

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

Friday, October 10, 2014
1:00 p.m. – 4:00 p.m.
Salishan Resort
7760 Highway 101 North
Gleneden Beach, Oregon 97388

MEETING AGENDA

- | | |
|---|--|
| 1. Action Item: Approval of minutes - PDSC meeting held on June 19, 2014 (<i>Attachment 1</i>) | Chair Ellis |
| 2. Oregon Budget Update | Steve Bender |
| 3. Parent Child Representation Program – Update | Amy Miller
Melissa Riddel
Paula Lawrence
Rachel Negra |
| 4. PDSC – Conceptual contract language changes for contracts beginning January 2016 (<i>Attachment 2</i>) | Paul Levy |
| 5. PDSC - Proposed Meeting Dates for 2015 (<i>Attachment 3</i>) | Nancy Cozine |
| 6. Hurrell-Harring v. State of New York; DOJ Statement of Interest (<i>Attachment 4</i>) | Paul Levy |
| 7. Oregon Justice Resource Center (ORJC) | Bobbin Singh
Ali Vander Zanden |
| 8. Recruitment for Chief Defender | Nancy Cozine |
| 9. OPDS Monthly Report | OPDS Staff |
| 10. Executive Session* | Commission |

***Executive Session:** *The Public Defense Services Commission will meet in executive session at approximately 3:30 p.m. The executive session is being held pursuant to ORS 192.660(2)(d).*

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 Al Omrani at (503) 378-3349.

Next meeting: December 11, 2014, Office of Public Defense Services, Salem, Oregon. Meeting dates, times, and locations are subject to change; future meetings dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, September 18, 2014
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
John Potter
Per Ramfjord
Janet Stevens
Hon. Elizabeth Welch
Chip Lazenby

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Amy Jackson
Amy Miller

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

Agenda Item No. 1 Approval of minutes – PDSC meeting held on June 19, 2014

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

Agenda Item No. 2 PDSC Compliance with Best Practices

Chair Ellis led Commission members through a discussion to determine whether the PDSC is in compliance with the best practices for boards and commissions. After thorough review, and detailed examples of the ways in which the Commission meets each of the 15 specified criteria, Commission members were asked to vote on the Commission's performance.

MOTION: Commissioner Stevens moved to find the Commission in compliance with all 15 best practices; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 3

PDSC 2014 Key Performance Measure Report and Proposed New Key Performance Measures

Nancy Cozine first reviewed the Annual Performance Progress Report, and then moved on to a discussion of new KPM targets to include in the agency request budget. She explained that, while the agency was interested in adopting a KPM that would focus on caseload or participation of lawyers at first appearance, there were still too many challenges in getting data. She indicated that though the agency would continue to look at these as possibilities for the future, it was necessary to consider other options.

Ms. Cozine explained that the first new proposed KPM focuses on training. Commission members had a lengthy discussion about training expectations, and what would be both reasonable and meaningful, for public defense contract providers. The Commission also heard from contract providers who indicated that they already attend CLE courses, and would want to make sure that there are options, perhaps some flexibility; that something like the Gerry Spence trial college is an approved course. Chair Ellis confirmed that anything accepted by the Oregon State Bar would be appropriate, and Commission members pointed out that this is a KPM target, not a requirement. Commissioner Ramfjord asked how the education credits would be monitored. Ms. Cozine indicated that it would be self-report with the option of auditing through the Oregon State Bar records. Commissioner Ramfjord and Commissioner Potter emphasized the fact that lawyers can get credit for speaking at CLE's and preparing written CLE material, and that offices can get credit approved for informal trainings. After thorough discussion, Commission members suggested that an annual amount of 12 hours CLE credit per year would be appropriate.

MOTION: Commissioner Welch moved to adopt a KMP target of 12 hours per year of continuing legal education credit in the area of law in which providers represent public defense clients; Vice-Chair Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Amy Miller reviewed the second proposed KPM, which is a measure of the time attorneys in the Parent Child Representation Program are spending on communication with clients outside of court. She pointed out that this is a measure Washington State has been using in its Parent Representation Program. Commissioner Welch pointed out that the measure seems appropriate when the lawyer has an adult client, but perhaps less so when the lawyer is representing a child client, especially an infant, who is not yet capable of considered judgment. Commissioner Ramfjord asked whether the communication time requirement has had an effect on the level of compliance or satisfaction with services in Washington. Ms. Miller indicated that they receive consistently positive results from client satisfaction surveys, but pointed out that the bigger impact is that over the 14 years that the program has been in effect, they have cut the time to adoption and guardianship in half and reduced the time to safe reunification by about 10%. She noted that they attribute that success, partially, to the fact that they are able to spend more time with their clients.

Commissioner Potter pointed out that the measure seems appropriate when the lawyer has an adult client, but perhaps less so when the lawyer is representing a child client, especially an infant, who is not yet capable of considered judgment. Mark McKechnie pointed out that, especially with younger children, frequency of contact might be more important than time spent.

After further discussion of the PCRCP, the lawyers involved, and the program requirements, Commission members concluded that a KPM focused on communication time with clients who are capable of considered judgment would be appropriate.

MOTION: Commissioner Ramfjord moved to approve the KPM as drafted, but applied only to clients capable of considered judgment; Commissioner Welch seconded the motion; hearing no objection, the motion carried. **VOTE 7-0.**

Agenda Item No. 4 PDSC Affirmative Action Report

Cynthia Gregory, OPDS Human Resources Manager, reviewed the agency's affirmative action report, which indicates that OPDS is doing well in its effort to attract and retain a diverse group. She also indicated that a survey would be going out to providers to get a better idea of the diversity among that group. Commissioner Lazenby pointed out that though the increase, from 5.8% in 2011 to 9.5% in 2014, in people of color at OPDS looks good, the increase in diversity really reflects a change in a very small number of positions. Ms. Gregory agreed. Commissioner Welch asked what efforts the agency is or will be making to increase diversity among trial level practitioners. Ms. Cozine indicated that collaboration with law schools and the Oregon State Bar is critical, and Ms. Gregory discussed efforts she is making through Frank Garcia, the Director for Diversity and Inclusion in the Governor's office. Commissioner Lazenby suggested that, if OPDS has not done so already, it should work with Marianne Hyland at the OSB.

Agenda Item No. 5 PDSC Agency Request Budget: Narrative and Policy Option Packages

Nancy Cozine explained that Attachment No. 4 includes the agency budget binder narrative and policy option packages. She noted that, as in past years, everyone in the office contributed to the budget binder; she also said that Angelique did a phenomenal job of pulling it all together. Angelique Bowers, OPDS Budget and Finance Manager, provided a summary of each section of the budget binder. Commission members suggested that the narrative be edited to include less emphasis on the budget crisis in 2003, and a stronger emphasis on where the agency is headed, and that the description of the consistent case rate POP be improved upon. Ms. Cozine indicated that it would be so edited. Commission members asked if they would be required to prioritize POP requests. Ms. Cozine indicated that it was likely, and that if they were asked, she would request that the Commission make a list of priorities for the Office of Public Defense Services, and another for the Professional Services Account. Commissioner Potter and Chair Ellis invited contractor comment on the agency request budget.

Agenda Item No. 6 PDSC Approval of Agency Request Budget for the 2015-17 biennium

MOTION: Commissioner Lazenby moved to approve the budget with revisions; Commissioner Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 7-0**

Agenda Item No. 7 PDSC Approval of Contracts for Case Management Services; Parent Child Representation Program

Amy Miller gave an overview of the Parent Child Representation Program, and talked about the role and recruitment of case managers. She noted that the program kicked off August 1, in Linn and Yamhill Counties, and gave information about the key components of the program, including a cap of 80 cases, and increased training and oversight. She explained that one immediate accomplishment in both pilot counties was full representation at shelter hearings. Ms. Miller went on to talk about the role of case managers, who work at the direction of the attorney to provide advocacy and services to parents and children clients, and requested that the Commission approve contracts for case managers. Commission members indicated that

they would be willing to approve the contract for the identified case manager, but that they would like to have the other case managers identified before approving those contracts.

Commissioner Welch asked several questions about the case managers. First, she asked about the rate for case workers, noting that it seemed high. Ms. Miller indicated that the figure is consistent with the DHS Social Service Specialist 1; she also noted that the proposed amount was the maximum allowable under the contract, but the actual amount paid will depend upon the number of hours of service. Commissioner Welch also asked whether the front-end services offered by the case manager are services that should be provided by DHS caseworkers. Ms. Miller explained that the Washington case managers told her that the big distinction is that PCRCP case managers work at the direction of the attorney, on behalf of the attorney, and that what often limits progress in a case is a parent's reticence to work with DHS. She explained that in Washington, the fact that case managers work at the direction of the lawyer allowed clients to engage sooner, to resolve faster, and there is not a duplication in services. At Commissioner Potter's request, Ms. Miller went on to explain a bit of background regarding Brandon Social Work, who will be the first case manager (pending Commission approval), and will also serve as the case manager coordinator.

MOTION: Commissioner Potter moved to approve the Brandon contract; Commissioner Welch seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 8 PDSC Approval of 2013-15 Strategic Plan

Nancy Cozine provided a summary of Attachment 6, the strategic plan, explaining that it is really just an update of the strategic plan adopted in 2011, with nothing dramatically different. She noted that the Commission might wish to have a more thorough review and revision of the plan in the new biennium.

MOTION: Commissioner Potter moved to approve the strategic plan; Commissioner Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 9 Oregon State Bar – Board of Governors Approval of New Performance Standards

Paul Levy explained that the Oregon State Bar Board of Governors has now approved updates and revisions to both the dependency performance standards and the criminal and delinquency performance standards. He provided a general overview of the revisions, as well as noting the committee members who worked diligently to draft the revised standards.

Agenda Item No. 10 Judge Haggerty's Advisory Opinion with Recommendations for OPDS and DOJ

Paul Levy gave a summary of Judge Haggerty's 63-page opinion, which issued following the resolution of the case by guilty pleas. Mr. Levy explained that in the opinion, Judge Haggerty describes a level of disorganization, or incompetency, on the part of the United States Attorney's Office and the Oregon State Police that is shocking in any case, but especially in a death penalty case, and that it also highlights some really zealous and top-notch representation by defense attorneys and their teams, many of whom provide death penalty work, either as attorneys or mitigation experts, at the state level. Mr. Levy indicated that the opinion is particularly shocking for its description of what a particular Oregon State Police detective did, which included withholding and destroying exculpatory evidence, failing to catalog evidence, backdating reports to cover up mishandling evidence, lying to the US Attorney's Office, intercepting and listening to, in a systematic and wholesale fashion, privileged defense communications, and filing false declarations with the court.

Mr. Levy provided a more detailed summary of the case, and concluded by sharing Judge Haggerty's recommendation that OPDS and Oregon DOJ review all cases involving Detective

Steele. Mr. Levy and Ms. Cozine summarized actions the agency has taken in response to Judge Haggerty's opinion.

Agenda Item No. 11 OPDS Monthly Report

Pete Gartlan provided information about events taking place in the Appellate Division, including both personnel matters and case summaries. He indicated that the office is recruiting for new Deputy I lawyers, and that though there are fewer applicants than in past years, there are excellent candidates; he also noted that changes in the hiring process have filtered out individuals who are not qualified earlier in the process. The office is also offering Deputy I lawyers the opportunity to promote to a Deputy II position, doing performance reviews, and engaging in the annual review and update of the AD Attorney Practices Manual. Mr. Gartlan then summarized current Supreme Court cases that AD lawyers are either briefing or arguing.

Nancy Cozine mentioned that the office is preparing to pilot a new case management system in our Juvenile Appellate Section. She also invited Commission members to attend the October OCDLA Public Defense Management Conference, and the Juvenile Law Training Academy. She concluded by mentioning the work of the HB 3363 task force.

Agenda Item No. 12 Executive Session

Chair Ellis made the following announcement:

The Public Defense Services Commission will now meet in executive session for the purpose of conducting deliberations with persons designated by the governing body to carry on labor negotiations and to consider information or records that are exempt by law from public inspection. The executive session is being held pursuant to ORS 192.660(2)(d) and (f), which permits the Commission to meet in executive session for the purposes just stated. 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.

Return to Public Session

Chair Ellis pronounced the meeting back in public session.

Commissioner Welch asked that a future agenda include a discussion of the appointment of counsel in juvenile delinquency cases.

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

Meeting adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, September 18, 2014
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
John Potter
Per Ramfjord
Janet Stevens
Hon. Elizabeth Welch
Chip Lazenby

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Amy Jackson
Amy Miller

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

Agenda Item No. 1 Approval of minutes – PDSC meeting held on June 19, 2014

0:11 Chair Ellis Good morning everyone. Thank you for your attendance. The first item is the minutes of the meeting of June 19, 2014. Are there any additions or corrections? If not, I would entertain a motion to approve.
MOTION: John Potter moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 2 PDSC Compliance with Best Practices

0:37 Chair Ellis Attachment 2 is our Commission's compliance with best practices. There are 15 specified criteria. I believe we are to go down that list and determine if we are compliance with best practices.

1:07 N. Cozine That is correct.

1:07 Chair Ellis This is a self-assessment. Item 1, The Executive Director’s performance expectations are current. Any thought on that?

1:22 S. McCrea We last updated the executive director’s position description in April, 2011.

1:31 Chair Ellis I believe it is current. So I would propose that we check the “yes” on that. Item 2. The Executive Director receives annual performance feedback.

1:44 J. Potter We just did one.

1:46 Chair Ellis I think we are totally good on that. Item 3. The agency’s mission and high-level goals are current and applicable.

2:00 J. Potter My question is what is the high level goals as opposed to low level goals?

2:07 Chair Ellis I think it is 10,000 feet as opposed to 2,000 feet. I think we are fine on that. Some of the materials in this month’s meeting demonstrate that. Item 4. The board reviews the Annual Performance Progress Report. I believe that is going to happen today.

2:35 S. McCrea Yes.

2:35 Chair Ellis Item 5. The board is appropriately involved in review of agency’s key communications. I feel quite comfortable about that. We get all of the major communications to the legislature, which are the ones most cared about and we do get to review that.

2:59 S. McCrea Yeah and we have the biennial budget proposals, the Emergency Board submissions, the request for proposals, the proposed contracts, and the rule and policy changes.

3:08 Chair Ellis Excellent. Item 6. The board is appropriately involved in policy-making activities. I think this is what we do when we get to these meetings. I think we are okay there. Item 7. The agency’s policy option packages are aligned with their mission and goals. I think we have been looking at the POPs for this year. I think when it says “aligned with their mission and goals,” I assume that means the agency’s mission and goals and I think we are fine. Item 8. The board reviews all proposed budgets (likely occurs every other year). Of course we are going to be doing that today and we do that. Item 9. The board periodically reviews key financial information and audit findings.

4:18 S. McCrea We get periodic updates on budget developments throughout the year and our expenditure funds. We also get the results of any internal audit division reviews presented to us.

4:30 Chair Ellis Item 10. The board is appropriately accounting for resources. I think we do. We review the budget. We get reports on the contract awards. Item 11. The agency adheres to accounting rules and other relevant financial controls. I think this is true. I am seeing the person I want to see nodding out there.

5:13 S. McCrea Well it is also significant, Barnes, that the agency has been awarded the State Controller’s gold star certificate for statewide accounting goals since the agency was created.

5:26 Chair Ellis That is very helpful. Item 12. Board members act in accordance with their roles as public representatives. I think that is certainly true. I will say we don’t have a problem similar to a certain football league. Item 13. The board coordinates with others where responsibilities and interests overlap. I think we have had good communication with the DA community, which in the earlier years I would not have said that. I think we are in reasonable communication with the state AG parallel to our appellate division. I think we are okay on

that. Item 14. This is one where we use to have to check no, but I think we are better now. The board members identify and attend appropriate training sessions. Paul has been kind enough to teach us, guide us, and train us in a reasonably regular way. I think we can say “yes” to that now. Item 15. The board reviews its management practices to ensure best practices are utilized. That is what we have been doing so far today. So my view is I think we can properly, on the self-assessment, check yes on all of the 15 specific criteria. Are there any other criteria that anybody wants to add?

7:28 J. Potter Mr. Chair, I understand this is a self-assessment, but I would be interested to know if there is anybody in the audience that has any quarrel with any of this?

7:42 Chair Ellis Hearing none. Okay. I think that completes that. Darn we are good.

7:55 J. Potter Do we need to vote on that? It was an action item.

8:02 Chair Ellis Is there a motion?

MOTION: Janet Stevens moved to accept the acceptance of how wonderful we are; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 3 PDSC 2014 Key Performance Measure Report and Proposed New Key Performance Measures

8:10 Chair Ellis The PDSC 2014 Key Performance Measure Report and Proposed New Key Performance Measures.

8:29 N. Cozine Chair Ellis, members of the Commission, Nancy Cozine here to review the KPMs with you. You have as a handout, I believe, the 2013-14, agency performance progress report. This is a document that will be included in the budget binder. We did find one small data entry error that needs to be adjusted. But these are the key performance measures that this agency has used for the last several biennia. The first key performance measure is the appellate median date to filing of the opening brief. We actually discussed this KPM quite extensively leading up to the February request to the legislature to reduce that KPM target from 210 days to 180 days. You will note that that adjustment, accepted by the legislature, is reflected in the KPM, which is on page four. We held steady this year, approximately, from 223 to 227 days. We attribute that change largely to the amount of training we have been putting into newer employees. We do expect to start making some headway toward the 180 day goal in the next year and the coming biennium. Mr. Gartlan has just returned from argument. Did you want to make any comments? If there are any questions about this Mr. Gartlan is really just back from arguments and can respond to questions. The second KPM is the customer service KPM. This is the one where there was a data entry glitch. I think that the dotted line across the top is supposed to be the target. That should be straight across at 95, but it was entered such that the 95 is appearing as a bar. The dots that you see across the top are the actuals for 2014. You will see that we had some dip in the availability of our information and in timeliness and in the overall it was just slightly below last year. We do attribute that to the pretty dramatic changes that we had this last year. We acknowledge that there were some challenges getting information. We had two of our key management positions change in the same week, and that lead to quite a bit of shifting of duties. The same change, I think, is what affected the timeliness. We knew that there would be a dip there but we seem to be back on track and very much hope to be meeting this target in the next biennium. We do this every other year. We send out this survey every other year. We hope we will again be at the 95% mark.

11:29 J. Potter So is timeliness more associated with people who are getting payments that are a little bit tardy?

11:34 N. Cozine It can be non-routine expense requests and it can be bills. When we looked at the comments on the survey, the comments were that there was some slow down but it was still faster than any other state agency, or federal, for that matter. So while we take it very seriously and we want to make sure that we are being as responsive as we can be, we also want to make sure that we are being very accurate and that we are reviewing things thoroughly. I think during that change-over time, it took people who had new responsibilities a little more time to get comfortable to make sure things were accurate and that things were appropriately being reviewed and approved. The last KPM is the Commission...

12:33 Chair Ellis Nancy, what is the little box that shows up in the graph and it shows up on a different location? Is that some kind of an average or media?

12:45 N. Cozine Do you mean across the top?

12:48 Chair Ellis Yeah.

12:49 N. Cozine That is the actual responses for 2014. I think that should be the 95% target and it should be straight across the top. Those are the actual responses. I think we need to flip it so that the actual responses are built into the bar. Again, this was a shift in duty. We will get that corrected. So the last one is the Commission adherence to best practices. We review this every year just to make sure we are consistently meeting those bench marks. We did this last year. We just did it again. This Commission, I think, is very diligent in meeting its best practices. We tend to have a very good score on that piece.

13:40 Chair Ellis Particularly when we grade ourselves.

13:43 N. Cozine Right. Self-assessment is very helpful. Really though this Commission does an excellent job. You all are here and that is half the battle for many commissions is getting the kind of participation that we have with this Commission. As an agency we are all very grateful for your attention to detail and your commitment to the agency. Unless there are questions then I would like to present the new KPMs. We have two. The first KPM we have talked about this a lot. We talked about trying to reduce caseload. We talked about trying to look at whether or not an attorney is at first appearance. We have talked to the judicial department and we just can't get that data as a data extract. We could measure whether there was an appointment, but it wouldn't actually reflect whether the lawyer was in the room. That is a problem. We really need to be able to identify that. The only way that we can identify that is actually by looking at the appointment order. In the next system you can do that. It would be too labor extensive for us at this point to be auditing every single appointment order by single look up. Caseload was similarly challenging in terms of defining a case. Although it is something that we want to work toward, but imposing right now, or adopting a KPM that is focused on caseload, is probably a little beyond our reach. We do still want to keep that as a target for future biennia. So after a lot of discussion one of the areas that also comes up, and is a best practice for public defense providers, is ensuring adequate training for the lawyers who are doing his work. KPM 1 focuses on that. This Commission has approved as part of its contract, a requirement of 16 hours of CLE credits for lawyers who are practicing in the juvenile area. We need to, if we adopt this KPM, we probably need to impose a similarly requirement for other case types so that we have a contractual expectation for the fulfillment of those CLE related to the type of practice that the lawyer is practicing in the public defense area.

16:01 Hon. Elizabeth Welch That is per year?

16:03 N. Cozine The 16 is actually per contract cycle. One of the things that I would actually like is input on footnote No. 6. You will see that the way that we described it is attorneys report CLE credit to OPDS at the end of the contract cycle. If the Commission is inclined to approve this KPM

then I would like to strike that at the end of the contract cycle and take a little more time to evaluate what the best timing would be. I think that is something that could be subject to Commission discussion. This is something that will enter our agency binder as a request to the legislature. We really do have time to keep perfecting it if we wish to move down this road.

- 16:48 C. Lazenby Isn't the state bar 45 credits over three years.
- 16:57 N. Cozine In the contract it is 16 every two years. I think the Commission discussion would be around if it is a provider who is practicing in multiple areas how does that break down? What would the Commission's expectations be? We haven't had that discussion. I don't think it should be a difficult one. It seems we could have a good discussion and come up with some new language in our contracts for the 2016 contract cycle.
- 17:27 P. Ramfjord This is just a very logistical question. How would you go about ensuring compliance with this? What type of measure would be taken to ensure that the CLEs that were taken by the attorneys were actually in the areas in which they practice?
- 17:43 N. Cozine Right now when contractors submit a proposal to our office they are required to include information about the CLE attendance if they are juvenile practitioners. So it would be something along those lines. If we had any concerns we could work with the Bar and audit through their records. They are on a three year cycle. Nonetheless, what is reported to us should also be reported to them.
- 18:11 Chair Ellis Okay. Any other comments?
- 18:13 Hon. Elizabeth Welch Yeah. I just wonder if this is enough. Is this enough? Is this the starting point?
- 18:23 Chair Ellis You are focused on the 16?
- 18:22 Hon. Elizabeth Welch Yeah. The number.
- 18:25 N. Cozine I think it is a starting point. That would be my view. That is why I said I think there is room for a lot more discussion about what is the right amount. I think we do have to be sensitive to the fact that bar requirement is 45 credits, and you already have some requirements within that 45. We don't want it to be overly burdensome. I think there is room for discussion and we probably want to include some of our contract providers in that discussion.
- 18:50 Hon. Elizabeth Welch The people who do more than one kind of practice within their work for us, are probably the people who need this the most and to need to be held to a standard. That is my concern is people who do juvenile work, for instance, particularly if it is just a sideline and you can do juvenile work and you can do criminal work. The people in this room know that is nonsense. I don't want it to be too easy.
- 19:36 Chair Ellis Are you suggesting that instead of saying "16 hours in the area(s) of law in which they provide public defense representation", it should be each area?
- 19:48 Hon. Elizabeth Welch I don't know what the numbers ought to be, Mr. Chairman. That is why I asked. It doesn't appear to be very demanding to me. This is about as critical a part of our responsibilities that you could identify.
- 20:08 Chair Ellis But 16 hours is two very full days.

20:12 Hon. Elizabeth Welch In two years, though.

20:12 J. Stevens Is this in addition to what the bar requires?

20:17 N. Cozine I think this is a subset.

20:18 J. Stevens So some may be doing this already?

20:21 N. Cozine Yes. The one way that we could structure it would be to say, “Percent of attorneys who meet Commission contract expectations regarding continuing education credits in the area of law in which they provide public defense representation.” So in other words not include a 16, but leave it subject to whatever contractual requirements we end up building into the next contract. We structured it this way simply because it is contract language we have right now in the juvenile area, but I think that is another option.

20:56 Chair Ellis That sounds pretty mushy to me.

20:59 N. Cozine It is much less concrete.

21:00 C. Lazenby It seems to me that if you go to OCDLA each year you have done it. You can pick up about eight credits just by going to OCDLA. You can knock that out by just going to the conference. I wonder whether this is adequate from that standpoint. Do we need to make it more focused?

21:29 Chair Ellis You suggested just sounds to me circular. How many of you have actually complied with what we put in the contract. It would be pretty disappointing if that was anything less than 100%.

21:42 N. Cozine It would. I would say that probably due to staffing that I don’t think we have audited those reports very thoroughly. I think that is an area where we can improve as an agency to make sure that everyone is meeting that expectation.

21:59 Hon. Elizabeth Welch Is the goal to improve the quality?

22:03 N. Cozine It is.

22:03 J. Stevens If they are already doing it you are not demanding much improvement.

22:10 N. Cozine Right. What I am saying is that if we adopt this we are forced to hold people accountable. We will actually be monitoring it and measuring it. Right now it is a contract submission but typically, assuming there is no competition in the jurisdiction, it may not be as meaningful as if it is a KPM and we are measuring it and reporting on it.

22:36 P. Ramfjord I share the concern that it may not be enough, but I also think that there is good reason to start at this level, find out how the contract providers are actually doing through that kind of monitoring, and then see whether there is a need to add to it or not. To see how we are doing. The biggest value of this, in a way, is that we actually set some bar and ensure some monitoring which, I think, will actually up the level of overall performance. Then I think we could further analyze whether we want to add to it.

23:17 Chair Ellis Are all contracts on a two year cycle? We had that the group in the capital area that we put on a one year cycle.

23:24 N. Cozine Then we had one additional contract during this cycle that was a trial level that we entered into a one year contract.

23:36 Chair Ellis I would have to say now that I read the fine print in footnote 6 and that the 16 is on a contract cycle and not an annual. I think it is misleading. I think if I were a legislature, I would read this just the way I did.

23:53 N. Cozine Sixteen annually?

23:53 Chair Ellis Yeah.

23:56 N. Cozine We can adjust this as you wish. The other thing is if we include this as a proposed KPM in our budget binder, which is what we need to do, we can tell the legislature that we wish to have a slightly different measure when it comes time for our budget presentation. So we want to get it as close to where we want it as possible.

24:21 Chair Ellis If you put the number 8 in place of the number 16, this looks pretty limp.

24:29 N. Cozine Unless you are a provider who is practicing in multiple areas of the law, juvenile, criminal, and then you are getting eight in every area.

24:33 Chair Ellis Well this doesn't say that. This is an aggregate. It is not each area. It is just the areas.

24:41 N. Cozine Right now, by contract, we are only requiring the 16 in juvenile. This is, again, this is a topic that we will have to discuss before we enter into contracts. I think we should have in our contracts expectations for all the case types and not just juvenile.

25:05 Chair Ellis So what would be wrong if we said at least 12 hours per year of continuing legal? I would feel better with that. I think what we have here is misleading and it is too minimal.

25:29 J. Potter Taking off Per's comment. It may be that we should do a little assessment of what we have going on right now. My guess is that most of the providers are doing this and more in criminal or juvenile law. Right now - I can't imagine that they are doing 15 hours a year of bankruptcy and doing criminal law as their practice. I can't imagine that is the case. I would kind of like to know what the problem is and how to best address it.

26:01 C. Lazenby I think you can anticipate some of the consortia members who have a varied mix practice saying that you are gobbling up my CLE opportunities to focus on criminal law, when in fact I am doing business planning and estate planning and I am doing a lot other civil matters that also require me to have a continuing legal education as well. I don't disagree with the concern about the need for adequate training. I am just saying anticipating how from the consortia the fact that they do other things.

26:37 Hon. Elizabeth Welch I disagree with that. My first five years of being retired I was circuit riding around the state. The level of sophistication true knowledge that I saw in people doing juvenile work was in some instances pitiful, pitiful. Now that should be better now anyway. We have listened to a lot of people when we go out and visit the world. What else do you do besides this? It has really gotten pretty narrow. Most of the people are doing juvenile and criminal, at least that talk to us. Again, I am generalizing and I appreciate that I am not covering everybody. There is some family mixed in there. Even in some of the urban counties there are some people who do juvenile and I wouldn't think so much criminal. Out in eastern Oregon it probably is everything. Isn't that really the point here that we are saying we need people who know how to do this work and are properly trained. I just think we need to push it up.

28:00 Chair Ellis And the way CLE is available today you don't have to go to a meeting. You can get it on tape and do it. I would be a lot happier if we went 12 hours per year. Is that alright?

28:15 N. Cozine I think it is up to this Commission. I would have no objection. There are contractors in the room. I don't know if you want to hear from contract providers. Because this is new it is not something we discussed as extensively as caseload and first appearance. We did talk about compliance with best practices for public defense providers, but this is just a piece of that. I think it is for this Commission to decide what the language should be and what the requirements should be. I do think there is still time to discuss and develop over the next few months, but I do think it is important that we put something into the budget binder that reflects this Commission's feeling at this time.

29:02 J. Stevens Can I ask a question, Barnes?

29:02 Chair Ellis Sure.

29:03 J. Stevens If we went to 12 hours a year, do you think we would be increasing the number of hours most providers would have to get in any three year period.

29:21 Chair Ellis I am not sure I am able to answer that.

29:21 J. Stevens I guess my question is if that is true, what sort of added expense are we adding that we give nothing back for it except what we pay, which isn't a whole hell of a lot.

29:35 C. Lazenby I think what this would do. I am required every three years to do at least 45 hours of CLE. What we are doing by this is saying 36 of that over that three year period will be focused on criminal defense or juvenile defense. It doesn't add any additional cost, it just specifies.

29:59 J. Stevens One of you mentioned that the bar has requirements of its own. If you add the bar requirements in are we then bumping up the total number.

30:07 C. Lazenby No. We are just narrowing your choices.

30:09 Chair Ellis This is a goal. This is not a mandatory requirement.

30:16 J. Stevens I don't object to it. I just want to make sure that in effect we are not doubling the expenses. Somebody in Ontario has to pay.

30:26 Chair Ellis This is measuring our performance level.

30:29 J. Stevens I understand.

30:29 J. Potter Notwithstanding what I just said about wanting some assessment to figure out what the problem is, I think we could say that the bar's current standards at 45 hours over three years is pretty minimal in and of itself. If you are doing a wide variety of practice.

30:49 J. Stevens You want to keep up on that.

30:49 J. Potter Even more than the bar is suggesting that you do.

30:49 Hon. Elizabeth
Welch Could we have a little input from the providers in the room.

30:55 E. Warren I am with the Portland Defense Consortium. I have been a provider for 25 years now. We do serious felony cases. Most of what I do is four to five murder cases a year. I think that we are already meeting these criteria, at least with my office. No one pays for our continuing legal

education. It is comes out of our pocket. Both of my associates are members of the Oregon Criminal Defense Lawyers Association and they get all of their CLE from OCDLA. I get my CLEs different places. I do go to some OCDLA functions. My practice is a trial practice and I do practice civil as well as criminal law, mostly murder. To me I think it would be okay but how do you define it. For example, every year I go to Jerry Spence's trial lawyer college for an advance seminar because what I concentrate on our trials. I am a trial lawyer. I go to trial. I might two murder jury trials a year. The judges that I appear in front of say I do an excellent job and I think it is because I go to Jerry Spence's trial lawyer college. So I think we are already doing it. That is one thing. I don't think it would add to my particular expense, but you all aren't paying for it either. I am already paying for it myself, and three, how broad is it going to be defined to meet the criteria for a trial lawyer with respect to meeting these requirements on these contracts.

32:58 Hon. Elizabeth Welch

Does the bar accept Jerry Spence?

33:02 E. Warren

Oh sure. The Washington State Bar and the Oregon State Bar. I practice in two states. I practice with Shaun in federal criminal court and what we do is murder cases. I think trials are something that is small percentage of cases that actually happen, but if I think we are inadequate anywhere we are inadequate in going to jury trials. Not necessarily in getting up and doing a plea and a sentence that has been negotiated between DA and defense counsel and a defendant.

33:44 Chair Ellis

I would have no problem saying that I think the Spence work would qualify.

33:51 J. Potter

Right. I would think so too. In fact, when you go to the Trial Skills College, if it is a weeklong college, you have picked up more than 45 hours in this one shebang and you wouldn't have to do anything for two more years. My guess is you do more than that. The standards are already fairly minimal. We are trying to figure out a way to give credibility to the folks like you that are doing this work, and to show the legislature that the folks that are doing the work have some standards. They can't just be a contractor doing criminal work and get all their CLE works doing bankruptcy seminars.

34:35 E. Warren

To be honest with you I don't think anyone in the Portland Defense Consortium is getting their credits doing bankruptcy seminars. I was an editor on the Oregon State Bar Criminal Law Treatise for this edition and got credit for that. That would probably qualify. But I would be concerned what is going to qualify.

34:56 C. Lazenby

I think that our concern is not with experience and quality representation like with get from folks like you and other folks that we see in this room, I think it is the judge's observation - one of the issues we have dealt with a lot, Ernie, in the last couple of years has been the graying of this bar. There are a lot of folks that have experience like you, but coming up there are a lot of younger people who don't have the depth or the experience or really the fundamental understanding. So when you are talking about whether or not the client should be taking a plea or not, there is a deficient sometimes in the professionalism that goes into counseling the client about that. That is the people that we really want to see that are trained. We have traveled around the state and we see that there has been some inconsistency in the quality of representation as we have gone around. Without pointing fingers at any particular regions because it really differs from region to region. We have got 36 different jurisdictions that do things almost 36 different ways.

36:08 Chair Ellis

Marc.

36:11 M. McKechnie

Frankly, I have very mixed feelings about this because any kind of across the board standard risks causing problems for somebody. I am thinking about our attorneys. Some of them we reported over 40 credits in a two year period about juvenile law, so I am not really concerned

with meeting the minimum. However, I do think given the various requirements of the bar and some of their offerings, I think some of the attorneys may feel that they will have to go to CLE that are, frankly, too basic for them if they have been practicing for 25 years just to check off that box. It seems like somewhat of a waste of their time if they traveling and all that to have to jump these hoops when it doesn't really benefit them. I think that is the risk of having kind of just one size fits all rule. Speaking of someone who is not an attorney and doesn't have to worry about this personally, I do find the requirements fairly rigid in terms of what counts. I think a lot of professional development, certainly in organizations like ours, occurs in ways that don't count as CLE hours. I would advocate for some flexibility and some range to address the differences between very inexperienced attorneys, very experienced attorneys, large offices, small offices, geographic. I think there are many different ways that we can do essentially what you are looking for which is improve and maintain the quality of practice. A rule like this runs the risk of

- 38:27 Chair Ellis It is not a rule. It is a measurement. It is not a rule. It doesn't say every contract will require every provider to meet this.
- 38:39 M. McKechnie Well our contract does.
- 38:40 Chair Ellis Right. But that is not what this is.
- 38:48 Hon. Elizabeth
Welch Mr. Chair, maybe responding to both of these gentlemen maybe is to use slightly different language in this goal or the short title that invites people to suggest other ways to do this besides what the bar allows. Maybe people who are asking for that flexibility ought to help us figure out what it should say.
- 39:17 Chair Ellis But if you don't have an objectively measurable criterion, it really doesn't really become a KPM. It then just becomes an aspirational statement.
- 39:26 Hon. Elizabeth
Welch That is why I said maybe they can help us because it absolutely does have to be something that you demonstrate you have done other than just to say, "I am a good guy and I read a lot."
- 39:38 J. Stevens They could bring their portfolios.
- 39:37 J. Potter But right now the Oregon State Bar controls that rigidity, right? They are the ones that approve any CLE credit no matter who is putting it on. So if you had something that was going on in your office you could apply to the bar. They would either approve or not approve of that based on their standards. Do you think it makes sense for us to have another layer? That maybe OPDS would have a standard that might have more flexibility. It may not qualify for the bar CLE credit, but it qualifies for OPDS because it includes this, this, and this.
- 40:17 M. McKechnie Some of the requirements are high quality written materials. Submitting the resume of the presenter and all that. Some learning isn't didactic. It is not one person imparting their knowledge on others. We have case meetings and workshops that get into much greater detail on some case issues that are very concrete in our office than what you would get in a lecture format with a PowerPoint. So I do think that having some allowance for professional development that might not meet the requirements of a CLE would be helpful.
- 41:07 N. Cozine I would just offer that having any kind of gray area becomes very administratively challenging. We are not in a good position to be independently analyzing the quality of the materials for every provider. We have over a 100 contracts statewide and 96 of those are trial level and capital. It could be very onerous to actually have to, lawyer by lawyer, analyze whether a non-Bar certified CLE, other than something like Jerry Spence or NLADA or

NACDL, some of these organizations that we know that they are meeting CLE criteria for various states, it could just be administratively cumbersome.

41:55 Hon. Elizabeth
Welch

My impression is that the Bar is very open to can we get credit for doing X, Y, Z. That they are not narrow minded about that. Maybe we could look into that a little bit.

42:09 P. Ramfjord

That is my impression too. Part of the solution for more senior lawyers doing things that are more valuable is for them to do teaching as opposed to receiving things. I get more CLE credits for putting presentations than I get from attending them. I think in my experience there has been a great deal of flexibility, even flexibility to do things like work shops or do some things that are alternative in nature. If you have case scenarios, just bare minimum case scenarios along with some description of the program will typically suffice. I think that there is a pretty broad range of flexibility there.

42:53 J. Potter

Though I think what Marc is saying is in part, if during a lunch hour or just as a group meeting you have a case and you are sitting around a table talking about it, you might impart a lot of knowledge but it is not a true CLE. The same happens at true CLEs. People say we go the CLEs but in the bar sitting there having a drink and talking about the case. I would learn more than I did listening to the lecture. Whether or not that is something you can quantify. I think that is a tough nut. I think Nancy is probably right. Having OPDS try to figure out and give credit where the bar can't. That is a staffing problem for them too.

43:36 Chair Ellis

How does the Commission want to proceed here.

43:46 Hon. Elizabeth
Welch

I want to do what you said.

43:46 Chair Ellis

Is that a motion?

43:47 Hon. Elizabeth
Welch

Yes.

43:47 Chair Ellis

Alright. So we would strike the opening phrase that says, "During the term of the OPDS contract." We would have the sentence read, "Percent of attorneys who obtain at least 16 hours per year ..

44:01 J. Potter

Twelve.

44:01 Chair Ellis

I mean 12 hours per year of continuing legal education credit in the areas of law in which they provide public defense representation. Is there a motion on that?

44:14 J. Stevens

Seconded the motion.

44:22 Chair Ellis

Any further discussion?

44:22 D. Bouck

I am Dan Bouck. I am with the public defender's office in Roseburg. I want to clarify what you are saying there. I have some attorneys that just do juvenile work so obviously 12 for them. Some do a split. So would they have to do six and six?

44:40 Chair Ellis

No. Any combination that gets you to 12.

44:47 D. Bouck

And you are assuming there are 12 useable juvenile credits every year.

44:56 Chair Ellis

You can get them on tape.

44:55 D. Bouck But as Mr. Potter just said more oftentimes at the conference talking with people. One of my attorneys who did primarily juvenile law just retired after years. She would roll her eyes because it is the same old thing. Those CLEs do not progress. Our contract says I can't spend money outside of the State of Oregon. So I can't go to Spence unless I get special permission and it is very expensive. The trial academy in Georgia is around \$4,000. That is not in my budget. So if you want to increase the number and make it more special than give me more money so I can either reduce my caseload so that they have time to go these and spent it, or we need some flexibility.

45:37 Chair Ellis I don't think the sense of this is to say you have to go to Wyoming. Isn't that where Jerry Spence is?

45:45 D. Bouck But you are assuming that just because they go 12 credits it's of any value. I know you need some objective thing to say, but there isn't much of value, at least in Southern Oregon, that we can get that is of any use. It repeats every few years.

46:04 Chair Ellis Things like the immigration status.

46:07 D. Bouck But that is not juvenile.

46:07 Chair Ellis It has relevance to juvenile.

46:14 D. Bouck That is really squeezing what we consider juvenile. If you want us to we will get creative as to what we want as juvenile. OCDLA offers a program every year but pretty much half of it is the same thing every year. The attorneys that have to do juvenile have to a practice a long time before they can do it. That was great the first year. I don't know how to do. It needs to reflect our practices changing and the needs changing. This weekend is the Search & Seizure Conference that OCDLA is sponsoring. My office is going to be almost vacant because everyone is there. They need that one every year, but the same trial academy for juveniles it is like, "really." But I need my 12 or 16 credits for the contract so I will there and will sit there and take up space and I will comply with the contract. That is what they are doing.

46:59 C. Lazenby So we are not increasing the number of CLE credits that your lawyers need to remain members of the bar. All we are doing is just specifying what the subject matter of those must be. A, I don't see how that is an additional expense for you and B, We probably have created a little market. So maybe there will be new offerings.

47:19 D. Bouck I haven't seen the market yet.

47:19 C. Lazenby Well, we haven't done the rule yet.

47:26 D. Bouck If you just make it criminal then that is not a problem. My attorneys get plenty of criminal cases between what we are offering within our office now, it is the juvenile. There is just much out there of any value in juvenile. If you want to increase the juvenile, you have to understand there isn't a market out there yet for quality juvenile...

47:46 Chair Ellis I would strongly encourage you to give this communication to the state bar. They are the ones who are organizing a lot of this.

47:58 P. Levy I would strongly encourage you to look at the agenda for this year's Juvenile Law Training Academy. Then look at last years and the years before. I challenge you to tell me that they are repeating and that it is basic and of no use to experienced practitioners.

48:23 D. Bouck After 25 years it does start to repeat. To be able to do juvenile law, typically my attorneys have about five years work, or they partner with an experienced attorney very carefully for several years. I am just concerned if you say that we want 12 of this, you are going to find my

attorneys saying, "Well, I will just go to that one," even though they would get more value if we could leave it open and just saying criminal law. Leave it to their experience and knowledge. If I am doing juvenile then I better go to the juvenile ones. Or, gosh, I really need to spend my time going to search and seizure, which will have a cross over. Don't limit me just too juvenile. Let me chose what is appropriate. Then if we are not doing our job in our site reviews you will realize it. The judges or people will point it out to you.

- 49:12 S. McCrea Did I misunderstand? I thought there was already a requirement on the juvenile contracts for the 16 hours.
- 49:20 N. Cozine There is. I think it is also worth pointing out that there is the Juvenile Law Training Academy. There is the Oregon State Bar Juvenile Law CLE. There is the annual spring juvenile CLE that OCDLA puts on. Then there is the National Juvenile Defender CLE. They hold two a year. Oftentimes there is a regional and there is a national. The regional is typically close and free. One of the things that we can absolutely do as an agency is ensure that our providers are aware of all the opportunities that exist.
- 49:55 Chair Ellis That is very helpful.
- 49:55 J. Stevens If, for example, immigration law applies, which I would guess it does in a lot of ways.
- 50:03 Hon. Elizabeth Welch It sure does.
- 50:03 J. Stevens That is not labeled juvenile, but it doesn't mean it is outside the parameters.
- 50:09 N. Cozine That is actually on the Juvenile Training Academy agenda.
- 50:16 J. Potter I want to put my OCDLA hat for just a moment. To suggest when I hear that you have lawyers that 10 and 20 years experience in juvenile and are looking at seminars and saying, "Gosh, we already know all that." As OCDLA or any training organization, they want that person to be a speaker. As you hear Per say, he learns more when he is speaking or presenting then it does when he is attending. For those cases in which you have got people that are in that category that would be great. Then if they have specific ideas that say we need to address something, funnel it in or have that person become a member of the education committee. We just did a live stream webinar out of the OCDLA office covering two areas that were specified that people needed. We had speakers from the Juvenile Rights Project and Youth, Rights and Justice, thank you. Come and talk about special needs. Students that are in schools and how they are being treated in schools and being charged with criminal activity, and police in schools generating these cases coming out the schools that are being fed into the criminal justice system. Totally different. Never done it before. Pretty interesting stuff. But engaging in the process would help your people, I think, if they just jump on in and say, "This is what we need, or I will instruct."
- 51:43 Chair Ellis Okay. There is a motion and a second. Are we ready? **VOTE 7-0.**
- 51:54 N. Cozine We have one more KPM.
- 51:59 Chair Ellis Sorry.
- 51:59 N. Cozine That was just the start. Parent Child Representation Program.
- 52:09 N. Cozine Yes. The second proposed KPM is one that relates to our new parent child representation program. There are many facets to this program, but one of them is the expectation that lawyers will be spending more time with their clients than they have in the past. By monitoring the amount of time that lawyers are spending court on preparing motions, on

education, and spending time with their clients, we get a good sense of what they are doing. We would like to see lawyers spending about a third of their time with clients on client communication, so that we are confident that the client is having the access that they need. The majority of complaints that we get in this office with regard to representation, tend to be around lack of communication. Washington who initiated the parent representation program had the expectation that lawyers would spend a third of their time on client communication. That was one of the core components that they have looked at over the years. We are proposing that to the Commission. Amy Miller, who is our managing attorney for that program, is here. We are both open to your questions.

53:32 Hon. Elizabeth Welch

Mr. Chair, may we assume that this is actually attorneys or their employees. In other words, does the social worker from Klamath Falls, who works for the defense bar down there, having contact with the client count, or not count? That is my first question.

54:01 A. Miller

Good morning. Amy Miller, Deputy General Counsel and program manager for this exciting, new parent child representation program. Your question was about recording time and does the utilization of a staff person meeting count. The answer to that question is it is the attorney's time that we are tracking and not the use of staff. We are asking the attorneys to spend their time with clients in client communication and meeting with clients. The idea is, and I will talk a little bit more about our program, but the idea is that by reducing and more effectively managing the workload the attorneys, they will, in fact, be able to spend more time with their clients building a trusting relationship and be able to help facilitate faster and more appropriate resolution.

54:46 Hon. Elizabeth Welch

Do you have any useful data at this point about what is going on now? In other words, how does this compare with anything that we actually think we know about how much time lawyers spent.

55:07 A. Miller

We have had some anecdotal discussions with the attorneys in both pilot counties. They are well aware of this KPM and of this request. In terms of data collections, one of the components of this program was that the attorneys are also tracking their time and reporting it. I have yet to receive the initial reports but I hope to be able to provide more information to the Commission.

55:28 Hon. Elizabeth Welch

Is there anything to know what is going on now.

55:36 A. Miller

We have no data.

55:34 P. Ramfjord

Your comment that this is a goal in Washington State too and they have been tracking it for some time. I am curious what that data and tracking is showing us.

55:58 A. Miller

I went up and met with them. Their attorneys record their time. They have a great little computer system that they record their time and they are continuing to do so.

56:11 P. Ramfjord

To your knowledge has that had an effect on the level of compliance or satisfaction with services in Washington?

56:18 A. Miller

They do a client satisfaction survey. They consistently get positive results from their surveys. However, I think the bigger impact for the program is that for them over the 14 years that the program has been in effect, they have cut the time to adoption and guardianship in half and reduced the time to safe reunification by about 10%. By doing that they attribute that success, partially, to the fact that they are able to spend more time with their clients.

56:53 S. McCrea You said that the attorneys in the two pilot counties are aware of this proposed KPM. What is their reaction?

56:57 A. Miller It was part and parcel of the contract and they are on board with the program in general.

57:08 J. Potter It strikes me that writing KPMs is a pretty tough deal. This is clearly outside of my wheelhouse and I am sure the judge is going to jump in. I look at it and wonder one-third of your time meeting with your court appointed client, and yet the types of clients that you have may be vastly different. You might have a child who is three or four years old that you are not going to be spending a third of your time with. But you might have somebody else who is 14 or 13, that requires more time, and for which you can benefit talking to that client. So having a blanket and picking a third, I don't know how we say, "Yeah. We support that." We support the concept of lawyers spending time with their clients in the appropriate amount of time. We are obviously trying to get away from stories that you hear of lawyers who never see their client or hardly ever see their client. But writing this KPM in particular, I am not there yet on this particular language.

58:20 A. Miller I certainly understand your concerns and you are right. Juvenile cases can vary greatly in terms of the amount of time the attorney needs to spend with their client. You are absolutely correct. These guidelines around time usage and information reporting by attorneys, it comes to us from Washington where they have had a long track record of success. In looking to establish something that we can measure and we can report back to the Commission.

58:48 S. McCrea It doesn't say that they have to spend a third of their time with each client. So maybe you spend some with the four year old and maybe a lot more with the 14 year old. It is the either that is the way that I read it.

59:04 P. Ramfjord I am also curious if that was an issue or complaint that came up in your discussions with people in Washington State. That there were different amounts of time spent with different clients or if that was a concern.

59:09 A. Miller It wasn't. Like I said this program has been around long time and has proven to be successful. It is part and parcel for every attorney participating in the program that they track their time. It wasn't raised as an issue at all.

59:26 Hon. Elizabeth Welch But there is a very big difference. That is that they don't represent children. As good as point as any that has been made in this discussion is how much time do you spend with a two year old. The answer is next to nothing. If you did, I, for one, would be questioning the judgment of the lawyer.

59:46 N. Cozine Maybe we do need to rephrase it. You are correct that in Washington the program is with regard to parents. Maybe we do need to rephrase it to limit it to the adult clients. However, that gets a little tricky too because there are plenty of children who fall in the category, particularly those in the teenage years with whom you may well need to spend a significant period of time.

1:00:18 A. Miller I was just going to say with the revised standards there is a continued focus on spending time with younger and younger child clients as well.

1:00:31 Chair Ellis So is there a way to rephrase this that would capture this issue?

1:00:39 N. Cozine I think we could limit this KPM to parents for now, or parents and children of considered judgment.

1:00:51 Chair Ellis Then we could still keep the one-third of their time. So you are really saying one-third of their time on those cases involving parents or ...

1:01:02 N. Cozine Children of considered judgment.

1:01:06 Chair Ellis That sounds like good language.

1:01:12 M. McKechnie In my mind in juvenile cases it is the frequency of contact is probably more important than the number of hours in a week. The duration has been discussed with each client can vary widely. Frankly, in a data collection perspective as well, I believe that would be much easier for everyone to track the number of hours. Those are incidents that are much easier to count than minutes or hours. If you get into counting time, do you start mulling over how long it took you to drive to get to the client. When we are visiting children clients we are going to them. They are not coming to us. I think having some sort of bench mark in terms of how many times per year we contact each client is probably much more meaningful. We have some clients that if we let them they would take up a third of our time alone. We want to make sure that every client gets meaningful contact.

1:02:25 Chair Ellis I can see arguments that the lawyer that just shows up at the hearing and gets the client outside for 30 seconds and then comes back into the hearing.

1:02:41 M. McKechnie We are assuming they will see the clients in the courtroom for the most part. I think what we are getting at is meaningful contact outside of the hearing and not immediately outside the courtroom, but in terms of preparing the case and knowing what they want and knowing how they are doing that we have regular contact with them to assess those things.

1:03:07 J. Potter So in a KPM environment how do they quantify them?

1:03:15 M. McKechnie I think you could come up with a number - it may vary slightly. In the first year of a case you probably want to see them more frequently. You might say a minimum of four client, outside of court, client contacts per year and a minimum of two or three after two years. Again we are talking, I think, a minimum threshold where you would say this is what you should be doing for every single client knowing that some will require more than that.

1:03:55 Chair Ellis So would you suggest, Mark, to make that an alternative measure of satisfaction of the KPM. So it would be spending a third of the time meeting with court appointed clients, or a minimum of X contacts outside of court appearances?

1:04:21 M. McKechnie I guess my positive is the latter is more meaningful. The number of client contacts per year is more meaningful than saying the attorneys will spend a third of their time because of the variables.

1:04:32 Chair Ellis I was going to make it disjointed so you could meet either criteria.

1:04:39 Hon. Elizabeth Welch Mr. Chairman. I would be curious, Mark, I think the real problem is with the child contact. Shouldn't maybe that be split out? In other words, a different standard for contact with children has been discussed a little bit. Maybe something different on the parents, but at least my comments were directed at the kid's stuff. I just think that is extremely unrealistic and there is no relation to reality for most child contacts particularly in the termination context. The permanency issues rather than kids that are in permanent foster care. That is not really what this KPM is about. Am I right? If you disagree with that please say so, Mark.

1:05:32 M. McKechnie I certainly think there are qualitative differences. With parents I think they either stay in touch because they are worried and they want their children. They may initiate contact frequently with the attorney. There are some parent clients we are desperate to get in contact

with and they may be incarcerated or homeless, out of touch, so that can vary widely. With children there are a number of other variables as well. To me it would make sense knowing that there are all those variables to try to come up with a minimum level of expectation that would apply across the board.

- 1:06:26 Chair Ellis It might help us if Amy could remind us what the PCRCP. How many lawyers are we talking about and what is the scope of the PCRCP?
- 1:06:37 A. Miller Thank you. So we are talking about lawyers in Linn County and Yamhill County and we are talking about seven attorneys practicing full-time representation in Linn County. We are talking about eight attorneys in Yamhill County practicing half-time juvenile representation.
- 1:06:55 Chair Ellis Are these primarily termination of parental rights cases?
- 1:06:57 A. Miller Not primarily. They are part and parcel. There is a mixed bag for both in terms of dependency, delinquency and TPR cases. I think it is worth noting that, again, these attorneys have mixed cases. We don't have one attorney representing all children. We don't have one representing only fathers. Their caseloads are mixed between parents and children in delinquency and dependency.
- 1:07:35 P. Ramfjord I actually favor this idea with the modification on the children. I think the fact that you have positive experience from Washington, where the program has actually made a contribution to shortening the time of case resolution that you don't have actually objections from the current practitioners who are aware what these standards are going to be, and that we would include some language that would exclude the requirement as applied to young children and the fact that it can be changed in the future. If based on the experience that we generate by doing this, if that experience suggests that it should be changed. Overall, I haven't heard anything that suggests that this is going to do anything other than good with the exception of the idea that it could be a time waster on small children. I certainly agree with that. I think if we carved something out on that I think there is some benefit here.
- 1:08:37 Hon. Elizabeth Welch Maybe they could go back to the drawing board a little bit on this, right? We don't have to decide this today.
- 1:08:40 N. Cozine We need to include something in our budget binder. So a draft of some kind that people feel comfortable with generally. I think that the challenge of coming up with an incidence based measure is that we don't have anything to draw from. We may be able to gather that information as we start collecting data, but a little bit hard to do something right now.
- 1:09:08 Chair Ellis The whole point of PCRCP is itself is an experimental program. We are experimenting with how to get a measure of at least input quality. We are talking 15 lawyers. We are not talking about several 100. I think I agree with Per. If we can modify it to carve out the young children, let's try this and we can adjust it as we go. Is that okay?
- 1:09:49 Hon. Elizabeth Welch I just want to know what the definition of young children. That is a subject that people in this field have very strong differences of opinion.
- 1:10:05 Chair Ellis Nancy had some language that sounded like it had secondary meaning.
- 1:10:02 Hon. Elizabeth Welch Way too young.
- 1:10:08 M. McKechnie Can I just add to that. I wonder if the expectation around younger children should be that somebody from the attorney's office, but it doesn't have to be the lawyer, has regular contact

with child clients. We certainly make sure that it is someone, whether it is the attorney, legal assistance, investigator, social worker, somebody checks in on our very younger clients because we need to know how they are doing and if they are safe.

1:10:31 Hon. Elizabeth Welch

A third of the time?

1:10:31 J. Stevens

This is a third of your total time, not a third on you and a third on you and a third on you?

1:10:48 Chair Ellis

No. It is aggregate.

1:10:47 J. Stevens

Then I wonder why do we have to carve out for young children? If we are talking about total time rather than each client that seems like that would give you the wiggle room on younger clients.

1:11:04 Hon. Elizabeth Welch

Except if you are keeping track, I don't see how you can do it any other way than client by client.

1:11:13 J. Stevens

I understand that. But you don't have to show that on each client you spent 30% of your time on that client with the client.

1:11:17 Chair Ellis

I guess my reaction is it is such an obvious anomaly that I would rather we show that we understood it than not. Is that enough guidance?

1:11:33 N. Cozine

I think so.

1:11:39 Chair Ellis

Alright. I think we need to have a vote approving the concept. We will leave it up to Amy to find the right language if that is satisfactory.

MOTION: Per Ramfjord moved to the approve the concept; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried. **VOTE 7-0.**

Agenda Item No. 4

PDSC Affirmative Action Report

1:12:03 Chair Ellis

Cynthia, do you want to do Item 4 and then we will take our break after that.

1:12:16 C. Gregory

I am Cynthia Gregory. I am the Human Resources Manager here at the office. This morning I want to talk with you briefly about the affirmative action plan, which is part of Attachment 4. It begins on page 57 in the budget narrative. In tracking our affirmative action goals, our goal is to monitor the recruitment and employment practices to ensure we achieve and maintain a diverse workforce, which represents a broad spectrum of our society. I am pleased to report that OPDS generally meets or exceeds our affirmative action goals in both recruitment and in employment. We will share with you the attorney group for appellate is our largest group of a single classification of employees. So, for example, our goal is to employ women in 30% of our total attorney positions. We are currently employing women in just over 70% of our total positions. In the same group we are also seeking to employ a diverse workforce of 8% and we are currently at 9%. On the recruitment side we are working with Pete and his group now to fill two vacant Deputy Defender I positions. We have a very broad, diverse group of candidates for those positions, and I attribute that to the long term outreach the agency has made to the colleges. We also feel the diversity of our clients is appropriate to address. Later this fall we will be asking our contract providers to give us some information from a diversity survey to help ensure that we are meeting the diverse needs as our client groups as well.

1:14:03 N. Cozine

Could I add to that as well. Something that Cynthia explained to me that I found helpful was that when she talks about what the goal is, the goal is really to mirror the population that

- exists in our state within that classification. So, if the lawyers registered with the Oregon State Bar are comprised of 30% women then we should reflect that.
- 1:14:32 C. Gregory So affirmative action figures are basically based on US Census data that is, as Nancy said, by the type of work that is available, the type of people that are qualified to do that work, and we should be mirroring those goals.
- 1:14:51 Chair Ellis I haven't seen the category called, "people of color" for a long time. What are you including in it?
- 1:15:00 C. Gregory People who are coming from a diverse ethnicity background typically.
- 1:15:04 Chair Ellis So Black, Hispanic, Asian, all of those.
- 1:15:09 C. Gregory Alaska natives, Pacific islanders, African-American, Hispanic, Latino.
- 1:15:21 Chair Ellis And this is all labeled affirmative action. How much of this just worked out that way? How much of this is a conscious effort to produce it?
- 1:15:37 C. Gregory Well in doing the research I also looked at the graduation statistics for each of the local law colleges here in the State of Oregon. I was interested to see that our ability to attract and retain employees to the agency mirrors or matches the ethnic diversity in the colleges as well. So, whether we are specifically going out and attracting certain groups, probably we are not alone in doing that. There are a number of other employers who are also going to be competing for a small workforce. I think we are doing a very good job being that we are able to meet our goals.
- 1:16:15 N. Cozine I would also add that this affirmative action report is something that all state agencies are doing. So all state agencies are, to some degree, looking at these statistics and engaging in hiring practices that help us meet our own expectations with regard to having a work environment that is attractive and appealing to people of all backgrounds.
- 1:16:43 Chair Ellis Will you be trying to attract some males?
- 1:16:52 Hon. Elizabeth Welch Mr. Chairman, I have a question. I don't understand what the last piece of your report means. When you are talking about clients - what are you talking about there?
- 1:17:06 C. Gregory Nancy could probably help me explain this better.
- 1:17:14 N. Cozine As you know we have a diverse client base. I think one of the challenges we have in public defense particularly is that the attorney group that we have, and this is at the trial level and at the appellate level, does not necessarily match our client base. So while we look at statistics about who is graduating from law school and we can feel good about the fact that we are attracting and retaining lawyers of diverse backgrounds, I think one of the areas where we still need to focus and improve is on offering to court clients, lawyers who have a similar background. I think we still struggle there, especially at the trial level where the client base is much larger and geography is broader.
- 1:17:55 C. Lazenby But the charts are about the work force. Where are you in terms of diversity of attorneys?
- 1:18:09 C. Gregory Here for our office we exceed the goal.
- 18:14 C. Lazenby I guess where I am kind of going is I am looking at the people of color as a percentage of the workforce, but your workforce is pretty small. From 2011 to 2014, you have gone from 5.8%

to 9.5%, which looks good but it kind of fun with numbers. That is really only like one or two people, right?

- 1:18:31 C. Gregory It is and the challenge here is that we have a small agency and a small finite number of positions to fill. So you are correct. We could be looking at a difference of adding one or two people.
- 1:18:55 N. Cozine That is why we have to continue to work toward diversity. Even if we are at a mark that looks good, it would be very easy to fall again because of the numbers. We need to continue engaging in outreach efforts; continue to make sure that our work environment is one that is appealing to everyone.
- 1:19:18 Hon. Elizabeth Welch But I want to go back to the other category which seems like a real challenge. I don't understand what it is that you think you can do so that the lawyers who serve ethnic minorities are more reflective of that. What is the effort there? How do you describe that?
- 1:19:37 N. Cozine I think the effort there is continuing to engage the law schools and with the Oregon State Bar and the minority lawyer groups to make sure that they are aware of this area of practice. To make sure that we offer employment opportunities that appeal to individuals of minority backgrounds. I think that is an area where we still struggle. I think it is hard. I think there are a variety of reasons. I have many conversations on this topic. Public defense is often appealing to a limited group of individuals. Not everyone is going to law school to do public defense work. I think that alone is the first hurdle. Then if you have an individual who has been successful and they are of a minority group, they may well wish to affiliate themselves with the prosecution or some other entity that offers more compensation, frankly. I think there are challenges in public defense. There are other people in the room that may speak to this much more eloquently than I do. I view it as something that we really need to keep working on.
- 1:20:58 Chair Ellis This stated though it is just the direct employment here at OPDS. Do we make any effort to determine how we are doing at the contract provider level?
- 1:21:12 N. Cozine We are sending out a survey. I think it is later this month. Caroline has it. It is all built. It is all ready to go. I sent a letter to providers to expect it.
- 1:21:27 Chair Ellis In some ways that seems to me more important because those are the people who have a lot of direct contact with the clients. Here we don't have that much.
- 1:21:39 N. Cozine It is true. I think Cynthia could also talk to you a little bit about the work she has been doing with the Governor's office.
- 1:21:44 C. Gregory Right. Frank Garcia is the head of the Governor's diversity and inclusion office. One of the things that we are focusing on is partnering with Frank on those opportunities to attend career fairs and spread the word through the groups that he works with throughout state, to ensure that we talk about the opportunities in Oregon and the agencies as we look for inclusion and diversity in each of our agencies. All of our job posting are now going to the Governor's diversity and inclusion office, so that we make sure that we are spreading the word as widely as possible.
- 1:22:28 Chair Ellis Is that including the contract provider community and not just this office?
- 1:22:31 C. Gregory It is not. I will say that we did spread the RFP for the PCRCP program through that channel. We, of course, are waiting to see how that turns out.

1:22:43 N. Cozine Once we get the survey results from our providers we can work with them a little bit more on what we can do to help them. We also, as part of the management conference, have Judge Ortega coming to talk on building diversity in the workplace.

1:22:56 C. Lazenby Let me suggest, if you haven't done so, that you open up a dialogue with Marianne Hyland at the Bar. But she is currently diversity person at the bar. She works actively with the law schools. There may be opportunities through her for internships as well that could expose lawyers and law students of color to this work to make it attractive to them. The job fairs are all great, but Marianne is a little closer to the source.

1:23:44 C. Gregory We may have some connection there as well. We do have Josh Crowther from the appellate division who does a lot of that outreach work, so I will connect with him and make sure we are touching that base. Thank you.

1:23:59 Chair Ellis Okay. Thank you, Cynthia. Why don't we take a 10 minute break and come back.

Agenda Item No. 5 PDSC Agency Request Budget: Narrative and Policy Option Packages

0:14 Chair Ellis Alright. We will resume. The next item is No. 5, the Agency Request Budget; Narrative and POP. Nancy and Angelique.

0:34 N. Cozine Thank you, Chair Ellis. Nancy Cozine. What you have in your packet as Attachment No. 4, is almost the complete agency request budget. It has the narrative and policy option packages. As Angelique will explain there are some other documents that get inserted before it is submitted. This is what you have reviewed in past years, and it includes the narrative descriptions of all of the packages. At our last meeting I think there was an inquiry about whether or not there would be narratives to explain all the different requests. This is that narrative. I think there are a few places where perhaps we want to remove a word or rephrase a sentence. Nothing substantive, but just for a better read.

1:26 Chair Ellis This is the budget that goes to the legislature. We don't do one that goes to the Governor?

1:31 N. Cozine This goes to the legislature and we are required to submit copies to the Department of Administrative Services and to the Legislative Fiscal Office. So the Department of Administrative Services in the executive branch entity that works with the Governor's office.

1:54 Chair Ellis Okay.

1:56 N. Cozine Let me say that this was, as in past years, very much a group project. Everyone in this office contributed and Angelique did a phenomenal job of pulling all together. I will let her run through the document and then you can ask any questions.

2:18 A. Bowers Angelique Bowers, the budget and finance manager. So Attachment 4 is our 15-17 agency request budget. Like Nancy said this is very similar to what we have had previous years. It just follows the standard state form that all agencies use. So the first section is our agency summary. In that we have a couple budget graphics. The first one is our expenditure program. It has our 13-15 total expenditures showing that 7.3% of our funding is for the Office of Public Defense Services, and 92.7% is for the professional services account. The graphic on the next page separates our expenditures by fund type. We have 1.8% of other funds and 98.2% of the general fund.

3:12 Chair Ellis Let me just go back. Our those percentages pretty similar to what we have had before?

3:19 A. Bowers They are. Last time for 11-13, we had 6.8% for OPDS and 93.2% for the account, so they are very similar. The next graphic is by fund type. The 1.8% is other funds and 98.2% is general funds. Again, very similar for last biennium. It is almost exactly the same.

3:44 Chair Ellis The other funds is the filing fee?

3:45 A. Bowers That is the application/contribution program.

3:51 C. Lazenby Do we have any federal grants?

3:56 A. Bowers We don't. On page three we have the comparison of our 13-15 legislatively approved budget to the 15-17 agency request. The total 15-17 agency request this time is 26.65% above our 13-15 legislatively approved.

4:17 C Lazenby Does that include the legislatively increase in contract provision for PDs. Is that what that is? I see a nod.

4:27 Chair Ellis Does that include the POPs?

4:31 A. Bowers Yes. The next several pages have our long term and short term plans for the agency. Then if we get to page 11, that is our 10% reduction option. This is a standard reduction that all agencies are required to put into the budget. Page 13 is the revenue discussion narrative. That is the application and contribution piece.

5:12 C. Lazenby In the reduction options where you look at the appellate division that sentences says, "The Court of Appeals may order the dismissal of pending cases that exceed 350 days from the date the record settles." Would that allow cases to just be dismissed through time? Let's say the AG's office gets the same sort of budget cuts. Does that mean there would be pending appellate cases which would just get dismissed because the lawyers couldn't get to it to get it done so the merits of those cases wouldn't be heard?

5:45 N. Cozine That is my impression. Pete Gartlan might wish to comment.

5:49 P. Gartlan Thankfully that hasn't happened yet. We have been able to meet whatever the due date was. I don't remember that happening.

5:59 C. Lazenby That is our requirement not their requirement.

6:03 P. Gartlan No. The NFE, no further extension, date is the court. So theoretically cases would be dismissed. The court does have that authority to dismiss it.

6:21 Hon. Elizabeth
Welch So the history of the calamity.

6:25 A. Bowers Of 2003?

6:26 Hon. Elizabeth
Welch It seems like there is a lot of tension and time spent talking about that. I am sure that is on purpose but I am curious. Is it to remind people what will happen if they don't do what they are told?

6:41 N. Cozine It is to remind people that there was this significant event. It really wasn't that long ago. Eleven years ago we had a situation where the entire public defense system almost shut down. I thought about whether or not we should shorten it, not include it, but the reality is every single session we have new legislators and to the extent that anyone is willing to read the information, it really is important. It really does provide a foundation regarding the critical

nature of counsel and why, I think, in Oregon we do have a relatively collaborative approach to funding public safety. However, if the Commission wished us to trim down we could.

7:28 Hon. Elizabeth
Welch

No. I was just curious.

7:26 P. Ramfjord

I also did question that and I also thought, to some extent, given that it is in the discussion on long term plan that it is characterizing our history in a somewhat negative passage way as opposed as to more positive future situation. Now if want in some ways to describe the funding situation that we have, it may be better almost to emphasis the gap between what our providers are funded versus the prosecutors are funded. These might be worth giving some thought over the future and trying to shift that narrative a little bit that. Or maybe down play this and also mention that other aspect of it. Instead of it being a question of avoiding a shutdown, avoiding the creation of a bigger gap could be something that we aspire to.

8:34 J. Potter

I think it I were editing that I would probably take out the quote of the police chief, can't afford, go free. I don't know that that serves the purpose to remind people.

8:50 N. Cozine

We can certainly take that out.

8:51 Hon. Elizabeth
Welch

It is certainly an attention getting device.

9:03 A. Bowers

The next section is the appellate division's programs. For the most part this is similar in narrative to what you have seen before.

9:12 Chair Ellis

Why on page 15 do we omit the Court of Appeals? It seemed odd to me.

9:30 A. Bowers

I am sorry. Where?

9:30 Chair Ellis

Where you are describing the Chief Defender. We say nothing about the Court of Appeals. It is though it didn't exist. Pete?

9:38 P. Gartlan

Pete Gartlan here. I guess I do have a Court of Appeals caseload but it is minimal. My practice is really focused on Supreme Court.

9:57 Chair Ellis

But I am sure you directly supervise a lot of the lawyers that do have Court of Appeals cases?

10:03 P. Gartlan

That is more indirect because the way we are set the team leader has more influence on cases that are argued in the Court of Appeals and directly supervising the individuals.

10:16 Chair Ellis

So you are saying it is intentional to leave it out?

10:21 P. Gartlan

Right. I think indirectly the Chief Defender is reasonable for how the office is doing in the Court of Appeals. I am kind of like the captain of a ship. I am responsible for everything.

10:37 Chair Ellis

So do you want it in or not?

10:37 P. Gartlan

I can put it in if that is what the Commission wants.

10:40 Chair Ellis

I thought it ought to be in.

10:47 A. Bowers

Then on page 19, that begins the special policy option packages. These packages are the same as what we presented to the Commission recently, a few months ago. The first package is Package 105, Employee Compensation. It has a total cost of \$1,5 million dollars general funds. The second package is Package 106, Office Space, for an additional cost of \$148,000

general fund. On page 23, that begins the program description for the Professional Services Account. In fiscal year 2013, this special services account provided funding for over 170,000 cases. There also a couple of budget graphics that are in this section as well. They start on page 29. These are similar to graphs that have been in the binder in the past. We have first the trial level on non-death penalty caseload. This time we added the 2011-13, actuals to the graphic. Then on the next page, page 31, you have the death penalty expenditures and caseloads and, again, we added the 2011-13 actuals to that. Page 33 has the package on mandated caseload. For 2015-17, we are projected a flat caseload. Page 35 begins the policy option packages for the section. The first one, Package 100, is Consistent Rates and Mileage for Public Defense Contract Providers. That package has a total cost of \$7.5 million dollars general fund. Package 101 is the Public Defense Provider Parity Package. This has a cost of \$21.5 million general funds. Then we have Package 102, the Contractor Quality Assurance. This package has two components to it. So we have contract administration and quality assurance with a cost of \$3.7 million and the case management system at a cost of \$900,000. Package 103 is Providers Hourly Rate Increases. This package has three different sections to it. The first is the increase to hourly paid public defense attorneys. The package would increase the rate from \$46 an hour to \$70 an hour for non-death penalty, and \$61 an hour to \$95 for death penalty. The next piece is for increase for attorney and mitigators under contract for aggravated murder cases. That would increase the attorney rate from \$98 an hour to \$125, and mitigators from \$62 an hour to \$70. The last piece is for hourly paid investigators. That would increase the investigator rate from \$29 to \$35 an hour for non-death penalty cases, and \$40 an hour to \$45 for death penalty cases. This total package cost is \$1.5 million dollars. The next Package 104 is the Juvenile Representation Improvement. This would expand the current parent child representation program to include Clackamas and Multnomah County. It has a cost of \$5.9 million. On page 47 we get to the last section of the binder, which is for Contract and Business Services Program Description. This is very similar to what was in the binder in the past. Starting on page 51, these are the policy packages for this section. They are the same packages that were mentioned in the appellate division and the professional services account section. Nancy mentioned there are other budget documents that are reports that will be included in this, but otherwise this would be the final document that we could forward for the agency request binder.

- 15:23 C. Lazenby Can you clarify for me, you talked about the PCRCP, and we just had an extensive conversation about that earlier and it is just getting started up. So do you anticipate that if make changes in this we would have to go back and ask for more? We are launching it as a pilot now and talking about, but going to the legislature and asking for it already to be expanded to two additional counties. Is something that could get chopped off by the legislature as being premature?
- 15:52 N. Cozine The legislature could feel that it was premature. We were able to launch the pilot in two small counties, Linn and Yamhill. We would like to launch it to larger counties so that we can compare results between small and large. Starting with larger counties wouldn't have been financially feasible. It would have proven too challenging given the number of lawyers. So starting in a smaller setting and getting our templates in place was very helpful, but really, to get a better sense of how well the program will work in larger counties, we need to have at least one larger county and we would prefer to have two.
- 16:35 C. Lazenby And the \$9.5 in the item would fund the effort in all four counties, right?
- 16:40 N. Cozine We should have continuing budget for the existing counties right now. That is just the new counties.
- 16:49 Chair Ellis So are there parts of this that you think we need to focus on?
- 16:57 N. Cozine Not necessarily. I think this Commission has talked so extensively about policy option packages that you may wish to have contractor feedback. I put it on the agency in case you

wanted some. I think the policy option packages as describe reflect what this Commission has directed us to do in terms of building packages for this biennium. The rest of the budget binder really tracks what we have done in the past, but modified to reflect the changes that we have experienced over the last two years. So unless there are questions, I think it is in its final form and we can certainly add the piece about the Court of Appeals. If the Commission wishes I can also modify, somewhat, the language concerning the 2003 events.

- 18:00 Chair Ellis I would shorten it. As a matter of persuasive use of history it can be a lot shorter.
- 18:12 N. Cozine Okay. I will do that.
- 18:12 Chair Ellis But there is nothing in here that you think that if you were us you would really want to focus on?
- 18:19 N. Cozine There is nothing terribly out of the ordinary that we haven't discussed.
- 18:27 Chair Ellis We all know the day will come when prioritizing the POPs will be a topic, but we don't have to do that yet.
- 18:33 N. Cozine And I would say on that note that I think that if and when the times comes, I suspect it will, that I would like to see the Commission prioritize in two separate lists. One for the Office of Public Defense Services and one for the Professional Services Account. I think it is very difficult to create a list of priorities that treats them as part of the same list.
- 19:04 Chair Ellis You don't want to seek the office space at the expense of the compensation increase?
- 19:13 N. Cozine I would like the opportunity to look at what we really want for this office and then look at what we would like for providers, exclusive to providers.
- 19:39 Hon. Elizabeth Welch I was just going to ask about the prioritization but you already brought it up.
- 19:40 N. Cozine I think you can prioritize any time you want. I don't think the legislature would ever shy away from having that recommendation. Mr. Bender has offered to come and speak to us. He is our legislative fiscal office analyst. He has offered to come speak to us in October. You will have an opportunity to hear from him what he expects this next biennium to look like. So far what we are hearing at the state level is that the budget is better than it has been in six years. There is still a deficiency, and thought the agencies won't necessarily be expected to take across the board cuts, it will still be a limited budget.
- 20:23 J. Potter I know there is a historical precedence and there may even be guidelines how you dictate how you submit this budget, but it strikes me that I would organize it slightly differently. I would put the professional services account as the first budget block. Then the appellate division and business services division next. In part because I think we want to emphasis that is where all the money is in the professional services account. When I look at appellate division and I see that sort of the employee compensation and the next thing is office space. If I am a legislator, I am not sure I want to look at office space as a seemingly, just by order, a priority right now.
- 21:11 A. Bowers We have actually had that same discussion. The reason that it is in the order that it is, is just our current budget structure and we need to keep the binder so that it follows the way the structure is in the system, although we are talking about making changes to that in the future if we can so that it will follow an order that makes more sense.
- 21:32 Chair Ellis So you need approval?

21:42 N. Cozine We do. We do so that we can go ahead and submit it. Of course the approval would be subject to the changes the Commission suggested.

21:50 J. Stevens You do have a typo on page 51.

21:53 A. Bowers Thank you.

22:03 J. Potter Mr. Chair, before we move into the approval process, I would ask that once again, even though this would be the third time, that we ask if there is anybody in the audience that has questions to make sure that we are all awake and we are all on the same page here.

22:22 Chair Ellis Well we know that Janet is awake. We would entertain....

22:34 Hon. Elizabeth Welch Mr. Chair, I have a comment on page 35, the first package. I consider this to be a very compelling issue, but I don't think the description of it is very good. Just reading it cold I don't understand it. I am not about to give you words or anything like. I would just ask that you take another look at and think about whether somebody who really doesn't know what the hell is going on here will understand what you are trying to accomplish. The mileage thing is pretty easy but I don't think it is clear what the point is there.

23:21 A. Bowers Okay.

23:24 Hon. Elizabeth Welch The reason is you talk more about the fact that lawyers that do this don't really do very much retained work anymore. It comes across almost like what has that got to do with this. Maybe it does. Just look at it like I read it like a nincompoop. Not saying that the people in the legislature are.

23:50 A. Bowers Right. Without the background.

23:59 Chair Ellis Any other comments?

23:59 P. Ramfjord I would echo the point about revising the long term plan section at the beginning. Not only maybe shorten the discussion of the past events, but also to emphasis some of the priorities of this budget. I think that many people tend to the read the beginning of the document more carefully and closely than the later portions of the documents. Even foreshadowing what is coming up next and why it is important is good to do.

Agenda Item No. 6 PDSC Approval of Agency Request Budget for the 2015-17 biennium

24:29 Chair Ellis So is there a motion to approve subject to the revisions that have been discussed.
MOTION: Chip Lazenby moved to approve the budget with revisions; J. Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 7-0**

Agenda Item No. 7 PDSC Approval of Contractions for Case Management Services; Parent Child Representation Program

24:58 Chair Ellis Okay. Nancy and Amy. This is the PCRCP piece.

25:04 A. Miller Hello again, Amy Miller. So I want to talk to you about a program near and dear to my heart. I put out in your chairs this morning some additional information about the program just for your knowledge. I included a one page handout and the parent child representation program, where you can just gain some more information about the program. Then I also included just a little bit of information about how we are working to recruit case managers. So an invitation to some of our information sessions, but for the purposes of this presentation today

what I am here to ask for is your approval of four contracts for case management services. I realize that this formation is slightly different than what is normally presented. I wanted to answer any questions that you have and tell you a little bit about our program and the case managers. So our program kicked off August 1, in Linn and Yamhill Counties, you heard about that. The key components are a cap of 80 cases, increase training and oversight, including additional training requirements as well as we talked earlier about tracking time and reporting activities. Other things of note, full shelter hearing representation, which wasn't occurring necessarily, and then a big component which is case managers. Case managers are folks who work, and this is again consistent with the Washington model. Case managers are folks who work at the direction of the attorney, on behalf of the attorney, to provide advocacy and services to parents and children clients. I think they can provide a wide variety of different things. Some of the things that I identified as key tasks would be maybe shelter hearings. So in those couple of hours between when an attorney is notified that shelter hearing is upcoming and the time at which the parties are appearing in court, a case manager may be able to identify a relative, get in touch with folks, develop an alternative plan for placement, find a safety service provider that could help with visitation. Maybe help with a youth who would otherwise be held in detention to find a safe placement. So there is a good opportunity there. Assist in locating appropriate services and helping to develop alternative service plans. In Washington they said one of the most effective usage of case managers was just engaging and motivating clients to participate in their case plan which is how they showed some of the results about shortening the length of cases. So what we need to have is about four case managers. We are actively recruiting for these folks. We have identified one. She is called out here as a proposed contractor. The other three we have not yet identified, which is why I provided the invitation. We are having some information sessions and we have released an RFP. We hope to have the RFP complete and we hope these folks trained and up and running by November 1, however I wanted to ask for your approval of these contracts prior to identifying the names of these folks so that we could continue to proceed quickly with the program. So with that any questions you have.

- 28:24 Chair Ellis I am little confused. We approved a lot of contracts but always after the other party is identified and the content is identified. It is unclear to me what you are asking.
- 28:43 N. Cozine We issued an RFP for the case managers with the intent of bringing them to you for approval now. We had one good, quality candidate at first recruitment. We need to have that contract approved. This Commission doesn't meet again until December 18.
- 29:09 Chair Ellis I thought October.
- 29:09 N. Cozine Oh we do meet in October. You are right. So we can bring them back in October.
- 29:15 A. Miller The RFP doesn't close until October 6. We will have gather information and assess qualifications and then identify potential candidates. So we won't have that information prior to the October meeting.
- 29:27 N. Cozine It is likely that we won't. So in the event that we don't we could bring it back in October. We thought we would ask whether the Commission was comfortable with the idea of us identifying the three candidates, or whether you wanted to proceed with actually waiting until you have three named individuals. I acknowledge that we are asking you, at least in theory, to approve contracts with individuals who have not yet been identified.
- 30:02 Chair Ellis I am uncomfortable doing that.
- 30:02 C. Lazenby What do we lose by waiting till December?
- 30:07 N. Cozine Time.

30:07 A. Miller Time. We are trying to gather information. We are trying to track data and trying to show evidence of our program being successful. The attorneys are excited about the program and this is a essential component of the program. So for that reason we wanted to move forward as quickly as possible.

30:26 Chair Ellis What if we approve the Brandon cause you are able to identify that and tell us. Give you encouragement that we are likely to approve the others, but we really know who we are talking about before we do it.

30:42 P. Ramfjord I would just add to that I believe our meeting is scheduled for October 10. Even if we don't have a final decision, it would be useful to know that yes we have gotten plenty of good candidates in the door. We think we can fill this without a problem and give us some idea about that. I think we might be in a better position to move forward then. I think the problem that I share with the chairman is that it is just difficult to prove something that inchoate as this right now.

31:19 A. Miller I appreciate your encouragement. I think that is extremely helpful.

31:29 Chair Ellis So why is Brandon \$4,200 different than the other three?

31:35 A. Miller I knew you would ask that. Because we have identified this person they can start sooner.

31:42 Chair Ellis So it is a time issue.

31:42 Hon. Elizabeth Welch I have a really fundamental question and I am not looking for trouble. I promise. One person for three years is what Brandon is and what the other ones are. A case manager cost \$90,000 a year?

32:05 A. Miller Their work and their rate is consistent with the DHS Social Service Specialist 1. That is the metric that we use. I do want to be clear that the value that is listed here is the up to value. So it may or may not be at this level, but up to the maximum amount.

32:31 N. Cozine I just also want to explain that is also includes their overhead expenses.

32:34 Hon. Elizabeth Welch Yes. I assumed. The stuff that these people do, particularly at the very, very front end, is what DHS is supposed to do.

32:49 A. Miller It is actually interesting that you asked that question. I met with a DHS branch manager yesterday and I talked to both about this program because there is some question about the overlap and about the potential for conflict. I think the big distinction is that these folks work at the direction of the attorney on behalf of the attorney. So they are providing services requested for by the attorney for their advocating for clients. The case worker pointed out that so often what limits progress in a case is this reticence to work with DHS. They folks don't have faith in the system. They don't have trust. It is this sort of a role that can hopefully bridge that gap. I don't think they are going to be doing the same type of work. I actually asked the question in Washington as well. Do you feel like your case managers are doing work that should be done by someone else and the answer to that was "no."

33:50 Hon. Elizabeth Welch I am not against this but the answer to the question is, "yes," but it doesn't happen. What you described is what happens before shelter hearings is the function of DHS.

34:06 A. Miller And to some extent it is, but when a parent won't speak to a case worker but will speak to an agent of the attorney.

34:17 Chair Ellis So why don't we break this into one action item and one advisory item. The one action item would be to approve the Brandon social work contract for the value and date listed. Is there a motion?

MOTION: John Potter moved to approve the contract; Hon. Elizabeth Welch seconded the motion;
Any further discussion?

34:41 J. Potter Yes. Can you tell us about the Brandon Social Work?

34:50 A. Miller Sure. In terms of qualifications?

34:52 J. Potter Yeah. Who they are?

34:53 A. Miller Sure. Brandon Social Work is the business entity for Dana Randant. Dana has a long history of working at MDI in Portland both as an investigator and as a field assistant. She has recently graduated from social work school and has an MSW in social work.

35:20 J. Potter Did I hear you correctly that was the only person who submitted a request? Or that was the only person who met the requirements that you had?

35:32 A. Miller It was the only person who met the requirements that we had. I did have some interest from other folks. It was also the only person who completely completed the RFP proposal. On a positive note, we issued the RFP again. I took feedback from folks about why or why not people may or may not have responded to it. I updated it and issued it again Monday and I have received a lot of response from what appears to be some fairly high qualified candidates.

36:06 J. Stevens What sort of changes did you make?

36:08 A. Miller I put more detail in about the program. I put more detail in about the length of the contract period.

36:10 J. Stevens So no particular changes to the requirements?

36:12 A. Miller What I learned is that for lawyers it is real comfortable for us to be able to (inaudible). It is less comfortable for folks in kind of the social work type field. So trying to acknowledge that and address that and provide further information. That is another reason we are holding these information sessions in the counties. Again, to try to reach out on personal level.

36:37 S. McCrea And the RFP closes on October 1?

36:38 A. Miller Sixth.

36:46 Chair Ellis Okay. We have a motion pending. All those in favor say aye. **VOTE 7-0.**
I think you can take a sense of the Commission that we are supportive but we want to know the details.

37:03 A. Miller Thank you.

37:10 N. Cozine I didn't know if the Commission would be interested in hearing some of the initial experience that we are having since we launched on August 1, or we can wait until October.

37:17 A. Miller And in October I asked some of the attorneys we are participating in the grant to attend the meeting so you can hear directly from them about their experience so far. What I can say that since the program has started we have antidotal information as you heard. We are tracking a

bunch of information and data but we haven't received that yet. Reports are due a month after, but some of these antidotal information that I have gotten is that lawyers are able to spend more time meeting with clients. We talked about that. I noticed that lawyers are doing more initial investigation on cases, which is critical in juvenile cases. We have full representation at shelter hearings in Linn County and Yamhill County. I am pleased to report that we have worked out discovery issues in both of those counties as well so that is positive. Then antidotally in Linn County the number of petitions filed has reduced dramatically. We will see if the trends continue. We have some small but positive results.

38:16 Hon. Elizabeth Welch

What is your theory about the relationship between the initiation of this program and the drop in the petition filings? That is not a presumptive outcome is it?

38:33 A. Miller

I don't really have enough information.

38:38 Hon. Elizabeth Welch

I am just curious what you think.

38:38 A. Miller

I hope to gather some more hard evidence to bring to the table.

38:48 Chair Ellis

We will look forward to October.

Agenda Item No. 8

PDSC Approval of 2013-15 Strategic Plan

38:53 Chair Ellis

Okay. The strategic plan.

38:54 N. Cozine

Thank you. The strategic plan is Attachment 6. This strategic plan is really just an update of the strategic plan that we have been working with for the last few years. There is nothing dramatically different in it. It just updates to conform to our current structure. I am asking the Commission to approve it as it is with any changes you wish. We had had a discussion during my performance evaluation about whether or not the time was right to actually engage in a more full-blown evaluation and revision of our strategic plan. My feeling is that this isn't quite the right time. We have a lot of pieces in motion right now and we probably need to move through some of those before we take an opportunity to do an extensive revision. I am open to your thoughts and suggestions and feedback.

40:00 Chair Ellis

I made a note to myself on the first page that this is well written. Then I realized that I had read it before.

40:11 J. Potter

Nancy, what is your proposal if we were to revisit it at a more appropriate time? When would that be?

40:23 N. Cozine

I would like to get a little bit further through the pilot program. I would like to get through some of the internal office changes that we are experiencing, so I would guess a more appropriate time would be as we head into the next biennium.

40:45 J. Potter

So a year from now.

40:50 Chair Ellis

Any comments or suggestions? If not, is there a motion to approve the strategic plan.
MOTION: John Potter moved to approve the strategic plan; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 9

Oregon State Bar – Board of Governors Approval of New Performance Standards

41:18 Chair Ellis

Alright. Now we get to the Paul part.

41:19 P. Levy Now we get to the meaty stuff.

41:26 Chair Ellis You have got some interesting subjects.

41:29 P. Levy Thank you. I don't think there will be terribly deep treatment of these two interesting subjects. If you haven't already read Judge Haggerty's opinion it is really remarkable and worth reading. I will get to that in just a moment. The Oregon State Bar Board of Governors has now approved updates and revisions to both the dependency performance standards and the criminal and delinquency performance standards. These are projects, to a large degree, were initiated by our agency. Two separate work groups that have been in the making for years. I think the criminal and delinquency group got under way in 2012, and the dependency, I think, may have been 2011. These standards are important and they are very different, at least the look and feel of them and in some respects the substance from what they replaced. They are important to the Commission because the Commission is responsible under Chapter 151 with adopting performance standards. You have essentially embraced these as your performance standards and they are in your qualification standards as one of the basic qualifications for any attorney doing public defense work, which is that you read, understand, and observe these standards. They are also reflected in our contract which is your contract. Under the general terms under the obligations of contractors and what it means to provide representation. I urge you to take a look at them. The link is in your materials. I did want to acknowledge who was involved with these revision projects on the criminal and delinquency task force. These were people who were formally appointed by the Bar's Board of Governors. In addition to myself, Margie Paris from the University of Oregon Law School. Shaun McCrea, who was a critical part of this.

44:09 S. McCrea You mean I was critical?

44:10 P. Levy You were very helpful. I wanted to also acknowledge that we had a few minutes in Eugene where you brought some great pastries.

44:21 S. McCrea The important part of it.

44:21 P. Levy The Honorable Lisa Greif, who is with the Jackson County Circuit Court and had been a provider with the public defender down there. Lane Borg with the Metropolitan Public Defender. Julie McFarlane from Youths, Rights & Justice. Shawn Wiley from our appellate division. That was it. It was a small work group and we did a lot of work. We changed the structure. We updated the contents in some respects. We critically added commentary to explain further some of the standards. We expanded and addressed some areas that were touched on but not sufficiently concerning representation of veterans and collateral consequences. One thing that we did is incorporate wholesale by reference the National Juvenile Defender Center. An excellent set of performance standards of juvenile delinquency. That is the criminal component. The dependency group really was much more ambitious and they produced a really major document. This group was comprised of Julie McFarlane again from Youths, Rights, & Justice. Shannon Storey from our juvenile appellate section in this office. Joe Hagedorn with Metropolitan Public Defender. Leslie Harris with the University of Oregon. Tara Sanks who is in practice with consortium here in Salem. Lee Ann Easton, an attorney in Portland and Joanne Southey who is with the Department of Justice. This group took a set of pretty good standards and really redid them entirely. There are now two separate set of standards. One for attorney representing children and another for those representing parents. Again, it reads more like a treatise now. There is a black letter standard followed by action items, which are paragraph narratives, and then usually commentary that are very helpful with really helpful in coming to grips with an understanding the best practices in juvenile dependency. To the extent that the other format was useful because it was more of a checklist, they are now included as an appendix to these standards. The recommendations have been reduced to a checklist. So you can go to a checklist for those who find this helpful and there is a place for those. I don't want to talk more about these because there is a lot to

talk about. I would just also briefly mentioned there is a set of standard for post conviction. Those were adopted in 2009. Partly because of the Commission's interest in improving representation.

47:47 Chair Ellis Okay. Move on to Judge Haggerty.

Agenda Item No. 10 Judge Haggerty's Supervisory Opinion with Recommendations for OPDS and DOJ

48:04 P. Levy Sorry about having belatedly providing this to you. That is my part entirely. I thought, well they aren't going to read this thing. It just was too much paper. We wanted to provide you with another similarly lengthy opinion from Judge Marsh that also affects our agency to some degree. I may just touch on that one briefly.

48:32 Chair Ellis This is that very salacious one he wrote?

48:37 P. Levy There may be other salacious ones. This one wasn't that salacious. It was fairly remarkable finding that it was probable that a woman convicted of murder was innocent. It is a very interesting and detailed description of how he arrives at the conclusion. The opinion that we did want you to know about because it has specific recommendations for agency, is Judge Haggerty's recent opinion, which is he calls an advisory opinion, which is remarkable for a number of reasons. If for no other reason it is a 63-page opinion following the resolution of the case by guilty pleas. So he didn't really have to write anything. It is a lot of very detailed and important work that didn't have to be done, but he felt it had to be done because of what had happened in the case and that if it wasn't addressed it would happen again.

49:47 Chair Ellis Or may already have happened.

49:47 P. Levy Or may already have happened again. He also describes a level of disorganization, or incompetency, in this particular case. I will get to the details in a moment. On the part of the United States Attorney's Office and the Oregon State Police that is shocking in any case, but especially in a death penalty, which this was. The opinion also highlights some really zealous and top-notch representation by defense attorneys and their teams, many of whom are contractors with us to provide death penalty work either as attorneys or as mitigators. It is also particularly shocking for its description of what a particular Oregon State Police detective, the lead detective on this case did, which Judge Haggerty strongly suggests was criminal and should be prosecuted. It included withholding and destroying exculpatory evidence, failing to catalog evidence, backdating reports to cover up mishandling evidence, lying to the US Attorney's Office, intercepting and listening to in a systematic and wholesale fashion, privileged defense communications, and filing false declarations with the court. It was in connection with this detective and the Oregon State Police that Judge Haggerty had recommendations for our agency. Before I discuss that I will tell you a little bit about the case and its context.

51:31 J. Stevens Can I ask for two definitions before you start?

51:32 P. Levy Yes.

51:34 J. Stevens Because I did read it and there were two things that I didn't understand completely. That were "filter" and "taint teams."

51:42 P. Levy Those two terms were meant to describe this one team. They are different terms for this process that was set up belatedly and incompetently and didn't function by the US Attorney's Office to look at information that they had received that might have included confidential attorney/client communications so that they didn't get to the lawyers who were actually handling the prosecution.

52:18 J. Stevens

I see.

52:20 P. Levy

As you know from reading the opinion they didn't set it up until months after they said they would and knew they should have. Then it didn't work very well and then one of the lawyers on the taint team ended up working for the prosecution team. So Judge Haggerty ultimately has lots of recommendations about how to handle that process well. Then there ultimately was a second filter team. While he doesn't name the lawyers who he is particularly upset by, because he says this is an preventive and corrective opinion and not a punitive one, he does name the lawyer who was head of the second team because he basically performed well and did a lot of work for Judge Haggerty. So this was the prosecution, if you haven't read the opinion, the federal prosecution of Hollie Grigsby and David Pedersen who went down the west coast, Washington, Oregon, and California murdering people as part of what they thought was a White Supremacy revolution. I think they started with Holly Grigsby's parents. By the time they got to Oregon they killed a guy named Meyers who they thought was Jewish but wasn't. It was bad and to many people it had death penalty prosecution written all over it. Then when the feds picked it up that is exactly what they sought to pursue. The evidence that was developed and set out by Judge Haggerty was developed in a four day bad faith hearing. The defense were alleged bad faith and the conduct of the US attorneys and how they provided discovery and other aspects of the handling of the case. There is 9th Circuit precedent for dismissing criminal prosecutions for bad faith in the handling of the prosecution. It didn't come to that because the case is resolved in guilty pleas that called for abandoning a bad faith finding. So there never was a ruling on that issue. Although Judge Haggerty says in the opinion that the way the prosecution was handled nearly derailed the entire case.

55:18 Chair Ellis

Why isn't that just a horrendous conflict for the US Attorney's Office to negotiate a plea that includes dismissal or non-pursuit of bad faith against their own people?

55:35 P. Levy

That is a good question. I think the defense was more than happy to have negotiation. Every wrong move was to them a gift once they learned of them. It ended up exactly where they hoped it would. To the defense, the outcome of this case was a victory. Life without parole in a capital case can be a huge victory. It was seen as that here and as Judge Haggerty implied, and I think it is true, that may not have happened but for the mishandling of this case. Your question is a good one but it is not one that anybody spent much time struggling with. The opinion talks about two big failures or problems in the case. One was the management of discovery by the US Attorney's Office and also by the Oregon State Police. Because they were the lead police agency on this multi-state case and they just botched the handling of the discovery and so did the US Attorney's Office. What angered Judge Haggerty more than anything was these problems were so large and manifested and nobody told him about them. In fact, quite the contrary, the US Attorney's Office was insisting that they were more than meeting their discovery obligations in the case. That sort of sounds familiar to me. He was very concerned about that. I will not try to detail for you the problems with discovery. The other big problem was the systematic interception of mail and monitoring of telephone calls between defendant, their lawyers, and other members of the defense team. These two problems were unified by the Oregon State Police and this particular detective who was directing, to some degree, the investigation of the case. It was his own misconduct that I sort of outlined earlier, but also he talked about, and this apparently was the case, talked about an Oregon State Police approach to discovery in death penalty cases that Judge Haggerty probably called unlawful. So at the end of the opinion Judge Haggerty has recommendations for the US Attorney's Office, but then he has two for our agency and the Department of Justice. One is that we considering taking action to ensure that similar misconduct does not reoccur. To the extent that refers to the Oregon State Police understanding an approach to discovery in death penalty cases, I think we have already addressed that. Our capital defense providers know this opinion, know it well, and know what the problems are with the state police approach to their discovery obligations. It was really quite fundamental and I can talk about them if you want. I think that we have taken care of. To the extent to which anybody

can take steps to see that criminal misconduct or other bad behavior by a police officer does not reoccur is much more challenging. The greatest safeguard against that is having talented, diligent lawyers on the case as was the case here. You read this opinion and you realize that a degree of luck is required as well to find out about misconduct of this sort. Either it is luck or stupidity because it was through inadvertent provision in discovery of some of the confidential communications that were being monitored that the defense first learned about the misconduct. The second recommendation is that DOJ and our agency considering conducting an audit of Detective Steele's recent cases to ensure that the results of those cases were based upon sound and complete evidence. Our appellate division is doing that thanks to our IT person searching all of their files for hits for Steele and then looking at those cases, and identifying, and if it seems to be appropriate, working with the trial counsel to determine what steps should be taken. We also sent the opinion to all of our contract administrators and recommended that they conduct their own review of their cases to determine what role, if any, this detective planned and whether misconduct might have affected the outcome of the cases. In that communication we did not have good information about where this guy worked. We have since narrowed down and for the most part he worked in the major crimes unit of the State Police here in Salem and on Department of Correction cases. We know of one very big case in which he played a role and the lawyers are well aware of that case.

1:02:13 Chair Ellis

So what do we do if we find a case that has already run its direct appeal and Steele was in it and there are questions whether he behaved there the way he had behaved here. What do we do?

1:02:29 P. Levy

Well there are all sorts of scenarios for the procedural posture of the case where we might learn about something. It could be a case that is pending on direct appeal and what do we do. The remedy that is most apparent is post conviction relief. There will be cases where there has already been post conviction litigation, or the statute of limitations to pursue it has already past. There are exceptions to filing successor petitions and to the statute of limitations. So PCR is the most obvious and apparent remedy to address the issue.

1:03:17 Chair Ellis

But that requires that the individual victim file a petition.

1:03:26 P. Levy

Yes. But there are instances where we have been proactive and have helped. We are not going to say to write to Joe Blow at the Oregon State Prison and say we think there is something the matter with your case, figure it out, file a petition. In those cases were we to identify them, and we have not identified them yet, but we don't think the review process is complete yet. We would provide assistance with pursuing that.

1:04:06 Chair Ellis

I have mentioned to Nancy that the Innocence Project is a potential place to go.

1:04:12 P. Levy

It is. Although these are not necessarily cases that would interest them. Innocence and a conviction that is tainted by misconduct and two very different things. This opinion by Judge Haggerty which is full of outrage, he begins and ends by saying, "I just want to clear there is nothing the matter with the convictions and sentences in these cases." So it has not been easy but we are taking Judge Haggerty's recommendation seriously and pursuing it. Questions?

1:05:07 Chair Ellis

What communications have you had with DOJ?

1:05:13 P. Levy

That is the part where I look at Nancy.

1:05:19 N. Cozine

I have had several communications with the Department of Justice. At this point in time, the message from both Department of Justice and the Oregon State Police is very clear. They are not at liberty to discuss any aspect of this situation at this time. If any information becomes available they will let us know. That is where we stand at this point in time.

1:05:42 Hon. Elizabeth

Welch Does he still have a job?

1:05:42 P. Levy I am not sure what his status is. He was investigated and prosecution was declined here in Marion County. I am shocked by that.

1:06:06 Chair Ellis Hang on. He may be our client before too long.

1:06:08 P. Levy But I believe he is still being investigated. Not by the US Attorney's Office but by some federal agency.

1:06:27 S. Gorham Steven Gorham for your record. What Paul just said about being shocked that Marion County decided not to prosecute the police officer. It is alluded to in the Haggerty opinion and that was a little bit shocking to us who practice a lot in Marion County. They clearly are then involved in this whole scenario and that is bothersome for those of us who practice in Marion County and do death penalty cases in Marion County. It leads me to believe that they are involved in some way. I am not much of a conspirator kind of person, but involved in some way. To me what Haggerty pointed out was something that almost every certainly serious client ever asked us. They are in jail or at least some sort of custodial situation. A lot of the community with their attorney is by telephone or in a "secure location" that eavesdropped on. We always tell the client – the current defense attorneys who use to be prosecutors who would tell us once they became defense attorney would tell us that they listened to confidential communications. This kind of throw a little bit of a monkey wrench into that kind of advice to people. It is certainly something that we all have to be careful of in defending people. Again, especially telephones and you are basically in a small room that is easily eavesdropped on by a sheriff's office and then communicated to a prosecutor. That is really bothersome. As I was reading Haggerty's opinion, I was waiting for him to say something about this filter committee that knew up front as soon as they listened to one conversation that this was a confidential communication. Yet deemed it was okay because they were "filtering" it from the prosecutors, which didn't seem okay to me. I was little concerned about that part too. To me it really brings up this possibility that our conversations are being listened to and somehow secretly taped.

1:09:14 P. Levy And what does bother Judge Haggerty so much is that nobody in the US Attorney's Office who knew this was happened or had happened, told the defense or the court about it as they should have.

1:09:34 Chair Ellis Okay. We understand that you are proactively pursuing both those cases that we have appellate records on and at the trial level where there may have been pleas and no appeal. We are doing the best we can to ferret out any of our cases where Detective Steele played an active role.

1:09:54 P. Levy Yeah. But it is not easy to do that. We have asked our contractors to do that. We can't do it.

1:10:06 Chair Ellis I understand that.

1:10:06 P. Levy But unless you have a really good conflict checking system and a database where you enter the name of every involved person, including police officers as some do, but only a few. Unless you have a case that you had prepared for trial and had an outline where you had the names of all of the folks written down in a searchable form, you are not even going to know if this person was involved. It is hard to actually do the audit that he is asking for.

1:10:53 Chair Ellis But we are doing what we can.

1:10:53 N. Cozine We are. I would add too that Jeff Ellis has served on the Department of Justice a request for information that is rather extensive about all the cases that Detective Steele has worked on. He will also be filing that, or has filed it, with the Oregon State Police. We agreed to work

through Jeff so that we aren't filing multiple requests that conflict or create more workload for the Oregon State Police. We want to at least be efficient with the way that we request the information. So hopefully at some point we will have more specific delineation of the types of cases that we need to be looking at. Hopefully a list of cases that we should be looking at.

1:11:36 Chair Ellis Okay. Thanks, Paul.

Agenda Item No. 11 OPDS Monthly Report

1:11:37 Chair Ellis Nancy, are you ready for the monthly report?

1:11:43 P. Gartlan I only have a couple of items for the Commission. First we have a couple of personnel moves. Two of the Deputy I attorneys left the office. One went to the Federal Public Defenders and one went into private practice with Martin Bishoff. So we have been recruiting. We have interviewed several people and we are checking references. We will hopefully extend an offer to the applicants.

1:12:19 Chair Ellis Is it still a buyer's market?

1:12:19 P. Gartlan Pretty much. We don't have the numbers that we had a couple of years ago. But I think we are filtering out more in the upfront process. I can report that the people who are applying are excellent prospects. We are also in the process of perhaps promoting to the Deputy II position. We are in that process right now and we have been receiving applications and close on Friday. We will have interviews and then announce promotions to the Deputy II position later this month. The seniors are in the process of checking in with their team members. What that means is we go through a performance evaluation annually on a management level. At the six month part, the senior deputy who leads a team meets individually with each attorney on that team to kind of give some feedback in a formalized setting. The next item is the AD management. That is me and the chief deputies and we are in the process of doing our annual review and updating of AD Attorney Practices Manual. That is ongoing and we usually have it completed in October. I think we are on schedule for that. The last item is just a review of some of the Supreme Court cases that we are either briefing or arguing. We argued two cases this week. We had one this morning at 9:00. I think both went well. We will see what the result is, or course, later on. We have three more to be argued in October. I will describe those a little bit. One is *State v. Mazzola*. That involves whether or not there is a per se exigency for DUII drugs. Right now there is a case that says that DUII alcohol is almost a per se exigency and police can obtain a blood sample without going through the warrant process in most cases. The question is may the underpinnings of that holding be applied to drugs? It is going a really interesting argument because we arguing you need a factual record with respect to what is the dissipation rate of different drugs and perhaps that is going to affect the equation of whether or not there is an exigency. So that is going to be very interesting. We have another case in October that is interesting. That is *State v. DeLong*. It asks the essentially the bottom line question is whether or not a *Miranda* violation, so police arrest somebody and fail to give *Miranda* warnings, have an exchange of questions and then ask for a consent to search. The person consents and there is physical evidence that is discovered as a result of that consent. Whether or not that *Miranda* violation affects or taints the physical evidence. The US Supreme Court has held that it does not as it is a voluntary consent. That is a very interesting issue. The third one to be argued in October we can refer to this one as the "Judicial Crack Case," because we think that judges cannot resist taking this case and deciding it. I think when you get to the bottom of it, it is a lot more complicated than how I am going to present it, but really the deciding point is whether or not the state has a property interest in wildlife. If I fish or hunt outside my regulation on my tags or licenses, or outside the season and I take a deer, have I stolen from the state such that I am guilty of theft? Or have I merely violated the Fish & Games laws and am I subject to perhaps a misdemeanor. The appellate court couldn't help but write an opinion and the Supreme Court took the case, and it is set in La Grande which is appropriate.

1:17:31 Chair Ellis There is going to be a huge audience.

1:17:32 P. Gartlan We think that is a home court advantage for us. We have four other cases that are in briefing. None of them is as interesting as “Judicial Crack.” But all very interesting in their own right and including the Oregon Supreme Court asked us to appear as *amicus* in a case having to do with post conviction relief. It is a fascinating question, fascinating issue. It has to do with the *Padilla*. The *Padilla* decision that as an attorney doesn’t advise somebody as to the deportation consequences of a guilty plea that is ineffective assistance of counsel. So the question is whether or not that *Padilla* decision can be raised now several years after the statute of limitations for post conviction relief has run, and even after this person actually filed a *Padilla* like claim before *Padilla* and was denied in state court. By the way there is another wrinkle onto this and that is the US Supreme Court held that retroactivity law which, is important in federal habeas that states can come to their own conclusions with respect to state remedies, post conviction remedies with respect to retroactivity. We think this is a really fascinating opportunity to kind of put forth that the post conviction relief statutory scheme does control. We don’t have to look to federal habeas law. Because federal habeas law has to do what federal courts are doing in common with what state courts have done. There is kind of a different relationship, so we were saying that the retroactivity is kind of product of the federalism system. It is just not at play. The question is does the PCR statutory scheme allow for this late and successive petition, so it is fascinating. Another really interesting case is whether or not police need a warrant to tell a veteran to draw blood from an animal and test the blood. So if your dog is at a veterinary can the police call up the vet and say, “Please draw blood from that animal because we suspect animal abuse or animal neglect.” *State v. Bovee* is another case about how far can an expert go with respect to comment on the credibility of a witness. There is a long list of cases that goes back 20 to 25 years. *State v. Medina* involves the question or not whether someone who is arrested and is fingerprinted and signs a state fingerprint card that has his fingerprint on it is guilty of ID theft. Somebody who supplies a false name. The police draft up this fingerprint card and puts his fingerprints on it. The person signs it. Is that ID theft? That is a very statutory interpretation. Heavy, intense analysis. That is all that I have.

1:21:27 Chair Ellis Go back to the absence of a *Miranda* warning. If the facts are what I think you are suggesting, you have someone who doesn’t know that he is arrested and doesn’t know that he is a target.

1:21:38 P. Gartlan He is arrested and in handcuffs in the back of the police car.

1:21:42 Chair Ellis But he is not told all the things a *Miranda* warning would normally tell.

1:21:48 P. Gartlan Correct.

1:21:48 Chair Ellis And he is being asked to consent without knowing all those things.

1:21:53 P. Gartlan Right. The way the argument breaks down and the way the US Supreme Court analyzed, *Miranda* is about being forced to give statements and testimonial evidence. Words coming out of your mouth that can be used against you in court and that is what the *Miranda* warnings are designed to protect.

1:22:16 Chair Ellis But the consent leads to the physical evidence that does the same thing.

1:22:19 P. Gartlan But the US Supreme Court has this analysis that says physical evidence is different than testimonial evidence and physical evidence can’t be twisted and bent the way words can.

1:22:34 C. Lazenby Have they met Detective Steele?

1:22:35 P. Gartlan It is a conceptual difference that the US Supreme Court has said makes a difference. They said all we care about with respect to consent is was it voluntary. They have holdings and so does the Oregon Supreme Court that says, "Police do not have to give warnings to somebody. That person has a constitution right not to consent." Traditionally words and physical evidence has been treated differently. So *Miranda* warnings are required for statements. There are no *Miranda* like warnings with respect to requesting consent.

1:23:22 Chair Ellis Nancy, what else on the monthly report?

1:23:27 N. Cozine Just a few brief mentions. We are continuing the process of trying to identify, well we have identified a new case management system for this office, but we will be piloting it in our juvenile appellate section. The case management system they are using was never fully developed. They need a system that is fully functional. So very exciting that we will be moving along in that trajectory and hopefully by October we will have a more in depth update for you. Also in October, of course, is the management conference. We will actually be offering demos of the two systems that rose to the top of our list. One is called "Defender." The other one is called "Defender Data." If anyone wishes to come to the management conference, it actually will be a very interesting agenda, day one and day two. That is October 9 and 10. We then have the Juvenile Law Training Academy on the 20th and 21st. Again, a very good agenda this year. Any Commissioners who are interested in attending either or both we would love to have you. Legislative days were Monday through Wednesday of this week. Judge Welch was actually here testifying on a guardianship bill and did a very nice job. It was relatively quiet for our office. We are waiting to move through the other piece of the bargaining so that we can move forward with perhaps changes that we can present to the legislature in their December interim days. They will be in session again the 8th, 9th, and 10th. We also expect that during those days we will be giving an update on the juvenile task force. That is the HB 3363 task force. It was created during the last session. Judge Welch is on that committee with me. We also have DHS, Judicial Department, Department of Justice, CASA, and we are working through both a bill draft that would expand what our pilot currently is to include the other systems partners so that everyone has full representation from start to finish, as well as a best practices document for all the different entities in a juvenile court setting. More to come on that. Lots of exciting things moving forward here at the office right now. I think that is all I have.

Agenda Item No. 12 Executive Session

1:26:03 Chair Ellis Okay. We are shortly going to go into executive session. We will after the executive session return to open session, but may not be terribly convenient for those in the audience. So if anyone has something they wish to share with us I would invite it now. Okay. The Public Defense Services Commission will now meet in executive session for the purpose of conducting deliberations with persons designated by the governing body to carry on labor negotiations and to consider information or records that are exempt by law from public inspection. The executive session is being held pursuant to ORS 192.660(2)(d)(f), which permits the Commission to meet in executive session for the purposes just stated. 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. I guess the next question is Paul, do you want to advise us on designated staff for this session.

1:28:03 P. Levy I will let Nancy...we are fine with everybody here.

Agenda Item No. 10 Executive Session

0:15 Chair Ellis

We are back in public session.

0:22 Hon. Elizabeth
Welch

It is not a question for the ED, it is an issue that I just want to raise because it has been a long time since it has been addressed. That the issue of representation of children in delinquency proceedings. We haven't had an update in a long time about how that looks. I know there are a lot of things going on with e-filing and all the other stuff that is going on that may be complicating having access to any useful information, but it has been awhile. It is such a fundamental issue. So I would hope sometime soon when it makes sense, I am not trying to dictate anybody's priorities here, I would hope that significant attention could be given that to. As a subset, I think it has been a couple of years ago now, we had a series of discussions leading to some decisions relating to this whole issue about qualifying for the appointment of counsel. The rates and how much people can make and still qualify and all that which is kind of a little bit of magic anyway. That is factor that very negatively affects children's right to counsel. I would like to maybe have an update on what is going on with. The typical parent of a kid who has been arrested and charged with something - well it doesn't even have to be a significant event. The parents are madder than heck, which is good because maybe that means that as long as they don't get abusive that the issue will be addressed where it most needs to be, which is at home, but they are mad and they don't really want their kid to have a lawyer because they want their kid to get funky by the system. So people have the ability to pay, or at may have the ability to pay, simply refuse to do so. They refuse to fill out the paperwork. They refuse to do anything. There can be situations where a judge asks the kid whether they want a lawyer or not and in jurisdictions where they actually go through any process like this, and the parents simply don't want it. Even if it is not a fiscal issue for them, they just want it to be over with. That is exactly what the issue is with kids. Representing children has an additional sort of coating on it that comes from the fact that all that kids understand is I want out of here. I want away from not. Not that adults don't have that attitude more or less as well. With children it is pretty spectacular sometimes. There are just all these things that seem to be kind of conspiring, an unintentional conspiracy, but conspiring to complicate this issue. We started into this great enthusiasm and commitment on everybody's part and it has been years. How long have we been at this? Five years, six years. End of speech.

4:12 Chair Ellis

Okay. Thanks.

4:12 N. Cozine

We can get that back on agenda. One of things that we are paying attention in our pilot program is what is happening in delinquency cases. Amy can probably speak to that a little bit at our October meeting, but because the practitioners who handle the juvenile dependency cases are also handling delinquency cases, we are counting delinquency cases in their 80. So we anticipate that through that exercise we may be able to make some advancements in the representation in those counties, and that those lessons learned can be applied in other settings. We will be thinking about whether or not there is any information by October that would be helpful. Otherwise, we will make sure we have it on the agenda.

5:04 Chair Ellis

Anything else for the good of the order? If not, I would entertain a motion to adjourn
MOTION: Hon. Elizabeth Welch moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Meeting adjourned

Attachment 2

2016-17 Contract Conceptual Revisions

1) Reasons for revisions

- a) To ensure the contract reflects current expectations for the performance of attorneys or of contract administrators
- b) To ensure the appropriate use and distribution of contract funds
- c) To enhance OPDS monitoring capabilities
- d) To enable meaningful enforcement of contractual obligations

2) Subjects for revision

- a) Performance responsibilities of attorneys
 - i) Better articulation of applicable performance standards
 - ii) Better delineation of proceedings and settings in which representation should be provided
 - iii) Incorporation of CLE expectations in the General Terms
- b) Quality Assurance
 - i) Better articulation of the obligations of contract administrators
 - ii) Caseload limitations
- c) Administrative Responsibilities
 - i) Data collection and management
 - ii) Caseload limitations and reporting
- d) Management of contract funds

Attachment 3

PDSC
2015 Draft Meeting Schedule*

January 15

ED's 2013 Annual Report to the PDSC
Oregon Parent and Children Representation Pilot Program Update
PDSC Discussion of Priorities for 2014-15 contracts

February - No meeting

March 19

Review and Approval of PDSC's Draft RFP
OPDS Budget & Legislative Update

April & May - No Meeting

June 18 - Bend

PDSC Budget & Legislative Update

July 30

Executive Session: Review of Statewide Contracting Plan & Capital Contracts (for contracts beginning 1/1/15)
Action Item: Approval of Statewide Contracting Plan & Capital Contracts
Annual Performance Progress Report

September 17 - Hillsboro

Washington County – Commission Service Delivery Review

October – TBD

Action Plan: Approval of Statewide and Capital Contracts
Action Item: Commission Approval of Biennial Report to the Legislature
PDSC Schedule for 2015 Meetings

November - No meeting

December 17

Commission Training: Public Officials, Public Meetings, & Public Records Laws
ED Review

Additional Potential Agenda Items

Appointment of Counsel in Delinquency Cases
Requirements when representing Veteran Clients
Representation in PCR Cases
Retreat

* All meetings will be held in Salem unless otherwise noted

Attachment 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
KIMBERLY HURRELL-HARRING, *et al.*, on
Behalf of Themselves and All Others Similarly
Situated,

Plaintiffs

INDEX No. 8866-07
(Connolly, J.)

-against-

STATEMENT OF INTEREST OF
THE UNITED STATES

THE STATE OF NEW YORK, *et al.*,

Defendants.

-----X

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STATEMENT OF INTEREST OF THE UNITED STATES

As the Supreme Court recognized in *Powell v. Alabama*, the constitutional right to counsel is more than a formality: It would be “vain” to give the defendant a lawyer “without giving the latter any opportunity to acquaint himself with the facts or law of the case.” 287 U.S. 45, 59 (1932) (quoting *Com. v. O’Keefe*, 148 A. 73, 74 (Pa. 1929)). Without taking a stance on the merits of the case, the United States files this Statement of Interest to assist the Court in assessing whether the State of New York has “constructively” denied counsel to indigent defendants during criminal proceedings. Plaintiffs allege that their nominal representation amounted to no representation at all, such that the State failed to meet its *foundational* obligations to provide legal representation to indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances:

- (1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or
- (2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution’s case—are absent or significantly compromised on a system-wide basis.

Under either or both of these circumstances, a court may find that the appointment of counsel is superficial and, in effect, a form of non-representation that violates the Sixth Amendment guarantee of counsel.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon*. The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). The United States is currently enforcing Section 14141’s juvenile justice provision through a comprehensive settlement with Shelby County, Tennessee.¹ An essential component of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with “reasonable workloads” and “sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters.” *Id.* at 15.

As the Attorney General stated, “It’s time to reclaim *Gideon*’s petition—and resolve to confront the obstacles facing indigent defense providers.”² In March 2010, the Attorney General launched the Access to Justice Initiative to address the crisis in indigent defense services, and the Initiative provides a centralized vehicle for carrying out the Department of Justice’s (Department) commitment to improving indigent defense.³ The Department has also sought to

¹ Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), available at <http://www.justice.gov/crt/about/spl/findsettle.php>.

² Attorney General Eric Holder Speaks at the Justice Department’s 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (March 15, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html>.

³ The Initiative works with federal agencies and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at <http://www.justice.gov/atj/>.

address this crisis through a number of grant programs, as well as through support for state policy reform, and has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.⁴ In 2013, the Department's Office of Justice Programs announced a collection of grants totaling \$6.7 million to improve legal defense service for the poor.⁵ These grants were preceded by a 2012 \$1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*, administered by the Bureau of Justice Assistance.⁶

In addition, it is always in the interest of the United States to safeguard and improve the administration of criminal justice consistent with the prosecutor's professional duty as outlined in the American Bar Association (ABA) Criminal Justice Standards: "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action." ABA CRIMINAL JUSTICE STANDARDS, STANDARD 3-1.2(D), PROSECUTION AND DEFENSE FUNCTION (1993).⁷

Thus, in light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest to address the factors considered in a constructive denial of counsel claim.

⁴ See U.S. Gov't Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose* 11-14 (May 2012), available at <http://www.justice.gov/atj/idp/>.

⁵ As noted by Associate Attorney General Tony West in the announcement, "These awards, in conjunction with other efforts we're making to strengthen indigent defense, will fortify our public defender system and help us to meet our constitutional and moral obligation to administer a justice system that matches its demands for accountability with a commitment to fair, due process for poor defendants." Attorney General Holder Announces \$6.7 Million to Improve Legal Defense Services for the Poor (Oct. 30, 2013), available at <http://www.justice.gov/opa/pr/2013/October/13-ag-1156.html>.

⁶ Grants have been awarded to agencies in Texas, Delaware, Massachusetts, Mississippi, Tennessee, Utah and Michigan.

⁷ Available at http://www.americanbar.org/groups/criminal_justice/standards.html.

BACKGROUND

Fifty years ago, the Supreme Court held that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon*, 372 U.S. at 344. Four years later, the Supreme Court held that the right to counsel extended to juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967). And yet, as the Attorney General recently noted, “America’s indigent defense systems continue to exist in a state of crisis, and the promise of *Gideon* is not being met.”⁸ Recently, the federal district court in *Wilbur v. City of Mount Vernon* echoed this concern, stating, “The notes of freedom and liberty that emerged from *Gideon*’s trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.” 989 F.Supp.2d 1122, 1137 (W.D. Wash. 2013).

Our national struggle to meet the obligations recognized in *Gideon* and *Gault* is well documented.⁹ See, e.g., Am. Bar Ass’n, Standing Comm. on Legal Aid and Indigent Defendants Report, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (2004); National Juvenile Defender Center (NJDC) State Assessments¹⁰ (outlining obstacles to provision of juvenile defense services in numerous states). Despite long recognition that “the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions,” Attorney General’s Committee on Poverty and

⁸ Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

⁹ In March 2013, the Yale Law Journal held a symposium on the challenges of meeting *Gideon*’s promise and published the discussions. See 122 Yale L.J. 8 (June 2013).

¹⁰ Assessments available at <http://www.njdc.info/assessments.php>.

the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide are continually funded at dramatically lower levels than prosecutorial agencies.¹¹

Due to this lack of resources, states and localities across the country face a crisis in indigent defense.¹² In many states, remedying the crisis in indigent defense has required court intervention. *See e.g., Pub. Defender v. State*, 115 So. 3d 261, 278-79 (Fla. 2013) (holding that courts must intervene when public defenders' excessive caseloads and lack of funding result in "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (ruling that the trial court erred when it appointed counsel to indigent defendants when, due to excessive caseloads and insufficient funding, that counsel could not provide adequate assistance, noting that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant"); *Duncan v. State*, 832 N.W.2d 761, 771 (Mich. Ct. App. 2012) (holding that, absent court intervention, "indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome"); *State v. Citizen*, 898 So.2d 325, 338-39 (La. 2005) (holding that courts are obliged to halt prosecutions if adequate funding is not available to lawyers representing indigent defendants).

¹¹ Compare Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Tables* 1 (2012) (noting that prosecution offices nationwide receive a budget of approximately \$5.8 billion), with Lynn Langton & Donald J. Farole, Jr., U.S. Bureau of Justice Statistics, *Public Defender Offices, 2007 Statistical Tables* 1(2010) (noting that public defender offices nationwide had a budget of approximately \$2.3 billion). *See also* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

¹² John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, Nat'l Ass'n of Criminal Def. Lawyers (2013) (describing astonishingly low rates of compensation for assigned counsel across the nation); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide).

The United States is taking an active role to provide expertise on this pressing national issue. Last year, the United States filed a Statement of Interest in *Wilbur v. City of Mount Vernon*, a case in which indigent defendants challenged the constitutional adequacy of the public defense systems provided by the cities of Mount Vernon and Burlington in the Western District of Washington.¹³ As in this case, the United States took no position on the merits of the plaintiffs' claims in *Wilbur*, but instead recommended to the court that, if it found for the plaintiffs, the court should ensure that counsel for indigent defendants have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation, "such as visiting clients, conducting investigations, performing legal research, and pursuing discovery." Ex. 1 at 5-10. The court in *Wilbur* ultimately ruled for the plaintiffs, finding "that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused that deprivation." *Wilbur*, 989 F.Supp.2d at 1124. To remedy this systematic deprivation of counsel, the court ordered increased resources for indigent defense services, controls to be established for defenders' workloads, and monitoring of defenders' actual representation to ensure that they carry out the traditional markers of representation. *Id.* at 1134-37.

DISCUSSION

In this matter, Plaintiffs allege that indigent defendants within five New York counties have been constructively denied counsel in their criminal proceedings. That is, as a result of inadequate funding, indigent defendants face systemic risks of constructive denial of counsel

¹³ Attached as Exhibit 1.

including: “the system-wide failure to investigate clients’ charges and defenses; the complete failure to use expert witnesses to test the prosecution’s case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients.” Plaintiffs’ Mem. of Law in Opposition to the State Defendant’s Motion for Summary Judgment at 41. An analysis of *Gideon* cases informs the United States’ position that constructive denial of counsel may occur when: (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and understaffing of public defender offices; *and/or* (2) indigent defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution’s case. *Wilbur*, 989 F.Supp.2d 1122; *Pub. Defender v. State*, 115 So. 3d 261; *Missouri Pub. Defender Comm’n*, 370 S.W.3d 592; *Duncan*, 832 N.W.2d 761; *State v. Young*, 172 P.3d 138 (N.M. 2007); *Citizen*, 898 So.2d 325; *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *New York Cnty. Lawyers’ Ass’n v. State*, 196 Misc. 2d. 761 (N.Y. Sup. Ct. 2003); *State v. Peart*, 621 So.2d 780, 789 (La. 1993).

Constructive denial may occur even in public defender systems that are not systematically underfunded if the attorneys providing defender services are unable to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”

United States v. Cronin, 466 U.S. 648, 659-60 (1984). This may occur when, for example, the defense attorney is not provided sufficient time to prepare. *Powell*, 287 U.S. at 53-58.

Thus, whether there are severe structural limitations, the absence of traditional markers of representation, or both, the appointment of counsel is superficial and, in effect, a form of non-representation that may violate the guarantees of the Sixth Amendment.¹⁴

I. The Court May Consider Structural Limitations and Defenders' Failure to Carry Out Traditional Markers of Representation in its Assessment of Plaintiffs' Claim of Constructive Denial of Counsel.

It is a core guarantee of the Sixth Amendment that every criminal defendant, regardless of economic status, has the right to counsel when facing incarceration. *Gideon*, 372 U.S. at 340-44 (1963) (holding that the right to counsel is “fundamental and essential to a fair trial”). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon*, 372 U.S. at 340-341, 344; *Powell*, 287 U.S. at 67-69 (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel [A Defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”); *see also Alabama v. Shelton*, 535 U.S. 654 (2002).

¹⁴ If the Plaintiffs prevail, the court may appoint a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a “Public Defense Supervisor” to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is “actual” and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. *See Wilbur*, No. C11-1100RSL at 19. Similarly, in Grant County, Washington, an independent monitor was essential to implementing the court’s injunction in a right-to-counsel case. *Best v. Grant Cnty.*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct. Dec. 21, 2004).

As the New York Court of Appeals held in this matter, claims of systemic constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the *Strickland*¹⁵ ineffective assistance standard which provides only retrospective, individual relief. *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that these “allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”); *see also Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the “ineffectiveness” standard may still violate a defendant’s rights under the Sixth Amendment); *Missouri Pub. Defenders Comm’n*, 370 S.W.3d at 607 (holding Sixth Amendment right to counsel requires more than just a “pro forma” appointment whereby the defendant has counsel in name only); *Powell*, 287 U.S. at 58-61 (holding that counsel’s “appearance was rather pro forma than zealous and active [and] defendants were not accorded the right of counsel in any substantial sense”). Courts have consistently defined “constructive” denial of counsel as a situation where an individual has an attorney who is *pro forma* or “in name only.”

A. *Considering the Role of Structural Limitations*

The provision of defense services is a multifaceted and complicated task. To guide the defense function, the ABA and NJDC have promulgated national standards to ensure that defenders are able to establish meaningful attorney-client relationships and provide the constitutionally required services of counsel. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION; Am. Bar Ass’n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*

¹⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

(2009); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System* (2002); NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012). These standards emphasize the structural supports required to ensure that defenders can perform their duties. They include an independent defense function, early appointment, adequate staffing, funding for necessary services (e.g., investigation, retention of experts, and administrative staff), workload controls, training, legal research resources, and oversight connected to practice standards.

In assessing *Gideon* claims for systemic indigent defense failures, courts have considered the absence of these structural supports as reflected in insufficient funding, agency-wide lack of training and performance standards, understaffing, excessive workloads, delayed appointments, lack of independence for the defense function from the judicial or political function, and insufficient agency-wide expert resources.¹⁶ In *Wilbur*, for example, the court noted the structural limitations—insufficient staffing, excessive caseloads, and almost non-existent supervision—that resulted in a system “broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.”

Wilbur, 989 F.Supp.2d at 1127. The court continued,

The Court does not presume to establish fixed numerical standards or a checklist by which the constitutional adequacy of counsel's representation can be judged. The experts, public defenders, and prosecutors who testified at trial made clear that there are myriad factors that must be considered when determining whether a system of public defense provides indigent criminal

¹⁶ We note that, in alleging that there has been a constructive denial of counsel based on systemic indigent defense failures, plaintiffs are not seeking to reverse criminal convictions but are seeking only prospective injunctive relief. The Court may enter prospective relief upon a finding of a substantial risk of a constitutional violation. See *Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011). In the context of a challenge to a criminal conviction, the defendant must also show that the denial of counsel caused actual prejudice to secure a reversal. *Strickland*, 466 U.S. 668. *Cronic*, 466 U.S. 648, creates a narrow exception to the need to show prejudice where the denial of counsel contaminates the entire criminal proceeding.

defendants the assistance required by the Sixth Amendment. Factors such as the mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available were mentioned throughout trial.

Wilbur, 989 F.Supp.2d at 1126.

Similarly, the court in *Pub. Defender v. State*, 115 So. 3d at 279, held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. Courts have also held in indigent defense funding cases that budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities, and courts have the power to take corrective measures to ensure that indigent defendants' constitutional and statutory rights are protected. *See Citizen*, 898 So.2d at 336. Similarly, in *Lavallee*, 812 N.E.2d at 904, the court held that proactive steps may be necessary when an indigent defense compensation scheme "raises serious concerns about whether [the defendants] will ultimately receive the effective assistance of trial counsel." *See also New York Cnty. Lawyers' Ass'n*, 196 Misc. 2d. 761 (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues); *Young*, 172 P.3d 138 (holding that inadequate compensation of defense attorneys deprived capital defendants of counsel). In all of these cases, the courts granted relief based on evidence that indigent defense services were subject to such substantial structural limitations that actual representation would simply not be possible.

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic

obligations to prepare a defense, including investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. Under these conditions, the issue is not effective assistance of counsel, but, as the Court of Appeals noted, “nonrepresentation.” *Hurrell-Harring*, 930 N.E.2d at 224. Other courts have emphatically made this same point. As the Supreme Court of Louisiana stated, “We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance.” *Peart*, 621 So.2d at 789. The court agreed with the trial court’s characterization that “[n]ot even a lawyer with an S on his chest could effectively handle this docket.” *Id.* The court concluded that “[m]any indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified.” *Id.*

B. Considering the Traditional Markers of Representation

In addition to the presence of structural limitations, courts considering systemic denial of counsel challenges have also examined the extent, or absence of, traditional markers of representation. The traditional markers of representation include meaningful attorney-client contact allowing the attorney to communicate and advise the client, the attorney’s ability to investigate the allegations and the client’s circumstances that may inform strategy, and the attorney’s ability to advocate for the client either through plea negotiation, trial, or post-trial. These factors ensure that defense counsel provide the services that protect their client’s due process rights.

The New York Court of Appeals recognized the importance of these traditional markers, stating, “Actual representation assumes a certain basic representational relationship.” *Hurrell-Harring*, 930 N.E.2d at 224. Other courts have adopted this reasoning. For example, in *Wilbur*, 989 F.Supp.2d at 1128, clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting. The court found that these services “amounted to little more than a ‘meet and plead’ system,” and that the resulting lack of representational relationship violated the Sixth Amendment. *Id.* at 1124. Similarly, in *Pub. Defender v. State*, 115 So. 3d at 278, the court reasoned that denial of counsel was present where attorneys engaged in routine meeting and pleading practices, did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial.

The absence of these traditional markers of representation has led courts to find non-representation in violation of the Sixth Amendment. *Wilbur*, 989 F.Supp.2d at 1131 (noting that in such cases “the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed”) (citing *Cronic*, 466 U.S. at 658-60, and *Avery v. Alabama*, 308 U.S. 444, 446 (1940)); *see also Pub. Defender*, 115 So. 3d at 278; *Citizen*, 898 So.2d 325; *Peart*, 621 So. 2d at 789. The traditional markers require the “opportunity for appointed counsel to confer with the accused to prepare a defense,” engage in investigation, and advocate for the client. *Wilbur*, 989 F.Supp.2d at 1131; *Public Defender v. State*, 115 So. 3d at 278; *Peart*, 621 So.2d at 789; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the

accused.”); *Powell*, 287 U.S. at 59-60 (finding that when “no attempt was made to investigate” the defendants lacked “the aid of counsel *in any real sense*”) (emphasis added).

The New York Court of Appeals, along with many other courts, has taken note of the vital importance of these traditional markers of representation. These markers may be considered in conjunction with the structural limitations placed on counsel to determine whether the counties “constructively” denied counsel to indigent defendants during criminal proceedings. When assessing the merits of the case, this Court may use this framework to assess whether a systemic “constructive” denial of counsel in violation of *Gideon* and the Sixth Amendment occurred from either factor, standing alone or in conjunction.

CONCLUSION

The Court can consider structural limitations and defenders’ failure to carry out traditional markers of representation in its assessment of Plaintiffs’ claim of constructive denial of counsel.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
KIMBERLY HURRELL-HARRING, *et al.*, on
Behalf of Themselves and All Others Similarly
Situating,

Plaintiffs

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants.
-----X

INDEX No. 8866-07
(Connolly, J.)

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STATEMENT OF INTEREST

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1
2 **STATEMENT OF INTEREST OF THE UNITED STATES**

3 The United States files this Statement of Interest to assist the Court in answering the
4 question of what remedies are appropriate and within the Court's powers should it find that the
5 Cities of Mount Vernon and Burlington violate misdemeanor defendants' right to counsel. The
6 United States did not participate in the trial in this case and takes no position on whether
7 Plaintiffs should prevail on the merits. The United States files this SOI to provide expertise and
8 a perspective that it may uniquely possess. If the Plaintiffs prevail, it is the position of the
9 United States that the Court has discretion to enter injunctive relief aimed at the specific factors
10 that have caused public defender services to fall short of Sixth Amendment guarantees, including
11 the appointment of an independent monitor to assist the Court. The United States has found
12 monitoring arrangements to be critically important in enforcing complex remedies to address
13 systemic constitutional harms.

14 In discussing the remedies available to the Court in this Statement, the United States will
15 address questions (1) and (3) of the Court's Order for Further Briefing, with particular focus on
16 the role of an independent monitor. (Dkt. # 319.) To answer the Court's first question, the
17 United States is unaware of any federal court appointing a monitor to oversee reforms of a public
18 defense agency, but the Ninth Circuit has recognized a federal court's authority in this area under
19 42 U.S.C. § 1983. *Miranda v. Clark County, NV*, 319 F.3d 465 (9th Cir. 2003). The United
20 States is aware of one case in which a federal court, through a Consent Order instituting reforms
21 of a County public defender agency, received reports from the county regarding the progress of
22 those reforms. *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1:94-CV-240-GET (N.D. Ga. May
23 21, 1999). However, the Court did not have the benefit of an independent monitor to assist it in
24 assessing the implementation of the reforms.

1
2 Also, an independent monitor is currently monitoring systemic reform of a juvenile
3 public defender system through an agreement between the United States and the Shelby County
4 (TN) Juvenile Court (“Shelby County”).

5 Finally, it is worth noting that but for removal to federal court by the Cities here, this
6 matter would have proceeded in state court, and state court litigation over the crisis in indigent
7 defense is not at all unusual. Those cases bear out the practicality—and, at times, the
8 necessity—of court oversight in this area.

9 In answer to the Court’s third question, a number of states have imposed “hard” caseload
10 standards,¹ but the United States believes that, should any remedies be warranted, defense
11 counsel’s *workload* should be controlled to ensure quality representation. “Workload,” as
12 defined by the *ABA Ten Principles of a Public Defense Delivery System*, takes into account not
13 only a defender’s numerical caseload, but also factors like the complexity of defenders’ cases,
14 their skills and experience, and the resources available to them. Workload controls may require
15 flexibility to accommodate local conditions. Due to this complexity, an independent monitor
16 would provide the Court with indispensable support in ensuring that the remedial purpose of
17 workload controls is achieved.

18 The Washington State Bar’s Standards for Indigent Defense, incorporated by its Supreme
19 Court in its criminal rules, considers the importance of workloads in evaluating the efficacy of
20 defender services. Washington’s move to implement workload controls is a welcome
21 recognition of its obligation under *Gideon*. The United States recognizes that these standards are
22 the result of work commenced at least since 2003 by the Washington State Bar Association’s
23 Blue Ribbon Commission on Criminal Defense and supported by the State Legislature, the

24 _____
25 ¹ For example, Arizona, Georgia, and New Hampshire have specific caseload limitations. A number of states have
“soft” caseload caps by using a weighted system. See attached Exhibit 1 for a description of select jurisdictions.

1
2 Washington Defender Association, and the Washington Association of Prosecuting Attorneys,
3 among others. These workload controls are scheduled to go into effect October 2013.²

4 **INTEREST OF THE UNITED STATES**

5 The United States has authority to file this Statement of Interest pursuant to 28 U.S.C.
6 § 517, which permits the Attorney General to attend to the interests of the United States in any
7 case pending in federal court. The United States has an interest in ensuring that all
8 jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to
9 provide effective assistance of counsel to individuals facing criminal charges who cannot afford
10 an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States can
11 enforce the right to counsel in juvenile delinquency proceedings pursuant the Violent Crime
12 Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). As noted
13 above, the United States is currently enforcing Section 14141’s juvenile justice provision
14 through a comprehensive out-of-court settlement with Shelby County.³ An essential piece of the
15 agreement, which is subject to independent monitoring, is the establishment of a juvenile public
16 defender system with “reasonable workloads” and “sufficient resources to provide independent,
17 ethical, and zealous representation to Children in delinquency matters.” *Id.* at 14-15.

18 As the Attorney General recently proclaimed, “It’s time to reclaim Gideon’s petition –
19 and resolve to confront the obstacles facing indigent defense providers.”⁴ In March 2010, the
20 Attorney General launched the Access to Justice Initiative to address the access-to-justice crisis.
21 Indigent defense reform is a critical piece of the office’s work, and the Initiative provides a

22 ² The United States does not by this mean to endorse or detract from the efforts of these entities.

23 ³ Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), available
at <http://www.justice.gov/crt/about/spl/findsettle.php>.

24 ⁴ Attorney General Eric Holder Speaks at the Justice Department’s 50th Anniversary Celebration of the U.S.
Supreme Court Decision in *Gideon v. Wainwright*, March 15, 2013, available at
25 <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html>.

1
2 centralized focus for carrying out the Department's commitment to improving indigent defense.⁵
3 The Department has also sought to address this crisis through a number of grant programs.⁶ The
4 most recent is a 2012 \$1.2 million grant program, *Answering Gideon's Call: Strengthening*
5 *Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery*
6 *System* administered by the Bureau of Justice Assistance.⁷ In light of the United States' interest
7 in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the
8 United States files this Statement of Interest on the availability of injunctive relief.

9 BACKGROUND

10 The Plaintiffs' claims of deprivations of the right to counsel, if meritorious, are part of a
11 crisis impacting public defender services nationwide. Fifty years ago, the Supreme Court held
12 that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial
13 unless counsel is provided for him." *Gideon*, 372 U.S. at 344. And yet, as the Attorney General
14 recently noted, "despite the undeniable progress our nation has witnessed over the last
15 half-century—America's indigent defense systems continue to exist in a state of crisis," and "in
16 some places—do little more than process people in and out of our courts."⁸

17 Our national difficulty to meet the obligations recognized in *Gideon* is well documented.⁹
18 See, e.g. ABA Standing Committee on Legal Aid and Indigent Defendants Report, *Gideon's*
19 *Broken Promise: America's Continuing Quest for Equal Justice*, (December 2004). Despite

21 ⁵ The office works with federal agencies, and state, local, and tribal justice system stakeholders to increase access to
22 counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford
23 lawyers. More information is available at <http://www.justice.gov/atj/>.

⁶ See Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding* 11-
14 (May 2012), available at <http://www.justice.gov/atj/idp/>.

⁷ Grants have been awarded to agencies in Texas, Delaware, Massachusetts, and Michigan.

⁸ Attorney General Eric Holder Speaks at the American Film Institute's Screening of *Gideon's Army*, June 21, 2013,
24 available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html>.

⁹ In March 2013, the Yale Law Journal held a symposium on the challenges of meeting Gideon's promise and
25 published resulting articles in its most recent issue. See 122 Yale L.J. __ (June 2013).

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2 long recognition that “the proper performance of the defense function is . . . as vital to the health
3 of the system as the performance of the prosecuting and adjudicatory functions,” Attorney
4 General's Committee on Poverty and the Administration of Federal Criminal Justice, *Final*
5 *Report* 11 (1963), public defense agencies nationwide remain at a staggering disadvantage when
6 it comes to resources. Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics,
7 *Prosecutors in State Courts, 2007 Statistical Tables* 1 (2012) (noting that prosecution offices
8 nationwide receive about 2.5 times the funding that defense offices receive); National Right to
9 Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right*
10 *to Counsel* 61-64 (2009) (collecting examples of funding disparities).

11 Due to this lack of resources, states and localities across the country face a crisis in
12 indigent defense. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33
13 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide). In many states,
14 remedying the crisis in indigent defense has required court intervention. *E.g.*, *State v. Citizen*,
15 898 So.2d 325 (La. 2005); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Missouri*
16 *Public Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012). The crisis in indigent defense
17 extends to misdemeanor cases where many waive their right to counsel and end up unnecessarily
18 imprisoned. NACDL, *Minor Crimes, Massive Waste* 21 (2009).¹⁰

19 DISCUSSION

20 It is the position of the United States that it would be lawful and appropriate for the Court
21 to enter injunctive relief if this litigation reveals systemic constitutional deficiencies in the
22 Defendants' provision of public defender services. Indeed, the concept of federal oversight to
23 address the crisis in defender services has gained momentum in recent years. *See, e.g.*, *Gideon's*
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25 ¹⁰ The report is available at <http://www.opensocietyfoundations.org/reports/minor-crimes-massivewaste>.

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2 *Broken Promise, supra*, at 41-42 (recommending federal funding); Drinan, *The Third Generation*
3 *of Indigent Defense Litigation, supra* (arguing federal judges are well suited to address systemic
4 Sixth Amendment claims); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform*
5 *of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000) (advocating systemic litigation). (Again,
6 the United States takes no position on the merits of the underlying suit.)

7 **I. The Court Has Broad Authority to Enter Injunctive Relief, Including the**
8 **Appointment of an Independent Monitor, if It Finds a Deprivation of the Right to**
9 **Counsel.**

10 If Plaintiffs prevail on the merits of their claims, or as part of a consent decree, this Court
11 has broad authority to order injunctive relief that is adequate to remedy any identified
12 constitutional violations within the Cities' defender systems. *Swann v. Charlotte-Mecklenburg*
13 *Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Thomas v. County of Los Angeles*, 978 F.2d 504,
14 509 (9th Cir. 1992) (noting that courts have power to issue "broad injunctive relief" where there
15 exist specific findings of a "persistent pattern of [police] misconduct"). When crafting injunctive
16 relief that requires state officials to alter the manner in which they execute their core functions, a
17 court must be mindful of federalism concerns and avoid unnecessarily intrusive remedies.

18 *Labor/Community Strategy Center v. Los Angeles County*, 263 F.3d 1041, 1050 (9th Cir. 2001).

19 Courts have long recognized—across a wide range of institutional settings—that equity often
20 requires the implementation of injunctive relief to correct unconstitutional conduct, even where
21 that relief relates to a state's administrative practices. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910
22 (2011) (upholding injunctive relief affecting State's administration of prisons); *Brown v. Bd. of*
23 *Educ.*, 349 U.S. 294 (1955) (upholding injunctive relief affecting State's administration of
24 schools). Indeed, while courts "must be sensitive to the State's interest[s]," courts "nevertheless
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2 must not shrink from their obligation to ‘enforce the constitutional rights of all persons.’” *Plata*,
3 131 S. Ct. at 1928 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

4 In crafting injunctive relief, the authority of the Court to appoint a monitor is well
5 established. *Eldridge v. Carpenters 46*, 94 F.3d 1366 (9th Cir. 1996) (holding that district
6 court’s failure to appoint a monitor was an abuse of discretion where defendant insisted on
7 retaining a hiring practice already held to be unlawfully discriminatory); *Nat’l Org. for the*
8 *Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543 (9th Cir. 1987); *Madrid v. Gomez*, 889
9 F. Supp. 1146, 1282 (N.D. Cal. 1995) (holding that the “assistance of a Special Master is clearly
10 appropriate” because “[d]eveloping a comprehensive remedy in this case will be a complex
11 undertaking involving issues of a technical and highly charged nature”).

12 **II. Appointment of an Independent Monitor Is Critical to Implementing Complex**
13 **Remedies to Address Systemic Constitutional Violations.**

14 In the experience of the United States, appointing a monitor can provide substantial
15 assistance to courts and parties and can reduce unnecessary delays and litigation over disputes
16 regarding compliance. This is especially true when institutional reform can be expected to take a
17 number of years. A monitor provides the independence and expertise necessary to conduct the
18 objective, credible analysis upon which a court can rely to determine whether its order is being
19 implemented, and that gives the parties and the community confidence in the reform process. A
20 monitor will also save the Court’s time.

21 In Grant County, Washington, an independent monitor was essential to implementing the
22 court’s injunction in a right-to-counsel case. *Best et al. v. Grant County*, No. 04-2-00189-0
23 (Kittitas Cty. Sup. Ct., filed Dec. 21, 2004). There, the monitor assisted the court and parties for
24 almost six years by conducting site visits, assessing caseloads, and completing quarterly reports
25 on the County’s compliance with court orders. We note that the monitor’s term in Grant County

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2 was limited from the outset to a defined period, and the monitor's final report noted work that
3 still remained to be done.¹¹ In our experience, it is best to continue monitoring arrangements
4 until the affected parties have demonstrated sustained compliance with the court's orders.

5 In 2009, the United States entered a Memorandum of Agreement with King County,
6 Washington to reform the King County Correctional Facility. *United States v. King County,*
7 *Washington*, No. 2:09-cv-00059 (W.D. Wash., filed Jan. 15, 2009). That successful reform
8 process was assisted by an independent monitor. Other significant cases involving monitors
9 include: *United States v. City of Pittsburgh*, No. 97-cv-354 (W.D. Pa., filed Feb. 26, 1997)
10 (police; compliance reached in 1999); *United States v. Dallas County*, No. 3:07-cv-1559-N (N.D.
11 Tex., filed Nov. 6, 2007) (jail); *United States v. Delaware*, No. 1-11-cv-591 (D. Del., filed Jun 6,
12 2011) (mental health system); *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash.,
13 filed July 27, 2012)(police). In each of these cases, the independent monitor improved efficiency
14 in implementation, decreased collateral litigation, and provided great assistance to the court.¹²

15 The selection of a monitor need not be a strictly top-down decision by the Court. The
16 parties may agree on who should fill the role of the monitor, but if they cannot, the Court can
17 order them to nominate monitor candidates for the Court's consideration. In addition, it should
18 be noted that the cost of an independent monitor, however it is paid, should not reduce the funds
19 available for indigent defense.

20 Finally, it should be noted that the appointment of an independent monitor can ensure
21 public confidence in the reform process. With allegiance only to the Court and a duty to report
22 its findings accurately and objectively, the monitor assures the public that the Cities will move
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24 ¹¹ The monitor's final report and two of its quarterly reports are attached as Exhibit 2.

25 ¹² Summaries of those cases, relevant pleadings, and reports from the monitors can be found at
<http://www.justice.gov/crt/about/spl/findsettle.php>.

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2 forward in implementing the Court's order, and will not escape notice if they do not. Moreover,
3 the Cities' progress towards implementing the Court's order will be more readily accepted by a
4 broader segment of the public if that progress is affirmed by a monitor who is responsible for
5 confirming each claim of compliance asserted by the Cities.

6 **III. If the Court Finds Liability in this Case, its Remedy Should Include Workload**
7 **Controls, Which Are Well-Suited to Implementation by an Independent Monitor.**

8 Achieving systemic reform to ensure meaningful access to counsel is an important, but
9 complex and time-consuming, undertaking. Any remedy imposed by the Court may require
10 years of assessment to determine whether it is accomplishing its purpose, and the Court and the
11 parties may need independent assistance to resolve concerns about compliance.

12 One source of complexity will be how the Court and parties assess whether public
13 defenders are overburdened. In its Order for Further Briefing, the Court asked about "hard"
14 caseload standards, which provide valuable, bright-line rules that define the outer boundaries of
15 what may be reasonably expected of public defenders. *ABA Ten Principles, supra*. However,
16 caseload limits alone cannot keep public defenders from being overworked into ineffectiveness;
17 two additional protections are required. First, a public defender must have the authority to
18 decline appointments over the caseload limit. Second, caseload limits are no replacement for a
19 careful analysis of a public defender's *workload*, a concept that takes into account all of the
20 factors affecting a public defender's ability to adequately represent clients, such as the
21 complexity of cases on a defender's docket, the defender's skill and experience, the support
22 services available to the defender, and the defender's other duties. *See id.* Making an accurate
23 assessment of a defender's workload requires observation, record collection and analysis,
24 interviews with defenders and their supervisors, and so on, all of which must be performed
25 quarterly or every six months over the course of several years to ensure that the Court's remedies

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2 are being properly implemented. The monitor can also assess whether, regardless of workload,
3 defenders are carrying out other hallmarks of minimally effective representation, such as visiting
4 clients, conducting investigations, performing legal research, and pursuing discovery. ABA
5 Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense*
6 *Workloads* (August 2009). These kinds of detailed inquiries, carried out over sufficient time to
7 ensure meaningful and long-lasting reform, are critical to assessing whether the Cities are truly
8 honoring misdemeanor defendants' right to counsel, and they can be made most efficiently and
9 reliably by an independent monitor. As shown in Exhibit 2, these are the kinds of inquiries made
10 by the independent monitor in the Grant County, Washington case. Also, should non-
11 compliance be identified, early and objective detection by the monitor, as well as the
12 identification of barriers to compliance, allow the parties to undertake corrective action.

13 An independent monitor may also obviate the need for the Court to dictate specific and
14 rigid caseload requirements. In the Shelby County juvenile justice enforcement matter, for
15 example, the County is required to establish a juvenile defender program that provides defense
16 attorneys with reasonable workloads, appropriate administrative supports, training, and the
17 resources to provide zealous and independent representation to their clients, but the agreement
18 does not specify a numerical caseload limit. *See* Mem. of Agreement at 14-15.

19 CONCLUSION

20 Should the Court find for the Plaintiffs, it has broad powers to issue injunctive relief.
21 That power includes the authority to appoint an independent monitor who would assist the
22 Court's efforts to ensure that any remedies ordered are effective, efficiently implemented, and
23 achieve the intended result.
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25

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*Conditional Admission is Pending

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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