorneys participating in a consortium will maintain a private practice that includes retained work so that they are not entirely dependent upon public defense income. Consortium lawyers should not treat a public defense contract as an entitlement program that guarantees a particular level of income. Rather, the first priority should be the provision of high quality client representation through a structure that can meet the particular financial needs of its members.

- 3. Juvenile Delinquency Representation.** Two separate but related issues should be addressed by CCDA concerning delinquency cases. First, the consortium should work with the Presiding Judge and Juvenile Department to ensure that financially eligible youth waive their right to appointed counsel only after being fully informed of the risk of proceeding without a lawyer and the benefits of having one. As part of this process, youth should have an opportunity to consult with counsel before making a decision to waive a lawyer. In this regard, CCDA should work with the court to ensure that a consortium attorney is present when youth make their first appearances in delinquency cases. Of course, in addition to the youth, all other juvenile justice stakeholders should understand the benefits of having a lawyer represent a youth in delinquency cases. There should be little question about this point<sup>13</sup>, but it may not be apparent in Clatsop County if those lawyers now appointed in delinquency cases do not see their clients in detention or make timely responses to calls and other messages from clients and Juvenile Department officials.

The adverse consequences of shackling youth during transport to court proceedings and during such proceedings are becoming better understood. As a result, both nationwide and in Oregon, courts are increasingly prohibiting the practice without a clear demonstration of the need for heightened security measures and the absence of reasonable alternatives to shackling. Pleadings and court orders concerning the litigation of this issue recently in Yamhill County are available, along with other resources, for advocating against routine use of shackles in delinquency cases. According to one interview with a consortium member during the peer review, CCDA attorneys reached an agreement among themselves that they would not challenge this practice. It is hard to imagine what circumstances would have led to such an agreement, or how a lawyer's duties to individual clients could be sacrificed by a vote of a consortium. In any case, the group as a whole and each member attorney should reconsider the matter and seek assistance if required in challenging the practice. OPDS General Counsel can provide additional information on this matter. Youth, Rights and Justice, a public defense contractor in Portland, is also a resource.

---

<sup>13</sup> The importance of counsel in delinquency cases should be self-evident. An excellent description of the role and responsibilities of a lawyer in these cases can be found in publications of the National Juvenile Defender Center (<http://www.njdc.info/index.php>), especially their [\*Role of Juvenile Defense Counsel in Delinquency Court\*](#) (2009).

4. **Juvenile Dependency Representation.** It is not clear that CCDA should continue to provide representation in these cases. Representation in dependency cases requires knowledge and skills that are very different from the practice of criminal defense, and it is an unreasonable expectation that every good criminal defense attorney will also serve dependency clients well. Therefore, both CCDA and OPDS should reassess whether the consortium should continue to contract for representation in these cases.

But if CCDA does continue with this work, then each member handling dependency cases should become thoroughly familiar with the standards of practice and law that governs this practice. Every lawyer providing dependency representation under contract with OPDS is now required to attest to attendance at 16 hours of specialized training for each contract period. It is not clear that each CCDA attorney has fulfilled this obligation.<sup>14</sup> In addition, CCDA lawyers should be familiar with the expectations of the Oregon State Bar performance standards in dependency cases,<sup>15</sup> and with the OPDS expectations described in its document *The Role of Counsel for Children and Youth*.<sup>16</sup> The entire consortium would likely benefit from actual in-person attendance at applicable Oregon State Bar, ODCLA or Juvenile Law Training Academy programs. The group should also consider seeking consultations with the Juvenile Law Resource Center provided by Youth, Rights and Justice, and with the Juvenile Appellate Section of the Appellate Division of OPDS.

The group should work immediately with the court to ensure that lawyers are notified of shelter hearings so that attorneys can appear then to represent parents. The importance of zealous representation of parents at shelter hearings is explained well in a series of articles in the Youth, Rights and Justice *Juvenile Law Reader*.<sup>17</sup> Each member of the consortium should be familiar with these articles and share them with the court in order to promote an understanding of the importance of having counsel available to represent parents at the shelter hearing. In addition, participation in these hearings is an obligation of counsel under the Oregon State Bar's performance standards, Standard 3.5, which describes the steps that attorneys for both parents and children should take at shelter hearings.

Post-disposition representation of parents in dependency cases can be critical to ensuring that the Department of Human Services provides services

---

<sup>14</sup> In its 2011 response to the OPDS Request for Proposals for 2012-2013 contracts, the CCDA administrator explained that he had acquired the recordings of two past seminars from the Juvenile Law Training Academy, which each member was expected to "attend" by the end of December 2011. There was no separate certification that each lawyer had obtained the materials for these programs or listened to at least 16 hours of instruction.

<sup>15</sup> The performance standards, which are currently being revised and updated, are available at [http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html).

<sup>16</sup> *The Role of Counsel for Children and Youth* is available at <http://www.oregon.gov/OPDS/CBS/pages/roleofcounsel.aspx>.

<sup>17</sup> The articles, *Zealous Advocacy: The Shelter Hearing*, Part I and Part II, are in the December 2007 and February 2008 issues of the *Juvenile Law Reader*, available at <http://www.irplaw.org/juvenile-reader>.

and visitation, among other efforts, needed for successful reunification of children with parents. It appears, from interviews, that attorneys are not maintaining meaningful contact with clients following disposition in these cases, and that advocacy at review hearings is perfunctory. Again, the OSB performance standards are a good guide to the expectations for attorneys in this regard, particularly Standard 3.12 (Postdisposition), Standard 3.13 (Review Hearings and CRB Hearings), and Standard 3.14 (Permanent Planning Hearings). The peer review team heard that very few post-disposition review hearings are conducted by the court but that the court would also conduct early permanency hearings that frequently result in a change of plan to adoption. More active representation of parents combined with more frequent review hearings is likely to assist clients with fulfilling the obligations imposed by the court for achieving reunification. This requires, of course, engaged and informed representation by skilled lawyers for parents.

As noted above, the team heard from the CCDA administrator that he could not attend CRB hearings because they conflict with court appearances. Since CRB hearings are set at the same time every month, it is not clear why courthouse matters could not be scheduled around CRB meeting times. The team learned, however, that it might be possible to conduct the CRB hearings at the courthouse, as happens in some other counties, which would make attendance even more convenient for attorneys. The CCDA indicated at the peer review team's exist interview with him that he would be open to investigating this idea.

5. **Adult Criminal Representation.** In addition to addressing the issues concerning client contact and timely case preparation, CCDA should consider whether its attorneys are using investigators appropriately. It's not clear that attorneys are providing appropriate guidance to investigators or staying well informed on their work. It is a particular concern that an investigator would feel compelled to require—and an attorney would permit—a client to sign a form warning that case work would be incomplete if the attorney does not seek authorization from OPDS for the necessary hours to work on a case. The use of this form suggests a fundamental dysfunction in the relationships between attorneys and their investigator and clients. CCDA should resolve the issues that prompted the use of this inappropriate form.
6. **System Collaboration.** The peer review team recommends that the Clatsop County Defenders Association administrator, in concert with Ms. Murk, explore placing a public defense contractor on the Local Public Safety Coordinating Council or, if this group is not meeting effectively, urge the Presiding Judge to convene a Criminal Justice Advisory Council that can foster more targeted collaboration on policy affecting the court, public defense and related services<sup>18</sup>.

---

<sup>18</sup> A Local Public Safety Coordinating Council (LPSCC), required by ORS 423.560, must include a broad range of justice system partners, including a criminal defense representative, and address countywide criminal and juvenile justice system planning. Likewise, unless an equivalent already exists, ORS 1.851 requires that the Presiding Judge establish a local criminal justice advisory council (CJAC) that includes public defense providers and that specifically addresses “coordinating court, public defense and related

## **Mary Ann Murk Firm**

At that time it conducted the 2006 service delivery review, the Commission noted that “[b]oth attorneys in the Murk Consortium were singled out for their strong personal commitment and zealous advocacy on behalf of children in juvenile dependency cases.”<sup>19</sup> The comments received in interviews during the peer review team’s 2012 visit echoed this assessment and were similar to the comments on the online survey that highly praised Ms. Murk’s work.

Ms. Murk was described as extraordinarily diligent in all phases of her representation. She maintains good client contact, making timely visits to in-custody and detained clients and visiting with the children she represents in dependency cases. Unlike other public defense attorneys in Clatsop County, she regularly attends Family Drug Court and other post-dispositional proceedings, including CRBs and Family Decision Meetings at DHS. One person described Ms. Murk as “efficient, effective, direct and trustworthy.”

The peer review team heard only one concerning comment amid all the praise for Ms. Murk. As noted above, the PDSC’s 2006 report noted that Ms. Murk has a strong personal commitment to her representation of children. Several interviewees said that Ms. Murk often requests an early permanency hearing on behalf of her children clients, seeking a plan of adoption and termination of parental rights. Ms. Murk was said by some to be acting upon her own strongly held views of her clients’ best interest which may not always be the same as her clients’ expressed wishes. At the peer review team’s exit interview with Ms. Murk, she maintained that she understands and abides by her professional responsibilities when representing children, but also told the team that she has a strong commitment to permanency for children and a belief that children do not necessarily need to be raised by biological parents in order to thrive.

## **V. CONTRACTOR RESPONSE TO PEER REVIEW**

### **Clatsop County Defender Association**

Almost immediately upon receiving the draft peer review report, the CCDA administrator, Kris Kaino, began regular conversations with the OPDS analyst for Clatsop County and OPDS General Counsel about how his group could improve its work. Among other things, Mr. Kaino was invited to confer with Jennifer Kimble and Jennifer Nash, who were members of the peer review team with experience in the management of small consortia that had faced quality assurance challenges. He was also referred to other consortia that had undertaken quality assurance initiatives.

---

services and resources in the most efficient and cost-effective manner that complies with the constitutional and statutory mandates and responsibilities of all participants.”

The 2012 OCDLA/OPDS Public Defense Management Seminar featured a panel of prosecutors and defense attorneys from three counties who have used the structures of a LPSCC or CJAC, among other forum, to collaborate successfully on system policy matters and issues related to quality of defense services.

<sup>19</sup> See, [OPDS’s Final Report on Service Delivery in Clatsop County & PDSC Service Delivery Plan for the County\(2006\)](#).

In Mr. Kaino's formal written response to the peer review, which was attached to the final report, he outlined actions that he had taken or intended to take in response to the report's findings and recommendations, including:

- Hiring a consortium staff person to serve as a liaison with the court regarding appointment of counsel, to assist with client complaints about consortium attorneys, and to assist in other consortium operations.
- Meeting with Ms. Murk and Presiding Judge Nelson to arrange for the presence of an attorney at delinquency arraignments. The new CCDA staff person will assist with this process. The issue of waiver of counsel in delinquency cases was discussed at this meeting but was described as a matter needing further work.
- Recruiting new consortium members, and obtaining agreement from Ms. Murk and another local attorney expert in dependency cases, Stacy Rodriguez, to assist in mentoring attorneys new to dependency work, while Mr. Kaino would plan to mentor attorneys new to criminal representation. Judge Brownhill also agreed to provide input regarding the work of attorneys new to dependency work.
- Meeting with Ms. Murk and Judge Nelson regarding shackling of youth in transport to and during court hearings in delinquency cases. Independently of that meeting, OPDS General Counsel provided Judge Nelson, upon his request, a lengthy opinion on shackling by Judge John Collins, in Yamhill County, that addressed the potential for harm from unwarranted shackling and placing restrictions on its use in that county.
- Requiring each CCDA member to review the OPDS statement on the role of counsel for children and youth, the Juvenile Law Reader articles on the importance of zealous representation of parents at shelter hearings, and the Oregon State Bar performance standards in dependency cases. In addition, members agreed to read each new issue of the Juvenile Law Reader, published online by Youth, Rights, and Justice, Inc.
- Requiring each CCDA member to attend in person an upcoming OCDLA juvenile law seminar, and requiring in person attendance thereafter at one juvenile law seminar every year.
- Working with Ms. Murk to place a public defense contract attorney on the Clatsop County LPSCC, and arranging quarterly meetings with Ms. Murk, court staff and judges to discuss court operations and representation in criminal and juvenile cases.
- Planning a meeting with CCDA members and someone from parole and probation to learn more about the interstate compact on supervision of probationers, was an issue identified as needing attention in the peer review report.
- Meeting with each member of the consortium to discuss the peer review, requiring reporting of first in-person contacts with new in-custody clients, and addressing any issues particular to individual members that arose in the course of the peer review.

Later, on March 1, 2013, Mr. Kaino updated OPDS General Counsel on progress with CCDA improvements, reporting that two new attorneys would be performing consortium work, one of them focusing largely on dependency cases; that quarterly meetings with the judges had begun; that the court had agreed to restrict shackling of youth to only those instances where a specific risk is identified; that each CCDA member was

registered to attend the April 2013 OCDLA juvenile law CLE; that the staff person had been hired; that attorneys were now required to make timely responses to any complaint about their performance or face a fine; that the consortium would conduct an annual survey of system stakeholders regarding consortium performance; that the training session on interstate transfer of probation had been very helpful; and that other measures, specific to individual attorneys had been undertaken.

On May 23, 2013, OPDS Executive Director Nancy Cozine, OPDS Analyst Billy Strehlow and OPDS General Counsel Paul Levy visited Clatsop County to speak with judges, court staff, the District Attorney, contractors and others about developments following the peer review. Local justice system stakeholders generally acknowledged a variety of changes in response to the peer review, including the addition of new attorneys to the consortium, the addition of a consortium staff person, establishing a procedure for attorneys to be present at first appearances for parents in dependency cases and for youth in delinquency cases, a change in procedure concerning shackling of youth in delinquency matters, and other changes concerning particular consortium members. There is also an expectation that Mr. Kaino and Ms. Murk will meet regularly with the court concerning public defense management issues, and that periodically the court will meet with the public defense contractors and the District Attorney concerning court procedure issues.

After the May 2013 visit by OPDS staff, Mr. Kaino informed OPDS that two long serving members of CCDA would no longer be providing services for the consortium, one for health related reasons and the other because of plans to move to another community. Mr. Kaino described active efforts to recruit additional member to join CCDA. As a result of this development, if the Commission approves a contract for the 2013-2014 biennium, except for Mr. Kaino the composition of CCDA will be entirely different from the group as it existed when the peer review team visiting in 2012.

### **The Mary Ann Murk Firm**

As indicated above, the peer review team found a high degree of satisfaction with the services provided by Ms. Murk. With only one significant caveat, the peer review team concluded that she was indeed providing very good representation in her clients. Ms. Murk addressed that concern raised by the peer review in her response to the team's report, agreeing to review her advocacy for children with community partners and implement changes that might be needed in her practice. In its May 2013 follow up to the peer review, OPDS staff heard that there is still a very high degree of satisfaction with Mr. Murk's work, and that she has been working with Mr. Kaino to assist with improvements to the consortium operations, including providing training in dependency cases for attorneys new to CCDA.

## **VI. COMMISSION REVIEW**

On July 17, 2013, the Public Defense Services Commission met in Astoria to consider a draft of this report, and to hear from Mr. Kaino, Ms. Murk and two Circuit Court judges, Presiding Judge Philip Nelson and Judge Paula Brownhill. The District Attorney was invited to the meeting but was out of town on another matter.

The speakers confirmed much of what was in the draft report, including the addition of a consortium staff person to help coordinate attorney appearances at initial appearances and other proceedings, the presence of attorneys to represent parents at shelter hearings in dependency cases, and plans for the public defense contractors, District Attorney and judges to meet regularly about court process issues. Judge Brownhill thanked the Commission for the much needed review of public defense practice in Clatsop County, and commended the responses of Mr. Kaino and Ms. Murk to the report. Both judges noted that Mr. Kaino was rebuilding the consortium and noted that the recent additions are doing well so far.

Although it was not a focus of the peer review, the Commission spoke with each guest about the status of the Early Disposition Program (EDP) in Clatsop County. The Chair noted that when the PDSC conducted its system delivery review in the county in 2006, the public defense contractors were not participating in an EDP. Judge Nelson explained that EDP does exist in the county but defendants are unrepresented because contractors have been unwilling to participate. He said contractors would feel “professionally compromised” advising clients about plea offers without sufficient opportunity to review discovery. He added, “I would probably feel that way too.” Judge Brownhill explained that, despite DA policy to the contrary, contractors know that plea offers often improve as a case moves closer to trial and, thus, would have little reason to urge many clients to accept an EDP offer. Neither judge expressed any optimism that the current dynamics were likely to change soon but welcomed the possibility that PDSC might restart a conversation about systemic changes that would allow all parties to engage in an early disposition program that would adhere to best practices for EDPs<sup>20</sup>.

The Commission also discussed with Judge Brownhill, who handles most of the dependency cases, the peer review’s information that the court relies heavily upon Citizen Review Board (CRB) hearings in lieu of more frequent court review hearings. As identified in the report, there was a concern that parents, who were having little or no contact with their attorneys after the disposition of the petition and no court supervision of their progress with services, ended up at permanency hearings facing the strong possibility that the plan in their case would change from reunification to adoption. Judge Brownhill acknowledged that other jurisdictions conduct more frequent court reviews and identified docket pressure and scarce court time as the primary reason Clatsop County relies upon CRB hearings. She agreed that more frequent reviews would probably help parents keep on track, and said she would look into changing how the county handles them.

As noted above, the peer review team was told that approximately 40% of youth proceed without counsel in delinquency cases. Although the Commission did not inquire about this with Judge Nelson, who handles most of the delinquency cases, Judge Brownhill agreed with the Chair’s observation that one safeguard against unwarranted waivers of counsel is to have a lawyer available to advise youth about their right to counsel at the initial detention hearing. Currently, lawyers are not present at detention hearings, although the peer review team recommended that this change. Commissioner

---

<sup>20</sup> See, The Public Defense Services Commission’s *Guideline For Participation of Public Defense Attorneys in Early Disposition Programs* (2005), available at <http://www.oregon.gov/OPDS/docs/Reports/EDPGuidelines.pdf>.

Welch pointed out, though, that youth who are not in detention may be proceeding without a lawyer for critical case events before they see a judicial officer, which may be the occasion at which the youth enters a plea.

Kris Kaino and Mary Ann Murk also spoke with the Commission. They reviewed developments with public defense in the county in response to the peer review report, focusing on efforts to rebuild CCDA and other changes that Mr. Kaino has undertaken, as outlined earlier in this report. They also talked about the problems that arise when youth are unrepresented in delinquency cases, and elaborated on why participation in the EDP as currently structured is problematic.

On July 31, 2013, the Commission met in Salem with an agenda that included a discussion of the Clatsop County report and testimony that they heard earlier in the month. Understanding that the major obstacle to contractor participation in the county's EDP was insufficient access to and time to consider police reports and other information in the control of the district attorney, the Commission directed OPDS staff to work with the stakeholders—the contractors, DA and court—to explore whether accommodations can be made that would allow for participation in the EDP by contract attorneys.

The Commission also emphasized its concern with the high rate of waiver of counsel by youth in delinquency cases, and expressed frustration that there had been little progress on this issue since PDSC first sought reform of this common practice several years ago. OPDS General Counsel said that, in the short term, OPDS will continue to work with the providers in Clatsop County to seek the presence of a defense attorney at first appearances in delinquency cases, which is viewed as one possible safeguard against ill-advised waivers of counsel. But the Commission also directed OPDS to seek statewide systemic reform, whether through legislation or court rule.

## **CONCLUSION**

As described above, the peer review team concluded that public defense services in Clatsop County had not changed significantly since the Commission had visited in 2005 and identified a number of concerns. However, in response to the peer review report, Mr. Kaino undertook a number of actions, some immediately and others over the course of the following months, which promise to assure more meaningful quality assurance by the consortium and better representation to public defense clients. Those changes are welcome and appropriate, and the challenge will be to sustain and build upon them as the group's composition changes dramatically and grows. In its consideration of the peer review report and the comments by local stakeholders, the Commission appreciated the efforts that the contractors and court had undertaken to improve practices in the county. At the same time, the Commission also expressed continuing concern about some of the issues identified by the peer review team, including the representation of parents in dependency cases, the waiver of counsel in delinquency cases, and the fact that defendants are mostly unrepresented in the county's early disposition program. All Clatsop County justice system stakeholders should expect continued attention to these issues by the staff of OPDS and the Commission.

# Attachment 5

# Public Defense Services Commission

## Meeting Action Item

September 24, 2013

### Issue

PDSC approval of 2013-15 OPDS employee compensation.

### Discussion

Executive Branch agencies will be providing employees the following adjustments to compensation:

1. 1.5% COLA on December 1, 2013
2. 2.0% COLA in December 2014, to be implemented earlier if healthcare costs increases are less than anticipated (one month for every 1.6 percent below the 5 percent budgeted increase).
3. 5% employee contribution to employee benefit premiums, with a potential reduction for plan year 2015.
4. No furlough days
5. Regular step increases

The Judicial Department will be providing employees the following adjustments to compensation:

1. 1.5% COLA on December 1, 2013
2. 2.0% COLA on December 1, 2014
3. 5% employee contribution to employee benefit premiums, with a \$40 subsidy for full time employees with a base monthly salary of less than \$3,000 per month (before additions or deletions for differentials, leave without pay, etc.), with a potential reduction for plan year 2015.
4. No furlough days
5. Regular step increases

During the 2013 Legislative Session, the Legislature passed House Bill 5008, which set aside a Special Purpose Appropriation to the Emergency Board for state employee compensation changes. The Department of Administrative Services will be seeking this additional funding from the 2014 Legislature for all state agencies to cover the cost of COLA increases. The same calculation will be applied to determine the additional funding for all agencies regardless of minor differences between branches (and the "formula" for that calculation will likely be based on the Executive Branch adjustments). If the additional amount is less than the amount required to fund the COLA increases, agencies will need to fund the difference out of existing operating funds.

### **Recommendation**

PDSC is required by ORS 151.216(1)(e) to establish a compensation plan that is commensurate with other state agencies.

OPDS management recommends that the PDSC approve a compensation package that follows to the Executive Branch and Judicial Department plans, with one modification. Rather than having the second COLA calculation dependent on healthcare costs increases (as included in the Executive Branch package), and in order to provide OPDS employees with certainty throughout the remainder of this biennium, the first COLA would be given on December 1, 2013, at 2.0%. The agency will be able to cover the additional funds necessary for this COLA using funds captured through agency reorganization. In all other respects, the compensation plan would be identical to the Judicial Department's plan.

### **Required Commission Action**

Vote to approve the compensation plan as described above.