

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Friday, October 17, 2008  
12:30 p.m. to 4:00 p.m.  
The Resort at the Mountain  
68010 E. Fairway Ave.  
Welches, Oregon 97067

**AGENDA**

- 1. **Action Item:** Approval of the Minutes of PDSC's September 11, 2008 Meeting (*Attachment 1*) Barnes Ellis
- 2. **Action Item:** Approval of the Minutes of PDSC's August 14, 2008 Retreat (*Attachment 2*) Barnes Ellis
- 3. Report from Oregon Death Penalty Resource Attorney (*Attachment 3*) Matt Rubenstein
- 4. Review of PDSC Service Delivery Plan for Representation in Death Penalty Cases (*Attachment 4*) and Discussion of Supplementary Guidelines for the Mitigation Function (*Attachment 5*) Matt Rubenstein  
Prof. Sean O'Brien\*  
Robin Maher\*\*
- 5. Introduction to Drug Courts (*Attachment 6*) Devarshi Bajpai\*\*\*  
Oregon Criminal Justice Commission
- 6. **Action Item:** Approval of 2009-11 Budget Binder Narrative (*Attachment 7*) Barnes Ellis  
Ingrid Swenson  
Kathryn Aylward
- 7. **Action Item:** Approval of Service Delivery Plans for Jackson (*Attachment 8*) and Josephine (*Attachment 9*) Counties Barnes Ellis

8. **Action Item:** Approval of Amendments to Complaint Policy and Qualification Standards (*Attachment 10*)

Paul Levy

9. OPDS Monthly Report (*Attachment 11*)

OPDS Management Team

***Please note: Box lunches will be available for Commission members in the meeting room at 12:00 p.m., prior to the meeting.***

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

***Next meeting: The next meeting of the commission is scheduled for November 20, 2008 from 9am to 1 pm at a location to be announced in Salem.***

\***Sean O'Brien** is an Associate Professor of Law at University of Missouri-Kansas City School of Law.

Professor O'Brien has been Director of various criminal defense clinics at UMKC School of Law since 1983, including the Public Defender Appeals Clinic (1983-1985), the Public Defender Trial Clinic (1985-1989), and the Death Penalty Representation Clinic (1990-present). As an Adjunct Professor, he has taught Problems and Issues in the Death Penalty at UMKC since 1995, and he has also served as an Adjunct Professor of Law at Washburn University. He is a member of the Board of Directors of the Midwest Innocence Project. He teaches Criminal Law, Criminal Procedure and Wrongful Convictions.

Professor O'Brien served as the Chief Public Defender in Kansas City, Missouri from 1985 through 1989, when he was appointed Executive Director of the Missouri Capital Punishment Resource Center, now the Public Interest Litigation Clinic, where he represents clients in capital trial, appeal and postconviction cases.

Professor O'Brien is a Past President of Missouri Association of Criminal Defense Lawyers, former Chair of the Missouri Bar Criminal Law Committee, and is a frequent lecturer on criminal justice issues.

\*\***Robin Maher** is the Director of the ABA Death Penalty Representation Project.

She recently wrote an article in the Hofstra Law Review symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

From the abstract:

This article places the Supplementary Guidelines in the context of the ABA's work in the death penalty field. The ABA does not oppose capital punishment but does favor justice. Hence the organization has long insisted that any jurisdiction desiring to retain execution as a criminal sanction provide high quality defense representation in accordance with the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases reprinted in 31 Hofstra L. Rev. 913 (2003). Under those Guidelines counsel is responsible for the performance of a multidisciplinary team that includes at least one mitigation specialist. The Supplementary Guidelines spell out important features of the existing standards of practice which will facilitate the functioning of this team and will help defense counsel to supervise it. The

ABA accordingly welcomes the Supplementary Guidelines as important tools for all those who seek to insure justice for the men and women on death row.

\*\*\* Devarshi Bajpai is the Grants Manager for the Oregon Criminal Justice Commission. He manages \$6 million in grants to 22 Oregon Drug Courts, as well as managing the administration of federal Justice Assistance Grants (JAG). Previously Devarshi was responsible for policy issues related to methamphetamines, opiate replacement therapies, and older adult services at the Department of Human Services Addiction and Mental Health Division. Devarshi has 13 years of experience in the addiction treatment field, having been a counselor and treatment program manager, as well as having served on numerous boards and commissions including the State and National Addiction Counselor Certification Commissions, the Northwest Institute of Addiction Studies, and Dual Diagnosis of Oregon.

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, September 11, 2008

9 a.m. to 1 p.m.

First Floor Conference Room  
Aldrich Kilbride & Tatone LLC

1011 Commercial St., NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
Janet Stevens  
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Becky Duncan  
Paul Levy  
Billy Strehlow  
Amy Jackson

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Chair Barnes Ellis called the meeting to order at 9:03 a.m. and asked for a moment of silence to commemorate the events of September 11, 2001.

**Agenda Item No. 1 Approval of Minutes of August 14, 2008 PDSC Meeting**

**MOTION:** Shaun McCrea moved to approve the minutes; John Potter seconded the motion; hearing no objection, the motion carried; **VOTE 4-0.**

**Agenda Item No. 2** Approval of the minutes of the August 14, 2008 PDSC retreat was postponed until the October 17, 2008 meeting.

**Agenda Item No. 3 Commission Discussion of Service Delivery Plans for Grant/Harney, Baker and Malheur Counties**

Ingrid Swenson noted that although Commissioner Welch could not be present for today's meeting she had raised four issues for discussion: (1) increased use of technology as a means of improving communication between attorneys and clients, and potentially improving the quality of the equipment used for video court appearances; (2) use of insurance pooling to make it more economically feasible for contractors to provide health insurance coverage to their staff; (3) a resource center similar to what the Attorney General's office has created for district attorneys; and (4) a recruitment initiative by PDSC to bring more attorneys to eastern Oregon.

Ingrid Swenson said that although actual presence in the courtroom is preferable to video appearances, improving the quality of the video equipment would be beneficial. In many courtrooms the attorney is unable to speak confidentially to the client without actually leaving

the courtroom or using a second telephone connection. In some areas contract offices have been able to arrange for video conferencing from their offices to clients who are in custody. In order to address the needs and assess whether there are improvements that can be made, it would be necessary to convene a meeting of all the interested parties - the courts, the Department of Corrections, the sheriff's offices, the defense attorneys and others.

Paul Levy reported that another area of potential use is for witnesses, especially expert witnesses, in one part of the state to be able to testify by video in a case being tried in another part of the state.

Chief Justice De Muniz said that the courts have video arraignment capability in every courthouse in Oregon but that there are other uses that could be explored and he would be willing to convene a meeting to bring the parties together to talk about these issues.

Chair Ellis said that the capital cost involved should be a system-wide cost, not borne by the individual contractors.

Chief Justice De Muniz said that the cost could be viewed as security related since prisoners otherwise have to be transported from one location to another.

John Potter noted that OCDLA had previously explored the possibility of insurance pooling among its members but he has not been able to locate the research. He will discuss it again with his board.

With respect to the resource attorney concept Rebecca Duncan said that she had talked with Department of Justice staff to clarify what services and materials they provide to district attorneys. Two divisions in the Department of Justice provide support to district attorneys. The appellate unit provides a service similar to that provided by OPDS's Appellate Division. They confer with district attorneys on cases, prepare written materials for them and make presentations at continuing legal education events. They also prepare manuals. The Criminal Justice Division also has a district attorney assistance unit. They provide counsel to assist district attorneys in some cases. This division also prepares manuals and other publications including an annual appellate update, the Oregon Criminal Reporter (a summary of appellate decisions), a felony sentencing guidelines book, a search and seizure manual and an indictment form book. Six Department of Justice attorneys in the Criminal Justice Division and three in the Appellate Division are currently providing support services. OPDS does not have the same resources or funding.

OPDS currently receives approximately five substantive calls a day. There is a duty attorney assigned to handle those. The division also receives email inquiries. Some providers are not aware of the service although OPDS Appellate Division lawyers have made presentations at nine different conferences this year.

OCDLA maintains a list of experts.

In its structural reviews throughout the state PDSC has been informed in several communities that there are no adequate training resources in their areas. Training is generally more available in areas where there are public defender offices.

Chief Justice Paul De Muniz said that public defense lawyers are often very individualistic. The Oregon Judicial Department's Court Programs and Services Division recently provided a lawyer to serve as a law clerk to all of the one-judge courts in eastern Oregon and some of the two-judge courts. The law clerk does all their research and communicates with them electronically.

Steve Gorham said that defense lawyers have a great resource at OCDLA through the list serve. In addition, Willamette University College of Law publishes advance sheets.

Commissioner McCrea said that she has been impressed with the level of the discussion that takes place on the list serve. OCDLA also publishes a newsletter and a Criminal Law Reporter every month.

Commissioner Potter said that the prosecution system is a very centralized system and the defense is a decentralized system. Some defenders handle privately retained cases, others do only public defense cases. Inquiries and responses come from both groups. OCDLA does not have the staff or resources to update its search and seizure manual more often than once every six months.

Ingrid Swenson said that some of the information provided on the list serve is excellent. All of it is provided by volunteers. The Commission could consider whether it should contract with one or more attorneys to provide this kind of information. In order to serve both retained and appointed lawyers, some method of dividing the cost would need to be identified so that OPDS funds supported only public defense attorneys.

With respect to the recruitment of attorneys to work in eastern Oregon, Chair Ellis, Chief Justice De Muniz, John Potter and others talked about recruiting events at the law schools, including events directed at the younger students, and the need for criminal lawyers to convey the importance and joy of the work they do. Chair Ellis proposed that OPDS institutionalize its involvement in recruitment events so that it is a more active planner and participant in these events. He would like to follow up on this issue at a future meeting. OCDLA now has a listing of job openings for criminal and juvenile lawyers on its website. Paul Levy noted that Lewis and Clark sponsors a career day for first year law students at Portland law firms. The challenge, however is to attract attorneys to practice in less populated areas. Commission Stevens said it is hard to do that when these counties are losing population. Some kind of incentive is needed. Jack Morris said that even if you are able to get new lawyers to practice in less-populated areas, as soon as they get sufficient training and experience to handle Measure 11 cases they move to other areas. Additional compensation would be needed to keep attorneys in less populated counties. Bert Putney said that he has had similar experiences and that the salaries he is able to pay are insufficient to keep attorneys in the area.

Ingrid Swenson said that the Chief Justice had suggested that the Commission consider a scholarship fund for law students who would be commit to spending a specified period of time in one of these areas.

Ingrid Swenson reviewed the testimony that was provided to the Commission at its meeting in Baker City on August 14, 2008.

Chair Ellis raised the issue of whether providers should receive increased rates in cases in which their clients are incarcerated since it takes additional time to get into and out of the prisons. Kathryn Aylward said instead of a special rate it might be appropriate to increase the contractor's overall rates by a certain percentage.

Chair Ellis noted that another issue for providers in low population areas is that caseloads fluctuate and contractors perhaps should not take all of the risk. One option would be a flat rate for providing the service, regardless of caseload. Kathryn Aylward said that there are a number of ways it could be done, including covering an attorney's overhead at a certain

amount per month and then paying a small additional sum for each case. Sometimes the fluctuation is in the type of case that might be assigned during a given month; there might be five misdemeanors or five Measure 11 cases. OPDS has sometimes agreed to a single rate for all case types to cushion against those variations. OPDS has also been very flexible in terms of allowing contractors to carry over shortages or overages. The agency moved away from output contracts because of public misunderstanding. Some blend might be the solution. Commissioner Lazenby said that these contracts would probably not be appropriate in more populated areas.

Chair Ellis asked how an aging practitioner could bring in a new attorney and provide training so that there would be someone to take over the practice. Kathryn Aylward said it is difficult to bring in another attorney if the caseload is not there. Maybe it would be possible to find a metropolitan area attorney who would be willing to take over the practice of a retiring attorney if there were a guaranteed income for a period of years.

Ingrid Swenson said that Judicial District 24 -Grant and Harney Counties - is experiencing the most severe attorney shortage of the three districts and probably needs an additional attorney to manage the caseload. Kathryn Aylward said that OPDS had significantly increased the rates in this district in the last contract. They also receive the same rate for all case types. Ingrid Swenson said that the service delivery systems in place in Baker and Malheur Counties appeared to be appropriate for these jurisdictions.

Chair Ellis and Commission members discussed the fact that Malheur County is in close proximity to the Boise, Idaho area but that Oregon attorneys did not appear to be very involved with members of the Idaho bar.

#### **Agenda Item No. 4**

#### **Commission Discussion of Service Delivery Plans for Jackson and Josephine Counties**

Ingrid Swenson summarized the testimony and reports received at previous PDSC meetings regarding the structure of the public defense delivery systems in Josephine and Jackson Counties.

In Josephine County she said that the two principal providers were both functioning well - the Southern Oregon Public Defender office and the Josephine County Defense Lawyers, Inc. consortium.

Chair Ellis noted a statement in the report by Bert Putney recommending that the commission consider having a single organization provide services in each region of the state. At the chair's request Mr. Putney explained that he believed there were efficiencies in operation that could be achieved by having a single entity manage a number of offices in a particular region of the state. There would be savings in the cost of providing payroll services and CLE sessions, and a larger entity could probably negotiate better rates on employee health insurance for defender offices. The new entity would be a private non-profit that would act in an administrative capacity over the delivery of legal services but the existing public defender offices would continue to provide the legal services. Mr. Putney had not discussed the proposal with other public defense offices.

Ingrid Swenson summarized the information that had been provided about the three contractors in Jackson County – the Southern Oregon Public Defender (SOPD), the Los Abogados consortium and the Jackson Juvenile Consortium (JJC)

Mark Burkhalter, with JJC, testified that the consortium now has five full-time attorneys, that the group has met often to discuss the concerns raised at earlier commission meetings and that caseloads have been reduced from an average of 815 case credits per year per FTE attorney to 594. Although this number is still high it is no longer the highest in the state and the problem

appears to be a statewide one. He said that the Commission's concern about the consortium's caseload came as a surprise since it had not been part of the discussion when the last contract was negotiated. In the future he believes the number of review hearing in the county might drop when the current juvenile judge retires at the end of the year. He believes attorneys are doing good work on their cases. He said he would like to see caseloads go down if compensation did not go down. It is hard to find qualified juvenile lawyers. It might be preferable to hire paralegals to maintain contact with clients and others involved in the case. SOPD currently handles approximately one third of the juvenile cases and the consortium handles the balance. Mr. Burkhalter said that he does not see it as the attorney's role to perform social work in juvenile cases.

Christine Herbert testified by phone and told the Commission that the report implied that consortium attorneys were not providing representation post-disposition. She said that was incorrect; attorneys were talking to their clients between hearings and sometimes attending meetings with them.

Ingrid Swenson said that caseloads are an issue in a number of jurisdictions but that it was appropriate for the Commission to have the discussion in Jackson County because JJC's caseload per FTE was the highest in the state. She said that the consortium's caseload had been an issue that was discussed with them a number of times in the past, including after a comprehensive site review. When OPDS's efforts to encourage the consortium to add attorneys failed, Southern Oregon Public Defender was asked to take a portion of the juvenile caseload. She also summarized the kinds of activities attorneys need to take on behalf of dependency clients after adjudication. She said these require advocacy outside the courtroom but are legitimate legal representation, not social work.

Mark Burkhalter said that he and the other consortium attorneys spend the majority of their time in the courtroom and, consequently, are generally not available to attend meetings in other locations.

Mark McKechnie, the Executive Director of the Juvenile Rights Project said that although the caseloads handled by Juvenile Rights attorneys are less than half of caseloads carried by JJC attorneys, he believes that Juvenile Rights attorneys need to reduce their caseloads by 20%.

With respect to the Los Abogados consortium, Chair Ellis inquired whether some greater effort should be made to persuade the consortium to follow best practices for consortium management including a more structured management system and mechanisms to permit the consortium to take appropriate actions if members cease to perform satisfactorily. Ingrid Swenson described the information that had been made available regarding the need for such management tools as well as effective models used by other consortia but said that these had always been treated as recommendations rather than mandates. She said this consortium had not experienced any difficulties to date. Kathryn Aylward expressed her preference for imposing as few mandates as possible upon contractors because they make it more difficult to reach agreement.

## **Agenda Item No. 5**

### **OPDS's Monthly Report**

Kathryn Aylward reported that her division would be issuing a request for proposals for death penalty mitigation contracts in the near future.

Rebecca Duncan said that the Appellate Division had conducted several moot courts in preparation for some Oregon Supreme Court reviews in September. One of these was for a non-employee attorney. She believes it is educational for AD attorneys and a valuable service to the trial bar. The division is also conducting moot courts in *Oregon v. Ice*, an AD case that is pending argument before the United States Supreme Court in October. She said the Court of Appeals had recently conducted a training for juvenile appellate practitioners. She said the

appellate backlog is being reduced as a result of both internal and external pressure. The “no further extension date” will be reduced from 250 days for each side to 180 by next summer. She said a new Deputy I would be joining the office and there is an open position that has already been posted.

Ingrid Swenson said that Chair Ellis, Commissioner Potter, Kathryn Aylward and she had met with the governor’s staff to discuss PDSC’s 2009-11 budget proposal.

**MOTION:** Janet Stevens moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, September 11, 2008

9 a.m. to 1 p.m.

First Floor Conference Room  
Aldrich Kilbride & Tatone LLC

1011 Commercial St., NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
John Potter  
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Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Becky Duncan  
Paul Levy  
Billy Strehlow  
Amy Jackson

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[Meeting was called in order at 9:03 a.m.]

06 Chair Ellis This is September 11 and I think everyone in the room has a personal memory of where you were when those events occurred. I think it might be appropriate to have a moment of silence to commemorate that.

**Agenda Item No. 3 Commission Discussion of Service Delivery Plans for Grant/Harney, Baker and Malheur Counties**

31 Chair Ellis I guess we can't approve minutes without a quorum. We will defer that. You mentioned on the retreat minutes that they are in progress but haven't been finished yet.

46 I. Swenson That is correct. The minutes were unduly lengthy because it was an all day meeting with the meeting and the retreat. Our staff was simply not able to finish the transcription until yesterday. I would like the chance to summarize those before I provide them to you. I would suggest that we revisit that. I can send them out as soon as they are ready. We can have an action item approving them at the next meeting. The only item from that meeting that I think you would want to be aware of today is that Commissioner Welch mentioned that she would not be present today. She and her husband are on a trip to Russia. She suggested four topics for consideration when you began to consider service delivery plans for eastern Oregon counties. When you are ready to hear those I can remind you of what her suggestions were.

1:47 Chair Ellis Go ahead.

1:47 I. Swenson Well, the four areas she hoped you might look at were (1) increased use of technology as a means of communicating between attorney and client, and also potentially improving the

quality of the equipment used for court appearances when people appear by video transmission, (2) the potential for insurance pooling as a way of assisting our providers to be able to afford health benefits for their staff; (3) a research resource and I think by that she meant something similar to what the Attorney General's office is able to provide for district attorney offices in terms of resources for our contractors; and then (4) she suggested, without further description, a recruitment initiative by PDSC, assisting in the recruitment of attorneys to practice in eastern Oregon.

3:02 Chair Ellis            Maybe we ought to talk about those right now. All of these are ones that we have talked about before. Let's start with the technology. It did seem to me that there is a fair amount of use of technology for remote appearances occurring in the eastern counties. I don't know that we are in a position to do much more than encourage the court system there to keep going on that. What was your sense?

3:43 I. Swenson            Well, Mr. Chair, I think there are a couple of things to think about. One is that the quality of the equipment makes a lot of difference in terms of how good a substitute it is for actual presence. I think what you heard, certainly from Judge Sullivan and other commentators as well, was that it is certainly better if people can be there under all circumstances. We haven't been able to duplicate their actual presence. One of the problems that was brought to your attention was that oftentimes the equipment being used does not offer the attorney and the client, who are in different locations, to communicate confidentially while still participating in whatever hearing is involved. In some courtrooms, for example, it is necessary to use cell phones so that the attorney has a cell phone connection with the client in addition to whatever the official equipment is that is being used. It is awkward. In other circumstances they clear the courtroom so that the attorney and the client can confer outside the presence of the other parties. There is equipment, and the Chief Justice is probably aware of some of it, that does allow for that kind of communication using the same equipment. I have seen it but I haven't ever used it myself. That is one area - just improving the ability to communicate confidentially. Then at Metropolitan Public Defender in Portland they do have a room set aside where lawyers have the capacity to have video conferences with clients in custody. I believe it is just the jail but I think it also possible, if it isn't already being done, to have that kind of communication with prisoners in state institutions as well. That is another potential area to explore, having providers who can interview their clients in a confidential setting while they are in prison. The prisons and the jails have the capacity to do that, but it is a matter of making sure that the equipment is available to the attorneys and that it is all compatible. I think the first step in that direction would be to have somebody, maybe us, or maybe you will decide somebody else needs to do that, maybe our providers - but somebody needs to convene the local conversation about, "Okay, with whom do we need to communicate? What is the technology that is currently available and who needs to be at the table - the Department of Corrections, the courts, all of those people?"

7:08 Chair Ellis            It does seem, and particularly in the eastern part of the state where you have prisons sited, this would be terrific if the prison facility would have confidential space and the client could be there. We keep hearing how hard it is and time consuming for our lawyers to go through the access process.

7:39 P. Levy                One other area of possible development, and I haven't had a chance to share this with Ingrid, I had a call from an attorney who had a retained case recently in Baker City. There were to be two witnesses from the Portland area. One was for the state and one for the defense. For the state, the witness was from the Oregon State Crime Lab. The attorney reached an agreement that both his witness and the state's witness would testify by video at the Oregon State Police Crime Lab in Clackamas. That worked out well for him. He suggested, and it was why he called, that we might want to explore some more formal arrangement with OSP to use their video equipment so that the expense, at least of travel and hours for witnesses that we pay for could be (inaudible) by that kind of arrangement.

8:48 Chief Justice De Muniz Well, as all of you at the table know, of course we are committed to leveraging all the electronic capability that we can. We have video arraignment capability in every courthouse in Oregon, but I would be happy to be the convener, if you would like, to bring the parties together to talk about these issues. It might be that the court would be the proper convener for getting everybody together. I think this could be a valuable service particularly in areas with those long distances. We could really expand our use of video capability to be more client-based.

9:35 Chair Ellis What kind of leaps out at you is that it is a capital cost that should be a system-wide cost. It is one of those things that doesn't make sense to think of as an individual defense provider's expense. It should be common.

10:01 Chief Justice De Muniz I'm sure all of you here are aware with the counties owning the courthouse, sheriffs being responsible for security, transport, all of those things, that the court is trying to provide its part of it. The money for these projects comes from a variety of pots. We have stretched, in many ways, the use of our security funds to upgrade our video capability because we could make an argument that you don't have to transport, so therefore this is a security issue. You are absolutely correct that it should be a system-wide thing, but you have to be able to convene all the parties at the table or you get nowhere.

10:52 Chair Ellis I think the courts need to be at the center of it.

10:56 Chief Justice De Muniz I will commit to doing that.

11:05 Chair Ellis Any other thoughts on the technology topic from Judge Welch? She had the insurance pooling and John you indicated ...

11:18 J. Potter It was a number of years ago and I spent some time looking back at OCDLA minutes and I can't find the board member that did the research, but we did some research, or one of our board members did some research, to see if we could get group insurance rates. At the time our group, OCDLA, wasn't large enough to qualify for these large group rates. I marked it on the agenda to discuss again with the board. I will gladly take another look at it and make some calls to insurance providers.

11:57 Chair Ellis The concept is terrific. It is just a question whether the insurers are willing to think of this as a definable population.

12:15 J. Potter It came up from OCDLA's perspective slightly differently than from OPDS' perspective as just a benefit that OCDLA could offer to members. That is how we were looking at it. We'll take another look.

12:32 Chair Ellis The resource attorney concept, I take it, is a little like we are doing in capital punishment now but it would be in other areas that you would have something more refined than just our appellate lawyers available for a phone call. It would be a little bit more focused.

12:50 I. Swenson I think that was her recommendation. Next month you will receive a report on the death penalty resource center. Matt Rubenstein will be attending the meeting and some other folks will be there too to talk about what that is looking like and the contribution Matt is making in death penalty representation. I asked Becky Duncan to check with the Department of Justice to find out a little more about the information they provide, the services they provide, and whether some of their specific tools are public records and available for use by our attorneys.

If you will remember Bob Whitnah was the person who was talking about having been a deputy district attorney and having access to the search and seizure manual. I don't think he mentioned any other materials specifically but he really liked that manual. The question that came to our minds was, "Why can't we have that manual?" Anyway, Becky, I know, has had a chance to explore these questions with the AG's office in terms of what is available.

- 14:09 Chair Ellis                    Good morning, Becky.
- 14:09 B. Duncan                    Good morning. I did have the opportunity to talk with Tim Sylwester who has testified before you in the past. He has worked both in the Criminal Justice and Appellate Divisions of the Department of Justice.
- 14:21 Chair Ellis                    He is the capital punishment attorney?
- 14:22 B. Duncan                    That is what he testified to you about. He is now back in Appellate. Just about the resources that the Department of Justice provides to their trial attorneys, basically those come from two different divisions of the Department of Justice. The appellate unit provides support kind of like what the Appellate Division of our office does, which is to take calls from district attorneys throughout the state. They talk to the district attorneys about cases that the district attorneys are going to refer for state appeals, so they work with the attorneys when they are in court litigating cases they think will come before the appellate courts. Some of the people at the Appellate Division also prepare written materials for use by the trial attorneys and do presentations to the Oregon District Attorney's Association and other ...
- 15:13 Chair Ellis                    Is this, I mean I have always understood it to be briefs on specific topics, but does it go beyond that?
- 15:21 B. Duncan                    The manuals that they prepare do and that is just the Appellate Division. The division which I think was perhaps what Mr. Whitnah was talking about is the Criminal Justice Division of Department of Justice which has a district attorney assistance unit. They have attorneys who will assist trial level district attorneys at different levels of involvement in a case, from just answering questions about strategy, to working on motions, to second chairing cases, to - in some instances this unit of the Department of Justice has their attorneys out trying cases in local jurisdictions. They also prepare a number of manuals. Tim Sylwester identified a number of publications that they have. They do an annual appellate update. Then they do what they call the Oregon Criminal Reporter, which is like a summary of the appellate decisions for the last 15 years divided into subject areas. They do a felony sentencing guidelines book, which I assume is like the one that OCDLA has, prepared by Jess Barton. They do the search and seizure manual that Mr. Whitnah referred to. They do an indictment form book. They also go out and do trainings at ODAA and they do a week long new prosecutors' course. It is different training resource than we have for defense attorneys throughout the state. It is dedicated attorneys who are there to provide all sorts of different levels of assistance to the trial attorneys. As far as staffing, Tim Sylwester identified six Department of Justice attorneys in the Criminal Justice Division who are providing this type of support to DAs throughout the state. He said that in the Appellate Division he receives calls and provides support to district attorneys. He estimated that it takes up about a quarter of his time. He identified two other Appellate Division attorneys who receive a lot of calls. That would be Jonathan Fussner and Paul Smith. They are both attorneys in charge of the Appellate Division. In our Appellate Division we perform the same sort of function but we don't have the same sort of resources or funding that the Criminal Justice Division has to support district attorneys.
- 17:54 Chair Ellis                    Describe the current situation. How frequently are trial level providers calling appellate lawyers.

18:01 B. Duncan I would say that we get probably less than five substantive calls about how to handle a legal issue a day. We have an attorney who serves as our on duty attorney who takes those calls from the trial bar. So every day there is a dedicated attorney who handles those. We get some calls through that channel. We get emails also. Those can go to individual attorneys who have made connections to the trial bar. It is kind of like Tim Sylwester receiving, or John Fussner or Paul Smith receiving requests from the district attorneys. It doesn't sound like we are getting the same volume that Tim Sylwester does, if he spends a quarter of his time doing DA support.

18:49 Chair Ellis Is that because the providers don't know the service is available?

18:54 B. Duncan Yes. It may be that they don't know that they can do this, although we go out and present at OCDLA. I reviewed the seminars for 2008. We have been at all of the OCDLA seminars. We have had nine different attorneys present at OCDLA or at in house CLEs or through the Oregon State Bar. We are out there and we do tell defense attorneys that they can call us, but it doesn't sound like we are letting everybody know about that. We also have our webpage which has been updated this year and which will continue to be updated to be more user friendly.

19:46 Chair Ellis Do we have a central resource for locating experts in the area?

19:53 B. Duncan No. The Appellate Division does not. OCDLA keeps a list of experts.

19:59 J. Potter We have a list that is maintained and updated every year.

20:08 Chair Ellis I can see some parallels with cases like sex abuse cases which must be very specialized. A lawyer who has never had one may get one. I don't know if we do anything other than word of mouth in that kind of specialized area.

20:32 I. Swenson The kinds of assistance they need in those kinds of cases are generally practice assistance rather than legal knowledge. That is another issue entirely.

20:48 Chair Ellis Do you get the sense there is a demand from the providers that we look at some of these areas and try to develop a resource for them?

21:02 I. Swenson I think the Commission has learned in its trips throughout the state that there is a training component that is lacking in some communities. It is not always the same and in those areas where we have a strong public defender office, that office can serve as a resource since attorneys from that office often go on to become consortium members. It works better than in communities where there is no public defender to do the training and lawyers have to train themselves. I don't know that I am aware of a big demand but it doesn't mean that there isn't a need.

21:42 Chief Justice De Muniz I am probably the last one to say since I haven't been a lawyer in a trial for 19 years but I think it is a cultural matter. It is not necessarily that these services aren't available. They are available, but lawyers in public defense work are often very individualistic. There isn't that same culture of relying on DA assistance. Now, that doesn't mean that you can't move forward using technology and I will give you one example that we are doing. For years in, well, forever, our eastern Oregon judges have not had law clerks. Last year I put in place a virtual law firm. We have a lawyer working out of the Court Programs and Services Division that is dedicated to all the one-judge courts in eastern Oregon and some of the two-judge courts. That is his job. He does all their research and makes everything available to them and is their resource. They do it all electronically. It seems to me that all those capabilities exist. It is just whether the culture of the defense bar wants to tap into all of it. Often it is so

specialized, at least it was when I was still practicing, as to what the law might be on a particular subject.

23:43 S. Gorham

Steve Gorham, for the record. We have a great resource at OCDLA. I think a lot of what the state AG's office does OCDLA does through the pond, the email especially. People go to the email list for advice, or experts, or legal issues and that is an invaluable resource. I know there are probably other services but Willamette University College of Law puts out a – every time the advance sheets come out they put out a review of the cases. That, I think, supplements what OCDLA does in their criminal defense lawyer legal publication. There are resources out there. I think the pond is especially valuable to both inexperienced and experienced attorneys.

24:45 S. McCrea

I agree with that, Steve. I subscribed to the pond years ago and I got kind of tired of some of the chatter that went on but I sort of steeled myself and re-subscribed. I was just saying to the Chief that I am really impressed by the level of conversation that goes on. Somebody asks a question and people are willing to share motions, they are willing to share information, they are willing to share links and resources and that kind of thing. I am also kind of concerned from time to time at some of the questions that get asked. I am thinking, "Okay, you should know the answer to this," but that is okay because they are asking and then they get a response and they know the answer instead of just going forward without getting the information. That is good and I think the bottom line is technology is paramount. You have to be linked these days in order to effectively practice. I get the OCDLA newsletter that comes every month and the Criminal Law Reporter that comes every month. I have the Willamette reports as well and I get the Ninth Circuit daily. It really makes a difference and then the other thing is, and this is part of the culture of us sort of being like cats where we don't really go in herds or packs, but you can call people. I called Lisa Maxfield and I said "God, I need help with an expert because he is going testify in this sex case. I can't get a transcript." And I called Pete Gartlan and he looked and tried to find one but they didn't have one of this guy. But Lisa was able to get me a whole bunch of stuff that was really helpful. Now I have her stuff and when she needs something I can help or if someone calls me I can help them. I think there is a good culture of assisting one another and the technology is really important. Becky, I made a note because I would never think of calling you guys. I do look at the website and it is very good and very helpful. You will be getting calls from me now.

26:46 Chair Ellis

You don't do indigent work.

26:47 S. McCrea

That doesn't matter. They are just there to serve all of us, aren't they? If my client gets convicted they are probably going to be getting the appeal.

27:09 Chair Ellis

Anything else on the resource?

27:10 J. Potter

I was going to touch on that. As we compare these two systems, the prosecution system and the defense system, it is really a centralized system with the prosecution and a decentralized system with the defense. Then the defense system is also broken down between those who are doing public defense work and those who are doing retained defense work. When Shaun said she was going to call that is what struck me too. "Is that service available to the private bar?" And it may not be.

27:46 S. McCrea

I think we are going to have to have some discussion about that.

27:46 J. Potter

That is why OCDLA does fill a void because it crosses all of those lines. What OCDLA doesn't do as well as the AG, and that was clear from the testimony, is it doesn't have lawyers on staff to provide trial level legal assistance to people, nor does it have people that keep up a search and seizure manual every day like the AG will do. We update every six months. The Criminal Law Newsletter goes out 24 times a year, but you can go online and get it the day after the court rules.

28:31 I. Swenson Mr. Chair, just one comment about relying on OCDLA pond for legal guidance - in fairness I would have to say that it is uneven in terms of the kind of advice you get. You are fortunate if the right people have time to monitor it and time to respond. Recently that has been more and more the case. There are a number of lawyers out there who are dedicating a lot of their time to responding to these things. Whether it is fair to let volunteers take on that obligation, or not, I don't know. The lawyers who ask the question either get a response from a very capable, competent lawyer or they get another response. Do they know the difference? Well, we don't know about that. It has improved a lot. One thing the Commission could consider is whether it should potentially contract with one or more of those people to provide some kind of response to inquiries from public defense providers rather than having these lawyers volunteer their time.

29:44 J. Potter I know that right now those inquiries are coming from both public defense providers and the private bar. The answers are also coming from public defense providers and the private bar. When the Chief was talking about the culture of the defense bar it is one of sharing information. You can call whoever you believe the best lawyer is in the state and that lawyer inevitably will talk to you. It is an amazing culture in that sense.

30:17 Chair Ellis Do you see anything we ought to be doing differently?

30:19 J. Potter I like the idea of having a person that is a trial level lawyer that can be a go to person that someone can call. I am not sure what the best way to do that is. I am not sure it is in the appellate office if Shaun can't call that lawyer as well. If you contract with somebody like an OCDLA type organization or a non-profit organization you still have the same problem because it is state money coming into the contract. If it is with us we are going to provide the information to anybody who calls. Maybe you say, "We think, and we can demonstrate, half the criminal defense lawyers out there are doing some public defense work and therefore would qualify and half don't." The state then says, "We feel comfortable funding half of a person and OCDLA, or whoever is the contracting agency, you figure out a way to fund the other half."

31:31 Chair Ellis It has always seemed to me that the legal research piece is a reinvention of the wheel that should not go on if there is good briefing available and the appellate division is sharing it. That part I understand. I think the idea of a trial level resource as they call it, someone who would be a second-chair on cases or an expert in particular types of case, I guess I haven't heard that there is a big demand for that.

32:12 J. Potter Well, the demand for it has been filled in death penalty cases, as Ingrid noted. We now have a death penalty resource center, a person, and there aren't many retained death penalty cases so we don't have to cross that bridge. I haven't had private lawyers coming and saying, "We have no resources out there. We can't get answers to our questions." That is true.

32:39 Chair Ellis The fourth topic that Commissioner Welch had was recruitment. John, I know you have some recent history on that. I think the concept is to be proactive at the law school third year level to really encourage younger lawyers to get into defense work. They may not find their way there on their own. The idea is that it is a terrific time because people are making decisions and they are making career choices. Chief, you had your hand up?

33:18 Chief Justice De Muniz Only to say that I think it needs to begin before the third year. One of the best programs that Willamette, and I don't know if you did them at all the law schools, but it seemed like three years ago or so you did a defense evening at the law school. It was attended by first-year law students, many of whom I have watched over the last three years because they were in my son's class, and a number of them migrated to criminal law, into defense work, as a result of that presentation that was made at the law school. I think there needs to be an organized – I

realize that is one step removed from getting everybody over on the other side of the mountains.

34:15 Chair Ellis

But it is only one step.

34:15 Chief Justice  
De Muniz

It ought to begin the first year as opposed to something about the third year. I know as a result of that meeting at least three people dedicated themselves to finding clerkships in public defender agencies as a result.

34:40 Chair Ellis

I can really envision at each of the three law schools, and you are exactly right it shouldn't be just at graduation, putting a group of two or three, particularly younger lawyers, that have made the move into defense work, get them to go and present for an hour or two on the excitement and the joy of the work they do. I don't know that a lot of law students understand that. They may well think that criminal law is dirty and ugly and all that. It is intellectually interesting but they don't really see themselves actually doing it.

35:23 Chief Justice  
De Muniz

Let's be honest, Barnes, a step-child of the law.

35:35 Chair Ellis

I can see a lot of what we heard particularly in the low population areas, but we have heard it in plenty of places, "You need to stimulate new entry." And this is something that wouldn't be hard for us to sponsor and get some of our good providers to do. How do we follow through on that?

36:04 J. Potter

Well, OCDLA a couple of years ago started a yearly program of going out to the law schools. The chief did participate in a panel at Willamette Law School two years ago. Then two days ago I was at Willamette Law School with three local providers, Walter Todd, Tom Sermak, and Tara Sinks, to talk to first-year law students. There were 28 students that showed up for that. The career services folks took the initiative and called and said, "I know you do a program usually in January but we have these first year students," basically saying the same thing you are, "that we are trying to get information to very early on in the process, so we are inviting different components to come in and talk." The prosecution was going to come in sometime later in another month. The notion was to get these kids some information to help them make a decision. At the end of this one hour presentation students came up and shook Tom Sermak's hand, or shook Walter Todd's hand or Tara Sinks' and said, "We really saw the passion. We really appreciate you coming out." And people took information. It was a great introduction. How do you institutionalize these? Certainly OCDLA would partner, because Ingrid chastised me yesterday when I mentioned this to her, she said, "How come you didn't get somebody from the Appellate Division to come on this panel too?" I agree that that was an oversight on my part. It would be easy to partner with OPDS and do these jointly. The law schools are starting to understand, and we are starting to understand that reaching out there are groups that they can bring in. They are calling us now and we do not have to push as hard. I think it is an easy one to do. You just institutionalize a program yearly at each of the three law schools, maybe twice. We will do another one at Willamette in January just before we do the new lawyer seminar at the end of January. We will go back in and it will be more oriented toward those who are getting close to graduation. We will be making a presentation and saying, "If you are interested in this work at all you may want to come to this seminar." We have scholarships to provide assistance to attend those.

38:35 P. Levy

Can I make an observation here? For years Lewis and Clark has had a first year career day where students go to lots of firms in Portland. The Metropolitan Public Defender has always been on that tour. As a trainer there I was responsible for coordinating the visit for a number of years. We always had a really big showing of first year students and we put on a good show. We had lots of people from the office come and talk to them. We also had some of the best food although not the booze that other people had. These were first year students who

came and talked. I would hear from a lot of people who ended up working there, "I saw you that first year." I don't think there is any difficulty getting people interested in criminal defense. The challenge is to get them to go over the mountain. Rather than having a criminal defense day what you really need here are a "glories of rural life" day.

- 39:46J. Stevens      That is awful hard to do in a place like Wheeler County where they are losing population every year. That is why I think recruitment is great but I don't know how you are really going to make a dent in it without some sort of incentive. You go to Wheeler County and you are going to go Mitchell for dinner. That is a big thrill. It is true in Grant, and Harney, and all these counties. Several of them are losing population. There is just nothing to do if you don't fish and hunt. If you could come to Portland and have all of this available to you or go to Canyon City, for most people it wouldn't even be a discussion.
- 40:38I. Swenson      I think what Commissioner Welch was suggesting was a sort of targeted initiative so that you would look specifically for people who were potentially interested in either relocating or initially locating out there. A couple of our witnesses certainly did say that they had friends and acquaintances who might be interested in doing that. They either came from that region or were interested in moving there. That may have been what she had in mind. Just a note, we do attend a lot of recruitment fairs. Becky has attended a number of them. So has Pete. We attend the minority law student ones throughout the region as well of any general ones that we are aware of. It is an ongoing effort to recruit criminal lawyers.
- 41:27 Chair Ellis      Do you think we ought to institutionalize it more? Have someone on staff really take it on to be sure it is happening, or do you think it is working out sufficiently?
- 41:44I. Swenson      Well, I'm not sure that there are a lot more opportunities than the ones that we are aware of. This first year law student initiative is something quite different and something we did participate in two years ago and would love to do again. If it is not happening from elsewhere probably we should be initiating that discussion with the law schools. I do feel that is part of my personal responsibility and I am willing to put more effort into it.
- 42:21 Chair Ellis      I don't want this to be one of those things that we had a nice discussion about and everybody thought it was great and then nothing happened by way of follow up. Is there a way we could put this on the agenda next meeting. You think it through how best we make sure it gets followed up on.
- 42:44I. Swenson      Well, Mr. Chair, I would be happy to do that. We try not to let anything fall through the cracks.
- 42:55 Chair Ellis      I know that. The other piece of it, and I assume this happens but I don't know it, is there a place where positions that are open are known and potential applicants can find out.
- 43:16I. Swenson      There is. At the Commission meeting about a year ago, right here, we did talk about that and OCDLA since that time has initiated that kind of a list. I think most people are aware that they can post openings there and we invite people who come to us to explore their website for openings in the contract firms. Our official office brochure refers people who are interested in contract work to the OCDLA website for job openings.
- 43:55 Chair Ellis      Any more comments on the recruitment piece?
- 44:00J. Morris      Barnes, I guess that the one thing I would add to that discussion is it is difficult to get new lawyers out there. What is even harder is to keep them. You can get lawyers right out of law school who are looking for that first opportunity. They want to get their foot in the door. What happens time and time again is you will get somebody out there, they will be there for maybe two years, at least long enough to get felony experience - oftentimes the kind of benchmark for a new lawyer will be to get some Measure 11 experience - and then they are

marketable and then they are gone because where they want to be is Portland, Eugene, or Salem. You keep getting this revolving door effect that doesn't work well. It looks good for the lawyers. We end up kind of being a training ground for the metropolitan area. That first incentive is there. It is an opportunity to get some experience. I think the way you do that is with compensation. I remember a few years ago there was a discussion in the Commission that maybe we should have differing levels of compensation and because the cost of living in Portland, for example, was higher, the compensation should be higher there. I thought, "Oh my god, what a nightmare that is going to be."

- 45:18 Chair Ellis            You think that is perverse.
- 45:23 B. Putney            I would agree with Jack. I just lost the best attorney in my office because she took a job with the Federal Public Defender paying \$26,000 more. Her comment to me was, "Bert, I love this job ..."
- 45:39 Chair Ellis            Stayed in southern Oregon?
- 45:38 B. Putney            In Medford. She said, "I love this job, but I am 30 years old. I would stay with this job forever if I was married and had children, but the pickings around here are so slim that is not likely to happen." She is now going to Las Vegas to the Federal Public Defender. Even in Medford, which is not nearly what Hood River is, there is a huge problem of retaining new people. They want to go to Eugene or Portland. I have at least three people working for Metro either in Washington County or downtown.
- 46:28 J. Potter            OCDLA has a new online dating service that we are experimenting with.
- 46:40 J. Morris            What we really need is a situation where you have somebody that has been here two or three years and they are thinking about going to Portland or Eugene because they prefer to be there. What we need is a situation where they are making a decision saying, "You know what? I am going to stay because I can't afford to go to Portland or to take a pay cut."
- 46:53 S. McCrea            I thought you were going to say, "But we give them an offer they can't refuse to stay where they are." Some incentive to stay.
- 47:00 B. Putney            We are working on that, Jack. We are keeping housing prices high unlike the rest of the country.
- 47:11 Chair Ellis            Okay. Anything further on Judge Welch's four points?
- 47:19 I. Swenson            The Chief Justice had one additional suggestion. He had to leave but he suggested that one thing you might consider, if there were a mechanism for funding it, would be some sort of scholarship that you would award to, say, a second year law student, to take more criminal law courses in law school. We could assist them with their education costs and they would then have a commitment when they finished to spend two or three years working in eastern Oregon in criminal defense. In his former law firm they took this approach to developing tax attorneys.
- 48:12 J. Stevens            You could tie the scholarship to the length of time they stayed. If you agreed to stay five years you got the last two years for free. If you stayed two years you would get a year and limit the number of scholarships per school.
- 48:33 I. Swenson            It is a very interesting thought. I know we explored the idea of providing loan repayment assistance. At least initially legislative fiscal staff did not believe that we have the authority to expend funds for those purposes. We could take a closer look at that.

**Agenda Item No. 1                    Approval of the Minutes of PDSC's August 14, 2008 meeting**

48:56 Chair Ellis                    We now do have a quorum so we can review the minutes of the August 14 meeting.

49:08 Chair Ellis                    Are there any additions or corrections to the minutes of August 14?

**MOTION:** Shaun McCrea moved to approve the minutes; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

**Agenda Items No. 3                    Commission Discussion of Service Delivery Plans for Grant/Harney, Baker and Malheur Counties**

49:42 Chair Ellis                    The next agenda item is the service delivery plan for Grant/Harney, Baker and Malheur. I will say I appreciated all of the written materials that we got. I was fearful I wouldn't get through them all until I recognized that there was a certain amount of repetition. Do you want to go ahead, Ingrid, and present those?

50:01 I. Swenson                    Let me talk individually about these counties. They certainly share a lot of the same issues but I think there are some differences as well. I chose to include the same summary of the testimony in all of them because a lot of it did overlap and wasn't directed toward any particular county.

We were in Baker County and consequently heard more from Baker County people than we did others. Essentially what we learned, and Judge Baxter certainly agreed, was that the structure there was sound in terms of the public defense service delivery plan that is in place there. We have Dan Cronin, who is an individual attorney who drives every day from another county to be in Baker County. He lives in Grant County and has his office in Grant County but delivers services almost exclusively in Baker County. Then we have the consortium. You heard from some of the members of the Baker County Consortium. It is the largest provider in the area. Ken Bardizian, Gary Kiyuna, Charles Simmons - he does only post conviction - Krischelle Hampton and Bob Whitnah, both of whom testified. Dave Carlson works in that county as well as in Malheur County. You received a written letter from Dave Carlson. As it turned out, he had a last minute conflict that didn't allow him to be there, but he sent you written comments which I have included. I think I emailed them to you shortly after the meeting. Then there is an attorney by the name of Chris Zuercher who testified. He is with Coughlin, Leuenberger and Moon firm. He is another provider in that area. There are a good number of provider offices. They don't have as many issues in Baker as some of these counties do with conflicts because they have a number of different providers, but it was also there that you heard about the concern our providers have with conflicts. That is that, at least under their current arrangement between themselves, it is the attorney who is substituted onto the case who is paid, but the attorney who substitutes off the case is not. Different contractors handle that differently. There is no reason why they couldn't agree to split that payment. I think what they were telling you, though, was that there wouldn't be a lot of lawyers willing to take over some of these cases for half the credit. It is an issue that they raised in their contract discussions and that they brought to your attention. They think both attorneys should get paid for cases on which they do work.

53:05 Chair Ellis                    That is not unique to low population counties.

53:12 I. Swenson                    It is not but apparently it is more of an issue to them. We certainly heard about it and they feel - certainly Dan Cronin and some of the other attorneys feel - like they are put in a difficult position ethically because there is a temptation to remain on a case you shouldn't remain on for fear that you will have wasted all your time and energy if you get off.

53:35 Chair Ellis                    There should be an incentive to identify conflicts early so that you don't end up in that position.

- 53:43 I. Swenson           The latter is more of a financial incentive on our part than it is an ethical concern for the lawyers, I think is what they were telling us. In any case, we did hear some concerns there about lawyers not meeting with juvenile clients in particular, not specializing in juvenile law. The district attorney, Matt Shirtcliff talked about the need for lawyers to be able to specialize in public defense cases. He feels like a lot of them take additional cases not because they want to but because they have to to survive economically. His personal preference is for lawyers who are allowed to specialize. He thinks they do superior work. One of the questions that came up specifically there had to do with insurance coverage. You heard from Krischelle Hampton about a particular month in which her public defense revenue amounted to about \$1,900. To pay the insurance cost for a single employee would have cost her \$700 a month. It was not something she could afford. They also talked about the resource center. Mr. Whitnah talked a little bit about the benefits of the AG's material and a wish that he could have similar resources on the defense side.
- In Malheur County the report included information from Judge Sullivan, and Judge Pratt testified briefly by telephone at our meeting. In terms of summarizing the system in that county, they are operating three different drug courts. I think you heard that more than half their cases involve Hispanic clients. Dan Norris is the district attorney there. He has four deputies. They start their deputies at \$53,000 a year. He is the one who said he can recruit at will among defense lawyers when he needs to replace one of them. With the amount he is able to pay it is very attractive to them. Our contractors there are Rader, Stoddard and Perez. You heard from Mark Rader. David Carlson also works there as does Coughlin, Leuenberger & Moon. In this case Doug Rock is the attorney who is assigned to that county. Gary Kiyuna works there on an hourly basis. Just for comparison let me remind you that Malheur County is the biggest of those three. It has a total population of 31,000 people. Not big, but bigger than the others and then they have the prison. Baker County has a population of about 16,000, so it is about half the size of Malheur. Grant and Harney together are about 15,000. As a judicial district it is comparable to Baker. In Malheur I think you heard principally about the prison cases and the additional costs that attorneys incur in those cases.
- 57:16 Chair Ellis           That was one of the things that I wanted to talk about today. It did seem to me they made a pretty good argument that prison cases inherently cost more. The time that is required for them to enter and exit, the numbers of them that do go to trial seem to be higher. That might have to do with the mindset of the client and the difficulty involved with the witnesses in those cases. What is your thinking, Kathryn? Should we weight prison cases more?
- 58:09 K. Aylward           I personally wouldn't want to have further categories of cases, but I think if a provider said, "Okay, this is our felony count but three percent of them or ten percent of them are prison cases. Therefore, for are felonies so we should get three percent or ten percent worth of an adjustment. It gets pretty complicated to have special cases. Is it a "prison" A felony? A "prison" B felony? I would recommend just paying more.
- 58:53 I. Swenson           I think that Mark Rader said that there was a differential, is that correct in his contract?
- 58:57 K. Aylward           There was certainly a discussion of it. I am not sure it is something that could be quantified. It will be one of those things that, "Yeah, you do have prison cases so this is your rate." It would certainly have been something that was discussed and taken into account.
- 59:16 Chair Ellis           I had another compensation question that came out of this. In these low population areas caseloads do fluctuate probably more than in a larger population area. I did think it was a relevant point that the contractors shouldn't be at risk for all of that fluctuation. Gordon Mallon was the one that raised that. I don't know about a full flat fee - "We'll just pay you X thousand dollars and you are there to provide the service; if the service isn't needed then okay" - is the right answer. It did seem to me there was a real point to be made. I was curious

if there is some way to do a blended system where we would bear some of that risk of fluctuation. What is your thinking on that?

- 1:00:27 K. Aylward There are lots of ways you could do it. You could say, "We will cover your overhead. We will pay \$5,000 a month or \$8,000 a month just for staff, utilities, rent. Then on top of that we will pay you for each case that you actually have to do work on." I don't see any reason why you couldn't do something like that. I think the approach that we have taken in the past is we know, for example, you can't predict not only how many cases come in but what type they are. If you are used to getting five cases a month and they are five Measure 11 cases you have made a lot of money. If it is five PV cases you haven't covered your overhead. What we have done is to make all cases the same rate so it doesn't matter. It has almost been more like a client-based system or an event-based system regardless of the amount of time that is involved in a case. That does help cushion them against that. We also have been very flexible in terms of allowing contractors to ride out the ups and downs. If your contract happens to end in a down we say, "You know if you get another contract there will be an up." I think in the long term they are more cushioned than they believe they are. The Commission is free to decide on a better system. I don't see any reason why we couldn't do it. In the past, as I said at the retreat, we did have what we referred to as "outputs" contracts where we would say, "You get \$15,000 a month and you sit there. You can have one case or 30 cases, doesn't matter, you have to sit there." Because it is so complicated I think people on the outside take a simplistic view and sort of say, "What a minute. You got \$15,000 a month and one case came in the door. That is a waste of money." It was very difficult to explain to someone on the outside why you had to do this otherwise you wouldn't have anybody there. We did move away from that to something a little more like we are purchasing a service rather than employing someone. Certainly a blend might cushion us from that. I don't know how that would impact other contractors and where you would draw the line. It might be difficult but we could do it.
- 1:03:13 Chair Ellis This is probably a bad analogy but people that deal in stocks talk about thinly traded stocks having a higher beta. All that means is if there are fewer transactions the fluctuations are going to be more extreme. I think that is very likely to be true in the low population areas. You are going to have a high beta in terms of case fluctuation. It doesn't offend me at all that we would absorb a portion of that risk. How to do it ...
- 1:03:58 K. Aylward That's the tricky part.
- 1:04:00 P. Lipscomb As a suggestion you could simply put a minimum on the monthly payment, a fluctuation but establish a minimum. It wouldn't have to be the full amount. It might be 80 percent or 75 percent.
- 1:04:22 Chair Ellis I think that is what you were suggesting when you talked about covering overhead.
- 1:04:34 C. Lazenby We have to be very careful where we draw the lines. The farther west you go in the state out of Harney County the less basis there is to go to a system like that.
- 1:04:49 K. Aylward The other problem you have is that if you are, for example, covering overhead and the person doesn't happen to get a public defense case that month. They are not limited to doing public defense cases and they supplement their income with private cases. You have just then had a month where you handled private cases and the state paid your overhead.
- 1:05:18 J. Stevens If you did it that way and you were getting \$8,000 a month, and the month you had no cases you got \$8,000, but in a month you got 10 you would get probably somewhat less than you would have otherwise because you got \$8,000 back there.
- 1:05:42 K. Aylward What I was assuming is the value of the cases you actually got would then be less. If it is \$300 in another county it is like \$50 bucks for you because your overhead is covered all the

time. It would be a smaller amount so that the fluctuation is less of a hit. I don't care if I have a case or I don't. It is only \$50. Then we are virtually going back to outputs contracts which we were so pleased to have gotten rid of.

- 1:06:12 Chair Ellis      The related issue was, again I think it is more exacerbated in the small population county, how does the aging practitioner bring someone in and train them so they can take over the practice when the practitioner retires. It is not obvious. It is not at all clear because they would love to have some insurance at least some level of compensation that they are not at risk for providing.
- 1:06:52 K. Aylward      The other problem is if you get five cases a month you don't want to bring somebody else in and say here are two. You have a contract because you want the cases. When there are tiny contracts I don't know what the answer is other than some of the things we have talked about like finding somebody in Portland and saying that we want to lock you into a six-year contract. You are going to take over for this retiring person and you will get your \$8,000 a month plus \$50 a case to plant yourself over in Baker, Harney or Grant and make it a long-term commitment. Make it like how they send doctors to Alaska or women to Alaska. I don't think you are ever going to be able to have a provider in a small eastern Oregon community with a low caseload be able to bring someone into their office and train them on site. There is just not enough caseload.
- 1:08:07 I. Swenson      Mr. Chair, may I remind you that the other county, the other judicial district, that I haven't summarized for you is Grant and Harney. Their circumstances are the worst.
- 1:08:18 Chair Ellis      This is Judicial District 24?
- 1:08:20 I. Swenson      That is right. It is significantly worse than Baker or Malheur in terms of the coverage, current coverage of cases. Judge Cramer felt like people were doing their best. The two providers for that county are simply not adequate to meet the need and trying to bring in attorneys from Bend and other parts of the state has not been successful for them. It is not nearly the same kind of client representation they would like to see. They need an additional provider there to meet current needs in their estimation. Both of those providers are talking about retiring in the next five to six years. I think the circumstances there are probably more extreme. Interestingly, I looked at trial rates for these counties just out of curiosity trying to see if Malheur was significantly higher. Their felony rate is high. 9.3 percent of the criminal felony cases get tried there and 4.2 of the misdemeanors. Statewide the average is 4.5 for felonies and 4.4 for misdemeanors.
- 1:09:33 Chair Ellis      So it is almost double on the felonies.
- 1:09:37 I. Swenson      However, the interesting thing was that Judicial District 24 was significantly higher. They try 11.9 percent of their felony cases and a significant number of the misdemeanors. We didn't even hear about that there. They don't have a prison but they are trying a lot of cases. I don't know why that would be.
- 1:10:01 C. Lazenby      I think Commissioner Stevens raises a good point - percentage and numbers. How many trials is that when you talk about their trying 11 percent of their cases?
- 1:10:17 J. Stevens      But if they only have 100 a year that is only 11 cases.
- 1:10:19 I. Swenson      No. It is true and I'm sorry I didn't bring the report with me. I should have and I will bring it for you next time. Certainly, in Malheur County it is a significant number of cases. A lower number in Grant and Harney, but for two lawyers, trying 10 percent of your cases is a significant number. Since we are paying by the case their cases are requiring more effort if they are trying that many.

- 1:10:55 C. Lazenby You are right. If you have two attorneys who are trying 11 percent of the cases and that is a significant number, if we knew what the number was. Do you know what I mean? I don't know how much of a load that puts on those two lawyers. That is what we really need to look at.
- 1:11:18 K. Aylward We did in the last contract significantly increase the rates for Grant and Harney for example. They still have a flat rate and it is a PV or a review hearing. We did make an effort to compensate them sufficiently so that they would be able to handle the trial rate and the caseload that is there and still keep their doors open.
- 1:11:59 Chair Ellis What was your sense, Ingrid? The reason we do these regional visits is to look at the structure and see whether we have the right kinds of providers in place. It is not a quality review it is more of a structural review. Did you come away with any thought that we need to change the structure of the providers we have in any of these three areas?
- 1:12:37 I. Swenson I think probably not in Baker and Malheur. There seems to be a good variety of providers there. In Grant and Harney you certainly can't start a public defender office and it probably wouldn't help anyway. They need a third provider of some kind. An individual provider would probably be the appropriate way to go. I don't necessarily think they need a consortium there. But there probably needs to be at least one additional provider. I don't see a lot of other structural changes that would help with the issues you heard about.
- 1:13:35 Chair Ellis I hadn't realized, and I guess I should have know this because I have been there, but I didn't think about it, that Malheur in many ways is a suburb of Boise. On our map you have this eastern Oregon small population area but it really is a suburb of a pretty good sized city which raises very interesting points. They were saying that just across the border the compensation levels go up because it is more urban. I wasn't hearing that they are losing the ability to attract and maintain decent quality from that.
- 1:14:19 I. Swenson I think Mark Rader reported that he is pleased that he has these two associates in his firm. I think for a while they tried to recruit another, unsuccessfully, and have just given up doing that for the time being.
- 1:14:36 Chair Ellis The one subject that did seem to me part of being a suburb of Boise across the state line might be a problem with this push we have experienced to use in-state experts. Yet I am sure the experts are going to be close, available, but across the state border. Has that been an issue?
- 1:15:06 K. Aylward It hasn't because we have always rationalized their use. The bottom line is that that is the most cost effective way of finding the service. There is priority for in-state but the purpose of that is to not have the expense of bringing in people from out-of-state. In this case it is more cost effective so we approve it. That is what happens.
- 1:15:32 Chair Ellis I don't know how the practitioners relate. They are all OCDLA members but their natural affiliation would probably be more with the Idaho Bar even though they are in Oregon. How does that play out?
- 1:15:50 J. Potter The people in Ontario are all OCDLA members. There are a couple of lawyers that do some work in Idaho that are OCDLA members. The affiliation still remains with Oregon lawyers. At least talking with the Mark Raders over there, they are not affiliating themselves with Boise lawyers or doing things with Boise lawyers.
- 1:16:18 Chair Ellis Are there any other thoughts or comments on the three reports?
- 1:16:28 S. McCrea I have a couple of things. First, I don't really think that Malheur County is a suburb of Boise. What I heard Mark Rader saying is that he lives in Boise and he commutes to his office in Ontario. I know that area really well because my grandparents' place is in Weiser which is 16

miles from Ontario. It is basically a little ghost town. They love living in Idaho but because there is no sales tax they go over and buy everything in Oregon. The distance between Ontario and Boise is over 60 miles. I also thought I heard Mark saying that he was having trouble with his recruitment and retention, that he was very lucky to have two associates who had families who had a commitment. I thought they were also living in Boise. They are commuting but it is a distance farther than from Eugene to Albany, closer to commuting to Salem everyday but they have an interstate so it is not so bad.

- 1:17:49 Chair Ellis "Suburb" may be a little bit of a stretch.
- 1:17:51 S. McCrea That is the big population center. I agree with you there. The other thing is, I really think that for the purpose of the record, we need to have Commissioner Potter give us a report on whether the fishing advice he got at the meeting in Baker was helpful or not.
- 1:18:10 Chair Ellis Don't we have to go into a confidential session?
- 1:18:10 S. McCrea He asked for it in a public meeting, Barnes, so unless he has an objection and wants to interpose some kind of privilege...
- 1:18:21 J. Potter I wasn't going to correct the minutes because it just seemed petty, but on page 18 the DA doesn't say that he is fishing with a "sparkle gun" he is fishing with a "sparkle dun." I took his advice and I did catch fish. I have passed my thanks on to the DA.
- 1:18:53 Chair Ellis John, my understanding is that some of the fish you released you hadn't actually caught. They nudged your fly and you counted that as a catch and release.
- 1:19:15 S. McCrea Would this be a good time for a break?
- 1:19:18 Chair Ellis Any other comments or questions on Attachments 2, 3, and 4?
- 1:19:31 B. Strehlow Is there a law school in Boise? We are talking about recruiting at law schools in Oregon.
- 1:19:41 Chair Ellis I believe there is.
- 1:19:44 S. McCrea John would have to check out the fishing availability over there.
- 1:19:49 Chair Ellis If there are no further comments why don't we take our morning recess?
- [Break]
- 1:22:43 I. Swenson Christine, are you there?
- 1:22:43 C. Herbert I am.
- 1:22:44 I. Swenson Can you hear the chair, Barnes Ellis?
- 1:22:51 Chair Ellis Good morning.
- 1:22:53 I. Swenson Christine Herbert is on the line. She is one of the attorneys in Jackson County and she has asked to listen in to the next part of the meeting.
- 1:23:02 Chair Ellis That is fine.

**Agenda Item No. 4                      Commission Discussion of Service Delivery Plans for Jackson and Josephine Counties**

- 1:23:05 Chair Ellis                      The next topic is Attachments 5 and 6. This is Jackson and Josephine and I am sorry I was unable to attend the May meeting. I know there was a lot of good discussion that occurred then. Ingrid, do you want to start with where you see the process on both Jackson and Josephine?
- 1:23:27 I. Swenson                      Thank you, Mr. Chair. The Commission has looked at Jackson County a number of times and, on Josephine County we did have a short discussion when we were down there but really haven't come back and revisited Josephine County. Let me, if I could, just quickly summarize what we heard there and our recommendation for Josephine. Josephine, as you will recall, is a much smaller county than Jackson, less than half the size. Like Jackson they are experiencing a loss of timber funds. You heard a little bit about what the impact of that was going to be there. There are four circuit judges. The presiding judge is Lindi Baker. We heard about the processing of criminal cases and the fact that they have a drug court that is now well established. They had graduated 203 clients as of January, 2008. They recently added a new family treatment component to their court. They also operate a mental health court. Our attorneys staff these courts. In the juvenile court system Judge Newman is the juvenile judge. We heard about the fact that they had not been successful in providing representation at shelter hearings despite a significant effort by the court, Judge Newman in particular, and the bar there. Steve Campbell is the district attorney. He had eight deputies but wasn't sure what his situation would be beginning in July of this year because of the loss of timber funds. We have two essential providers there. The Josephine Defense Consortium is a nine member consortium. They do all kinds of cases, criminal, juvenile, and civil commitment. They have a board of directors comprised of consortium members. Their members sign participation agreements in the consortium. These and their bylaws allow them to suspend or terminate members if necessary. The consortium administrator there is considered to be responsive to complaints.
- 1:25:52 Chair Ellis                      This is Holly?
- 1:25:52 I. Swenson                      Holly Preslar, that is correct - responsive to complaints and concerns. The quality of representation provided is considered high in both criminal and juvenile cases. There was a concern about attorneys not meeting with child clients on a regular basis. I think you will recall that the consortium had recently had to deal with two significant problems among their membership. They were able to do that successfully. The second provider there is Southern Oregon Public Defender. Bert Putney is the director there and of the Jackson County office as well and he is here today. In Josephine County, at the time, there were seven attorneys. Is that still the case, Bert?
- 1:26:33 B. Putney                      That is correct.
- 1:26:36 I. Swenson                      We understood that it was more difficult for him to recruit attorneys for Josephine County then it was in Jackson County and that it wasn't easy there either. The senior attorneys in Josephine are considered to do very high quality work and to train the new lawyers well. The person assigned by Southern Oregon Public Defender to staff the drug court actually staffs it on behalf of all the participants, the court, the DA, and the defense providers. We said at the time that it appeared that the delivery system there was working appropriately and satisfactorily. I see no reason why that would have changed. It seems to be the best combination of providers for the area.
- 1:27:34 Chair Ellis                      There is a paragraph in the report that I didn't understand and Bert is here so he can explain it. It is the one on page 18, it says, "Mr. Putney also recommended that the Commission consider having a single organization provide services in all of the southwestern counties." Are you talking about going over to Coos/Curry?

- 1:28:02 B. Putney That was not just the southwest it was the whole State of Oregon. I gave Ingrid – this came up in the year 2000. It came from a conversation that I had with Ross Shepherd. I got bored one day so I sat around and basically colored a map of how there could be a regionalization of public defender offices. I thought that there were (inaudible) providers in each area that would be appropriate to head it up in each area. I think there could be substantial savings.
- 1:28:48 Chair Ellis Spell it out a little more. You are talking about having a single PD for a much broader area?
- 1:29:04 B. Putney I'm not sure a single PD but an individual who is the head of all of the PDs in a given area. You turn it into one contractor versus three to five contractors. Obviously, in each individual city ... Take the southwest. Certainly there is going to have to be a manager in Coos Bay and a manager in Roseburg, but there doesn't have to be a contractor. Some of the savings I could see happening: (1) I was talking to my CPA the other day and they provide checks for about 42 people, I think. I asked, "What more would it cost if you were doing checks each month for 100 people?" They said, "a third more than what you are paying now." (2) Insurance, once you get about 50 people, if you are between 50 and a 100 people covered by insurance you can negotiate. If you are under 50 you simply have to take what they give you. They suggested we could save as much as \$100 to \$150 per person insurance-wise if we were between 50 and 100 people. Metro is the only one that is that size. (3) If you just had one contractor - by and large after a contractor has been around for a period of time they are going to make the same as a circuit judge - they don't necessarily start as new contractor but managers you could pay substantially less. (4) I think another savings is continuing legal education. If you are in an office with six attorneys it is hard to have anyone dedicated to putting together continuing legal education. On the other hand, the bigger the office, just like Metro, well, Paul was a trainer and I assume was in charge of putting on CLEs. We have a non-attorney now in our office that is in charge of them. They put them on in both Jackson and Josephine County. The same thing can be done by that one person in Douglas County, Coos County, and it is just economy of scale. (5) Another thing that might help is you could have a pool of applicants. Metro has a pool of applicants. If you have, say 35, maybe 40 attorney positions you can then put yourself in a position of having a pool of applicants that have already been interviewed and you know you do want them to come to work as soon as there is an opening. I think it would be beneficial in filling spots quicker especially in the smaller towns. Coos Bay, I am sure, has a very difficult time finding attorneys. Those are some of the things.
- 1:32:32 Chair Ellis How do you envision this relating to the existing providers that are non-PDs?
- 1:32:31 B. Putney I don't think it relates to them. It relates only to PDs. I am not suggesting that it would be an individual who administers the whole indigent defense services through all those counties, only PD offices. I don't think there is savings to have one person do all of indigent defense in a (inaudible).
- 1:33:03 Chair Ellis Any comments or reactions to Bert's thoughts?
- 1:33:10 C. Lazenby I guess I am just a little bit confused. Would this be just a larger umbrella, private non-profit that would act in an administrative capacity over the delivery of legal services?
- 1:33:21 B. Putney Correct.
- 1:33:21 C. Lazenby Under this model the Commission and its staff would contract with that private non-profit for delivery of services in that entire region?
- 1:33:33 B. Putney Right.
- 1:33:33 C. Lazenby So basically just consolidating the little individual contracts that we do now and consolidating them all. In some of these areas where you have people commuting 60 miles – I guess the

problem is figuring out how to make sure you have enough attorneys in Coos Bay when there might also be a demand for the same lawyer in Gold Beach. A central location it might be in K. Falls. The logistics of it is what kind of bothers me plus the relation to the local bar. A lot of the people who come into these consortia and participate in criminal defense do it to augment their private practice. That would seem to cut them out.

- 1:34:22 B. Putney Well, I am not talking about consortia being involved in it. It is only public defender offices.
- 1:34:28 Chair Ellis Last I knew there were 10 PDs in the state? There aren't very many places that this regional administration would have much effect unless we sprouted some more PDs.
- 1:34:40 B. Putney In some areas you are right.
- 1:34:48 J. Potter But in the southwest, Bert, it would - I am looking at your chart from a distance - but it looks like there would be four public defenders in the southwest. You would have Jackson/Josephine, Coos and Umpqua.
- 1:35:04 B. Putney Correct.
- 1:35:04 Chair Ellis But Jackson/Josephine is one entity already. Right?
- 1:35:12 B. Putney Okay. There would be three.
- 1:35:14 J. Potter So, for those four offices, under your proposal there would be one person that was the director?
- 1:35:21 B. Putney Right.
- 1:35:24 J. Potter Then the other offices would have managers?
- 1:35:28 B. Putney Or whatever you want to call them.
- 1:35:29 J. Potter But you are not envisioning any other changes. The offices still stay there. The lawyers that are working there still stay there. Personnel-wise there are no changes. You are talking potential savings from group purchasing power, insurance, cutting of checks by CPAs.
- 1:35:54 B. Putney Administrative type things. You would find some name for the umbrella corporation, whatever name it would be, but then you would have offices doing business as "Southwest Public Defender," doing business as "Josephine County Public Defender."
- 1:36:10 Chair Ellis Are you finding support for this within the south?
- 1:36:16 B. Putney I haven't even thought about it. The letter in the back there is dated 2000. I haven't thought about it. Since you came to Medford - what was it three or four months ago? - I hadn't even given it any thought since that date.
- 1:36:37 Chair Ellis You answered my question. I couldn't figure out what this paragraph was talking about. Now I know.
- 1:36:45 I. Swenson It does seem, Mr. Chair, that there would be a significant advantage to having every region in the state served by some public defender office that would take on some of these training functions and other things. It is an interesting concept.
- 1:36:59 B. Putney There is one other advantage that I didn't mention and that is an example. There was a murder case that came up about four months in Josephine County. Every murder qualified attorney in Josephine County already had a murder. I just don't believe in giving anybody

two murders. I was able to get one of the Jackson County attorneys to handle the murder case in Josephine County.

- 1:37:33 Chair Ellis Further comments on Josephine? I gather we don't have the caseload issue in Josephine that applied to Jackson on the juvenile dependency piece?
- 1:37:48 I. Swenson No. Statewide there is a lot of variety, especially in juvenile cases, among providers. However, Jackson was by far the most extreme case. It was a good example for the Commission to look at.
- 1:38:11 Chair Ellis Jackson.
- 1:38:16 I. Swenson Very quickly. I did give you a lot of materials on Jackson because we have discussed it a couple of times. The original report talked about the circumstances there. The size of the county is 190,000 people, about 10 times the size of Judicial District 24 and Baker County. The circuit court has nine judges. They are covering in that system a community family court, a drug court, and DUII diversion program. In Jackson County in juvenile matters, Judge Orf had tried to create a system would permit representation of parents and children at shelter hearings. They were not able to do that even though we heard in some of these eastern Oregon counties that the lawyers are able to do that despite the great distances that they have to travel and all the conflicts they have. In Jackson that has not occurred yet. Mark Huddleston is the district attorney. He has 19 deputies. He pays a starting salary of \$54,000. He said recruitment had not been a major issue for him. Our providers are Southern Oregon Public Defender, Bert's office, and in that office he has 15 attorneys besides himself.
- 1:39:54 B. Putney Sixteen.
- 1:39:57 I. Swenson Sixteen attorneys. As you know they have a board of directors that reviews major actions by the director. They do CLEs in house. They also sponsor regional ones and ones within their own legal community on a regular basis. The office monitors individual caseloads monthly and weekly. They see their clients within one working day of their appointment and they have a client feedback process. I haven't heard any reports back on how that is working. Maybe at a later point Bert can update us on that. As you know, recruitment and retention were issues for him in that office as well as in Josephine County. They were able to increase their initial salaries as a result of the rate increase they received under their contract this year, but he had expressed concern about retention because it is after the initial training that it becomes difficult to retain these attorneys. Los Abogados is the other criminal provider. It is a consortium of four or five attorneys. The quality of representation there is reported to be very good - no issues that we heard about. It has no organization to speak of, never has, and has never yet encountered a circumstance that they felt required them to take some action they hadn't provided for in terms of either disciplining members or removing members. Structurally, they don't have mechanisms for doing those things. The third provider is Jackson Juvenile Consortium. Mark ...
- 1:41:54 Chair Ellis Pause on that. Are they willing to move in that direction? It sounds like an accident waiting to happen.
- 1:42:03 I. Swenson They did not express any desire to do so. They understand that this Commission encourages groups to consider creating those kinds of structural improvements. Because they have not encountered any issues, I don't think they are inclined to.
- 1:42:33 Chair Ellis Should we be a little more persuasive?
- 1:42:39 I. Swenson Well, for example, at this year's management conference Paul Levy and others will be making a presentation on consortium best practices and presumably they will be aware of that. Among those best practices are the creation of a board, agreements between members that

permit them to take the actions they need to if there are performance issues. They are aware that we encourage our contractors to do that, but I am still not aware of any desire or initiative on their part to follow through on that.

- 1:43:20 Chair Ellis           What is your thinking? Shall we just let it rock along or should we be more assertive?
- 1:43:22 I. Swenson           Well, it depends on whether this Commission wants to institute some sort of requirements of that sort in connection with the contracting process. That has not been your approach in the past. It was to identify best practices, publicize them, encourage contractors to pursue them, let them know, as Paul Levy's panel will do at this conference, how other contractors have run into issues and had to deal with them without adequate structures in place. But the Commission could decide that it wants to handle this differently.
- 1:44:00 K. Aylward           Could I just add that in negotiations the less burdensome that Salem becomes on a provider the easier it is to reach agreement. Even minor things when we say, "We are going to insist on this. We want reports electronically." There is often a distraction in negotiations because a provider will say, "Well, now I have to do this. Now it is going to cost me that." We have tended to not push things that weren't absolutely required by our office if we could avoid it.
- 1:44:39 Chair Ellis           Do they have a single administrator?
- 1:44:40 I. Swenson           They have co-administrators.
- 1:44:46 Chair Ellis           They just trade back and forth?
- 1:44:46 I. Swenson           Yes.
- 1:44:52 S. McCrea           They share the administrator duties. That is what the report says on page 24.
- 1:44:59 I. Swenson           How long – maybe Kathryn can tell us. How long have they been in place?
- 1:45:06 K. Aylward           Ages, forever. They were there when I got there.
- 1:45:12 I. Swenson           The reason I wouldn't consider it an urgent matter is just the good quality of work they have been doing over that time. As you recall, they were described as the "A team" for the work they do.
- 1:45:37 Chair Ellis           If it isn't broke....
- 1:45:37 C. Lazenby           How many lawyers are in that consortium?
- 1:45:38 I. Swenson           I think there are 3.03 FTE.
- 1:45:49 C. Lazenby           I see it. Seven attorneys working basically half time.
- 1:46:00 I. Swenson           The other provider is Jackson Juvenile Consortium and our attention tended to focus on juvenile representation. If you will recall, Southern Oregon Public Defender had recently started accepting appointments in juvenile cases. They were a new provider. Jackson Juvenile Consortium has been doing it for a long time and provided the bulk of that representation. The principle issue that was identified there had to do with the number of cases that attorneys in that consortium were handling. We provided you some statistics on that and the consortium responded that their numbers weren't quite as high as ours. In any case, they appeared to be, by far, the contractor with the biggest juvenile caseload.
- 1:46:59 Chair Ellis           This is kind of the poster child of our Policy Option Package No. 1?

1:47:05 I. Swenson

Yes, it truly is. I found some additional information after that initial meeting where you heard from the providers and you heard from Judge Orf and others. I contacted additional people involved in the juvenile system in Jackson County in an effort to find out, "Okay, what is it that isn't being done here? If they have too many cases is that important? Are they doing all the things that need done?" I provided you a supplemental account of what I found but essentially it was, in the opinion of the people I spoke to, and there were a total four to five in the system, so I think it is a good consensus about what is going on there, was that they do excellent work at the outset of the case. Even though they are not present at shelter hearings they are meeting with their clients, they are ready for court, they are following through and providing essential involvement at that stage of the case. Similarly, if the case ultimately goes to termination they are great lawyers. They are good trial lawyers. They represent their clients well. Even on behalf of children they are very active attorneys. They are not passive. However, it is between those events that very little gets done. It may be, to some extent, a product of the way we pay lawyers. We pay them for the initial case credit after they are appointed in the case. Then they are entitled to a case credit of less value at the time of any review hearing that is held in the case. I have heard sometimes from providers that they don't do much because they only get paid to go the hearing. Because their payment corresponds with the occurrence of a hearing, some people have interpreted that to mean that that is what they get paid to do, not to do all of the representation that occurs between the initial appointment and that review hearing. But, of course, that is where the substance of representation has to take place. I provided you a summary that was prepared last session for the legislature. The inquiry was, "What it is that lawyers don't do when they have too many cases?" There is whole series of activities that need to take place in a juvenile case in order for the client to be well represented and represented in accordance with the performance standards of the bar. That is apparently where representation was failing in Jackson County. Now, as you know, Jim Mueller on behalf the consortium sent a letter, and I have provided that in the materials to you, about some of the steps that have been taken. I think Mark Burkhalter is here today to talk about some additional information that might be relevant. Christine Herbert, who testified when you were down in Medford, is listening on the phone to that testimony. Maybe you want to hear from Mark?

1:50:50 M. Burkhalter

I just want to thank you for giving us some time this morning. I will try to be brief. There are five full-time attorneys in our group now. Charles Kochlacs, Christine Herbert, Jim Mueller, Vance Waliser and myself. Since you folks started looking at us I can honestly say that we have met intensely and regularly and have considered the information be it favorable or not. We want you to know we are working on this as much as we possibly can. I did submit, if I could start with that, a chart here which I based on our first six month report which we just got from Billy last week - very timely, I might add, because we are able to see where we are this year in terms of FTEs, etc. I think if you will notice that compared to where we were in the PDSC draft report, the cases per attorney are down significantly, cases per FTE.

1:52:13 Chair Ellis

Went from 815 to 594.

1:52:16 M. Burkhalter

Yes, exactly, and our FTE is up. Mr. Kochlacs was not reflected as being in the group, I don't believe, in the original draft report. He was in our group and left and now he is back in. There was maybe some confusion there, I'm not sure. I think the Commission can see that that has changed. I am not saying we are where we should be but I think if you look at the chart for the rest of the state, that drops us down into third position in terms of caseloads. What that says to me is, if you want to look at it from an FTE and case per attorney number, this is a statewide problem. It is not just Jackson County and we are not at the top of list. That raises a lot of issues that I don't think our just ours. What I would like to do, and I am going to keep this brief, the way we approach this is in a sense things have been going along pretty much the same for a number a years. I have been involved in the consortium now for 12 years. I was a prosecutor when the consortium started so it has been going on for over 20 some years. We looked at this as to see how we got into this situation with these kinds of numbers. Nothing was brought up during our last RFP about this. We submitted the RFP

based on the previous one with the numbers that are required. I can't remember having a disagreement about anything. We asked for our per-case numbers to go up in mental hearings a little bit go up in some delinquency matters and some review hearings because of the number we had. Nothing came up in terms of the projected number of cases as to how many lawyers we had during the negotiations. There we were last winter and we came into this analysis by the Commission and it really kind of blindsided us, quite frankly, because none of this was mentioned. We assumed that because our RFP was approved with these numbers in it that they were acceptable. We have been working on that basis until all this came forward. We are not trying to duck it but that is where we were. This is all new. I used to do the administrative part of it. Kathy Mueller, Jim Mueller's wife is now doing it, and I think doing a great job. I believe we always have ours in before anybody in the state. That is all working well. We bought a new program for checking conflicts. I think we are running real well in that regard. It was a situation where when the RFPs were put together, I would pick up the phone, "Oh, what do you think? How much time do you think you are spending on juvenile cases?" and I would get a number shot back at me. It was pure guesswork. That was because nobody ever told us it made any difference, but now it does, obviously. We have taken a different look at that. The number that you now see on this printout is 4.05. We have every reason to believe that is pretty darn accurate. We have all gone back through our files to see where we are and tried to estimate how much time we are spending. Hopefully that gives you a better idea of where we are. That is what led us to where we are today. We could go through the report and take issue with some things, not so much with others. I am not so sure I am concerned, and I only speaking for myself here, because I haven't heard about this idea of being paid more for review hearings, but we have a lot of review hearings. I think that might drop. It is the juvenile judge who is leaving who has been ordering a lot more review hearings than any judge we have ever had before. I am not sure we are going to stay at that level. That has never been discussed among of our group that I know about being concerned about what we are getting paid for review hearings, post-dispositional work. My take on that is - I don't know who is talking about it and I don't want to get into that. You have some confidential sources, but it is very inconsistent with post-dispositional clients as to how much time you are spending on a case. I really don't know how you are going to generalize that. Some people just take more attention than others and have issues that require a lot more attention than others. I had a case yesterday where I represent the children, and there are eight of them. They are placed in three different states. Two are in regular foster care and four are going to termination. That is just an example of a post-dispositional case that can just eat up a ton of time. You could have 90 percent of them that aren't anything like that. I think that is a very difficult area in which to assess what we are doing. I had a few notes since I am the one sitting here. Our group generally was not very happy with what we felt was the implication about the quality of work we are doing. I can tell you that we are all working very, very hard. What we wished we had seen more of was being evaluated in the courtroom. Somebody should sit in those courtrooms. We have so much court time it is just unbelievable. That just makes it very difficult to keep up, quite frankly, but the thing you have to remember is we are all in a private business, all of us, and if we lose a significant number of case appointments that income is going to have to be replaced. That means we are either going to have to get a whole lot more money per case or we are out of it. We are five lawyers. I have been at it 35 years. Jim has been at it 30 years. Kochlacs and Waliser are at 20 some years. Christine, who is on the phone, I believe is eight years plus 15 years as a paralegal. None of us are very new at this. We have to be able to have some idea of what we are looking at at this point. That is not a threat. It is just real. I think really, and I don't mean to go on too long here, but what I would like to see come out of this is to give us, and I am going to emphasize what I feel, was a lack of appreciation for whatever our negotiation system is between contractors and PDSC. The last couple of times it was just basically filling out a form, "You tell us the numbers, and we sign the paper." We need to know something more than that if we are going to be able to evaluate whether we are going to continue to do this or not. We cannot find out a year from now, and have that kick in three months later, when we have staff, offices, the whole thing, particularly when our FTEs are getting this high. We are averaging a little over .8. That is 80 percent of our office. We really do need to have some kind of guidance as to

where you folks think this whole thing is going. I don't mean that as a threat. It is just a fact of life. We need to be able to look down the road as well as you do. One other thing - shelter hearings. We appear at shelter hearings usually, if they are post-dispositional, because it is the only time we would have already been appointed. We do get notification of those and I think we are there on a very regular basis. It is the new ones and how they are going to do that. With Bert's group, and our group, we share one-third/two-thirds of the dependency cases. Who gets which case?

2:01:23 Chair Ellis

Who is the one-third? Who is the two-thirds?

2:01:24 M. Burkhalter

We are basically the two-thirds and Bert is one-third. It has been really good working with Bert's office. We have had no problems whatsoever and I appreciate that. I think that is all working very well. I think that pretty much covers what I wanted to bring out. I don't know if Christine has anything she wants to add or not.

2:01:55 C. Hubert

Just one thing. It was kind of implied that we were basically doing nothing post-disposition and I think Mark relayed that there are review hearings. There is a lot of work that is done. I know since April there has been an increase in it because it has become an issue within our consortium, since the state raised the issue, but I know that attorneys are talking to their clients between hearings and sometimes attending meetings at DHS. It is not like we don't see or hear from our clients. My clients, and I think I speak for all of the attorneys, call regularly. We are talking about some kind of form letter so that it is in writing and they know even though we tell them, "We are still here for you and will help you." I just wanted to add that. It seemed to be a criticism. We are working on that and we are seeing our clients. I just wanted to make sure that the board is aware that these people are not just left in limbo for months. That is really all I had to add.

2:03:28 Chair Ellis

Any comments or questions to Mark or Christine?

2:03:32 J. Potter

Mark, I appreciate your comments asking us what we might see coming up in the next cycle. As you were speaking you had said you had been in this business for 35 years, 30 years, 28 years, so we have an experienced group of folks. From our perspective we might ask back what do you see happening to your group in the near future? Are folks thinking about retirement? Is there going to be a change in the makeup?

2:04:01 M. Burkhalter

Fair question and believe me we have discussed that. You have to look at each individual member to answer that. I am probably the closest one to retiring in the group, but I am also the oldest and have been at it longer. I don't see that as a huge issue. I would like to see caseloads go down. I am speaking for myself now. I can't say that is the case with everybody in the group. I would like to see them go down. It drives you a little bit crazy to have this kind of a caseload. No question about that. I am not going to sit here and say it is any different. I would not mind seeing more lawyers. I don't know where that is at in terms of what kind of money would be available. Always the problem with a consortium is you are not just hiring somebody at a full-time job here. It has got to be somebody who is independent otherwise the conflict issue kicks in every time. We have to find independent practitioners that have juvenile experience and plug them in. That is not easy. Even though Jackson County is growing there are just not that many people who do this kind of work. I would like to see that happen. I would like to see more paralegals to do some of this stuff. That would be less expensive for everybody. I think that would be a good move. There are a lot of things, keeping in touch with people, trying to find them, things paralegals could certainly do as well as attorneys and for less money. I see those types of things as expanding. I don't see anybody in our group on the doorstep of leaving, if that is what you are asking. No, not at all. As a matter of fact we are always asking around for people who might be interested. The only problem I have had is the couple that have contacted me had absolutely no experience whatsoever. No offices, nothing, which you really need to come into our situation. Does that help?

2:06:12 J. Potter It helps a bit. We are certainly always looking at what are the transition plans especially with experienced organizations that have smaller population bases. You heard the discussions earlier about eastern Oregon. What you are telling me, I think, is that nothing is on the horizon for your group at the moment, horizon being two to four years?

2:06:34 M. Burkhalter No. I don't see any changes. I am not limiting that. It could grow. I don't see it going the other way.

2:06:41 J. Potter Do you see at some point a discussion within the group, anyone saying they are thinking about scaling back their practice? Maybe two of the people are thinking about scaling back their practice. How are we going to go about bringing somebody else in if we want to keep the consortium going at the same level?

2:07:01 M. Burkhalter I don't know what more we could do than we have done. I keep in touch with people in the community. I think I am probably the only one of the group that has thought about that, quite frankly. I always use the word 30 percent - cut back 30 percent, something like that. Also in the same breath you don't want to put more cases onto colleagues who are already overburdened. I think if I had to really set a date I would be out there trying to find somebody. You can't just go right to the law schools because they aren't in a position to do it. I have had a couple of people interested but I didn't feel they were qualified. We don't have an apprentice program.

2:08:01 Chair Ellis Do you feel that one-third, two-thirds division is about right?

2:08:09 M. Burkhalter Do you mean with Bert?

2:08:09 Chair Ellis Right.

2:08:09 M. Burkhalter There is some basis there because of conflict problems. I don't know how Bert feels about it. I think it has worked out pretty well. At the time, of course, you are territorial and we didn't want them to have anything. That is not reasonable. As it turns out, our caseloads are such... And I know the folks that work with Bert; I see them everyday in court. We practically live together and they are all working hard. I think it is a good thing. I have no problem with that at all.

2:08:36 Chair Ellis Any other comments or questions?

2:08:39 S. McCrea I have a question. Mark, would you agree that your caseload is too big? I don't mean you can't do it, but I mean in the sense of ... Let me rephrase it a different way. Would you prefer a lesser caseload?

2:08:53 M. Burkhalter Of course. Let me qualify that. I think what is underneath that... This is something we have talked about. I am talking dependency here because we don't really have much problem with delinquency cases. I think those are really going well. We are not overloaded with them. It is the dependency cases that really are the bulk of it. How do you look at the job? Quite frankly we don't like to be thought of as social workers. There have been some opinions that some of the things that we are expected to do are social work. We are not social workers and we don't want to be social workers. We want to be lawyers. If you accept that viewpoint as what we are supposed to do we have too many cases.

2:09:50 S. McCrea Okay.

2:09:50 M. Burkhalter If you accept my 35-year view that we should just be doing "legal," with a real tight definition, stuff, we don't have too many cases.

2:10:02 S. McCrea But you talked about working hard, being in court all the time, and I think I heard you use the term “overburdened.” Where I am coming from is - I hear you guys are doing great work and this is not to imply you are not doing good work -my concern is like with Christine’s testimony before. She has been working nights and weekends. I am afraid you guys are going to burn out. You were saying this was not a threat and you are not going to leave the system, but I don’t want us to put you in a position where any of you need to leave because we are putting too much on you. That is where I want you to help us to make it better for you.

2:10:48 M. Burkhalter That is a little different for each one of us. When I started doing this stuff I was in land use and real estate. I was a land use hearings officer for Jackson County. That was 10 years ago. I don’t do any of that anymore. All I do is our court-appointed work. I am not a good example because these other guys and gals are also doing criminal appointments. Christine and Vance, I think, are both members of Los Abogados. Jim Mueller has a significant family law practice as does Charles Kochlacs. They are doing more than I am.

2:11:29 S. McCrea This is part of where we are now which gets back to John’s question. We also have to look at where we are now and where we are going to be in the future when eventually there may be some transition.

2:11:43 M. Burkhalter All I can really say to that, and I touched on this and it does impact the rest of the people more than it does me, is that if we get caseloads lowered they are going to have to fill in with other work.

2:11:56 S. McCrea Assuming that the caseloads are lower at the same compensation.

2:12:03 M. Burkhalter Of course. I would love to see lower caseloads and bigger payments. That is obviously what we want.

2:12:08 S. McCrea Christine, did you want to respond to anything I said.

2:12:11 C. Hubert Just in terms of your comment about burnout. I think, like Mark said, it is an individual thing. Personally what I do is make sure I go on a vacation about once every three to four months. I have to do that. It does seem to be a problem with court scheduling and all that but it is something I do to get myself sane.

2:12:43 S. McCrea I know you are superwoman, and from my standpoint as just one person on this Commission, I would like you to be able to go on vacations every three or four months because you want to, not because you need to because you have so much work in the interim.

2:13:00 C. Hubert If you go on vacation it is because you want to. I am not always thinking about work on vacation. It is something I enjoy doing and I am just able to turn it off. The same with going home.

2:13:19 S. McCrea Good.

2:13:21 Chair Ellis Any other comments or questions?

2:13:22 I. Swenson I have a couple. I want to just briefly mention the origin of this caseload discussion. I think it may have been going on for sometime. Although our site reviews are confidential, it is fair to say that this issue was raised earlier with this consortium as a major question about the quality of representation being provided. After the site visit, and I had this conversation with Kathryn and Billy Strehlow, we looked to how we could address that caseload issue. We were not successful in persuading the consortium to add more attorneys. We were pleased that Bert Putney was able to supplement the work that was being done by the consortium. There has been an ongoing concern that I think was known to the entire community about those caseloads. That said, once again this is just the worst example. It was. It may not be

anymore. You may be third in terms of the number of cases you have. Mark McKechnie is here from Juvenile Rights Project. Linda Bergman from Metropolitan Public Defender. In the Metro area is it unimaginable that attorneys could handle this kind of caseload. They are struggling to do adequate work with significantly fewer numbers, a fraction of the cases that this consortium is handling. Now it is one thing to describe some of those efforts as social work efforts. That is not what we are really asking lawyers to do. We are asking them to advocate in different forums than they are accustomed to. It isn't in the courtroom that you necessarily do the most important advocacy in these cases. The bar standards, I thought, had clarified those expectations for lawyers. You go to family decision meetings not because you want to hold your client's hand and participate in a plan for some particular service. You go there because that is the most effective forum in which to advocate for your client's position and to put in place a plan that will be successful for them. If you are not there your client does the best they can to advocate for themselves. Sometimes other parties are represented and those lawyers take full advantage of your absence, if they can, to advocate for their clients instead. What the Commission needs to think about, I think more importantly than anything else, and these are good steps that this consortium has taken, is maybe in some way articulating these expectations in a different way or having a good thorough discussion about what the expectations should be in juvenile dependency cases - what it is that lawyers should be doing? Should they just go to the courtroom and do their advocacy there? These lawyers are doing excellent work in the courtroom. Is that the extent of what you expect of them? If our caseloads are excessive on average, and I gave you these standards from other jurisdictions so that you could look at some of the efforts that have been made in other places to define caseload standards, then maybe we need to change the way we contract and pay for these juvenile cases. I don't think the solution is to segregate what you do and decide that representation amounts being there in the courtroom and calling that good. I think that is the problem.

2:17:42 M. Burkhalter There is a ton agreement between Ingrid and me. At family decision meetings, those kinds of things, and I agree with you about everything that was said about how important they are, it is just that the number of review hearings and the way these are scheduled in Jackson County, and I am not familiar with any other county, it is rare that we are not in court when these things are set. Tuesday is probably the only day I am not in court on juvenile matters and Tuesday is the day we have terminations set. If you have a termination set you are there as well. It is really difficult. You got it out of me before that I would rather have fewer cases and more money. If that was the situation then, sure, we could go to a lot more of those things and do a lot more of that work. We have no choice. We have to be in court. CRBs are another one. We go to as many CRBs as possible. They schedule them mostly on Wednesdays which is one of our heaviest juvenile days. You can't get there. That is not anything that people that do that are unaware of. Some of that stuff could be done a little bit better. That is basically what our week looks like. It is not an attitude thing, I don't think, we simply don't have time to do it.

2:19:21 M. McKechnie Mark McKechnie, Executive Director of the Juvenile Rights Project. I did want to say in looking at the case numbers that our caseload is less than half of the revised Jackson County number. I would say that we would certainly like to see our own caseloads reduced by 20 percent, at a minimum, from what they are now, so I can't imagine some of the caseload numbers I see on the higher end and how that works. I would say our practice in the dependency realm is very largely done outside the courtroom by our attorneys, our legal assistants, and our social workers, to the extent that we can employ them. I am social worker. I am not an attorney. We have one other social worker on staff. We attend family decision meetings and do home visits which is a key part of representing children in foster care. Our clients are utterly dependent upon the actions of a state agency and the quality of the decisions that the representatives of that agency make. They are in a very vulnerable position by virtue of that custody. Their lives are determined at family decision meetings and treatment reviews. We see our clients all over the state. They are placed in facilities in Corvallis, Medford, Bend, Pendleton. I would really support Ingrid's suggestion that perhaps looking at

the rates and further differentiating the way that juvenile dependency cases are reimbursed versus delinquency cases because the nature of these cases and the activities that are required to do quality representation are significantly different.

- 2:21:48 Chair Ellis Any questions for any of the three? Thank you. Ingrid, any more you want to focus on in Jackson County?
- 2:22:08 I. Swenson No. Thank you, Mr. Chair.
- Agenda Item No. 5 OPDS's Monthly Report**
- 2:22:17 Chair Ellis We are at a point for the OPDS report.
- 2:22:44 I. Swenson Let's see, Kathryn do you have any dates or information you would like to provide?
- 2:22:53 K. Aylward CBS will be issuing a request for proposals for mitigation contracts. We probably should have done it last week but I was out. By the next meeting that RFP will go out. The Commission had talked about it earlier and we had hoped to do it at an earlier stage. I didn't get around to it, but fortunately I asked Billy and Lorrie to do it and they did. It is done. That is the only thing that is happening in CBS right now.
- 2:23:20 I. Swenson Becky, is there anything from the Appellate Division?
- 2:23:26 B. Duncan From the Appellate Division.
- 2:23:30 Chair Ellis Pete was here earlier.
- 2:23:32 B. Duncan He was. He went to a moot court which was one of our update items just to let the Commission know what is going on in the Appellate Division. The Oregon Supreme Court has been hearing cases since the beginning of September. We have a few cases that will be heard next week. We are doing moot courts on those. We also did our first moot court – well, it was probably not our first - but a moot court for an out-of-office attorney which is something that is educational for us and also a service we would like to provide to the trial bar. That case will be litigated next week as well.
- 2:24:06 Chair Ellis This is a trial level moot court?
- 2:24:07 B. Duncan No, the Oregon Supreme Court moot court. Whitney Boise has a criminal case before the Oregon Supreme Court. When we saw that case come on the docket, and a couple of others, we contacted the attorneys who would be arguing before the Supreme Court and said we would be available to have a moot court if they were interested. We did that this week.
- 2:24:34 J. Potter Does that happen often, Becky?
- 2:24:33 B. Duncan I think this is probably our second. It is a pretty new initiative that we undertaking.
- 2:24:43 Chair Ellis This is a contractor doing appellate work?
- 2:24:53 S. McCrea This is probably an issue of such importance to the whole bar that it was necessary.
- 2:25:05 B. Duncan It is a service that we have offered and it is educational to our attorneys. We want to stay current on all issues before the Supreme Court. For the Commission's information it is a *Miranda* case that is before the court. The other Supreme Court case is the U.S. Supreme Court case we have talked about a lot. We are holding moot courts this month on the *Oregon v. Ice* case that will be litigated approximately one month from now. We will be back in Washington, D.C. An update on the juvenile unit - the juvenile unit has filed briefs and they

will be having their first Court of Appeals argument the first week in October. Also, the Court of Appeals recently held a training for juvenile appellate attorneys, attorneys from our office and outside practitioners who handle juvenile appellate cases. That is what has been going on in the Appellate Division. There was something I didn't mention earlier when we were talking about the resources from the DOJ. The question came up whether attorneys could get the search & seizure manual that the Department of Justice publishes. We did confirm with their criminal division that, yes, that is for sale to members of the public. We will be purchasing one for our library.

- 2:26:33 Chair Ellis           The backlog issue, how is that coming?
- 2:26:36 B. Duncan           The backlog is being reduced in part because of internal pressures but also because of external pressures. The court is on track to continue to reduce the age of cases at filing. Right now the no further extension date is 250 days for each side. It will be going down to 180 probably next summer.
- 2:26:58 Chair Ellis           All the open positions you had are filled?
- 2:27:01 B. Duncan           We have a new Deputy I coming in. We extended an offer and it was accepted. We have an attorney who will be filling a spot in September. We had another attorney who left in July and that position is open. We have posted the position and received applications. We will be interviewing shortly. There is one open one that we are in the process of filling.
- 2:27:28 Chair Ellis           Thank you.
- 2:27:33 I. Swenson           Mr. Chair, for the benefit of the other Commissions who didn't participate yesterday in our meeting with the governor's staff, the Chair, Commissioner Potter, and Kathryn Aylward and I met with the governor's staff yesterday - one of these preliminary meetings to talk about our budget and what our hopes and expectations are. They, of course, conveyed what their expectations are in this next legislative session. We have all seen or read the excerpts from the state's economic revenue forecast. Revenue is expected to be up from what it was but down from what it was expected to be as of June forecast. The bad news is that it is not as good as a picture as we had hoped. The forecast includes all kinds of assumptions and we will see how those play out over time. At this point the message from the governor is certainly that we may have to look at cuts to all agency budgets next time around.
- 2:28:44 Chair Ellis           They certainly were conveying that expectation but they did it in a friendly way. The two principal ones we met with both have a public defense background.
- 2:29:10 I. Swenson           I am also meeting with legislators. This is a good time to be doing it. They are available and they have much more time than they are going to have later.
- 2:29:21 Chair Ellis           Any other comments or questions? Any new business or business that anybody wanted to bring up?

**MOTION:** Janet Stevens moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

[End.]



# Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION

RETREAT MINUTES

Thursday, August 14, 2008  
2:00 p.m. to 5:00 p.m.  
Swan Room  
Geyser Grand Hotel  
1996 Main St  
Baker City, OR 97814

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Peter Ozanne  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch  
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Becky Duncan  
Paul Levy  
Billy Strehlow  
Amy Jackson

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Chair Ellis convened the retreat by describing the August, 2007 PDSC retreat in Coos Bay Oregon. He noted that the Commission had been able to identify its budget priorities for the 2007-2009 biennium after receiving input from providers and discussing a long list of ideas. OPDS staff, under Kathryn Aylward's direction, was then responsible for negotiating contracts consistent with PDSC's priorities. By the end of the year, proposed contracts were presented to the Commission for approval.

Kathryn Aylward said the principal issue to be addressed is whether the Commission wishes to adopt an administrative model or a free market mode. For the past several years the Commission had been moving towards the administrative model and she has been supportive of that model since it results in consistent rates. She is not certain, however, that it can be implemented statewide because in most areas there are no potential competitors for current contracts. It may not be possible to reach agreement without making concessions on at least some rates in some areas.

The increase in hourly rates was easily implemented. With respect to the 3.1% inflationary adjustment that the Commission directed OPDS to apply to every contractor, across-the-board implementation limited OPDS's ability to distribute the inflationary adjustment based on areas of greatest need. Ingrid Swenson suggested that in the next contract cycle the Commission be given an opportunity to amend its directions to staff when the attempted application reveals possible exceptions.

Kathryn Aylward said that mitigating rate disparities was a particularly difficult priority to apply since in most contracts the aim is to make sure that it is the "bottom line" that is appropriate even if that involves disparate rates for some case types. Contractors also have different needs depending on their style of practice and the amount of monthly overhead they have to recover before receiving any net income. If PDSC wants to attract new and younger attorneys to practice in underserved areas of the state, rates in those areas have to be higher.

Commissioner Stevens asked if the model being used wasn't in fact a market driven model in disguise since you have to negotiate in order to reach agreement.

Chair Ellis said that consistency in rates is needed in order to avoid an appearance of favoritism. What has made it work is that both sides have been reasonable. Our system is a blend of the two approaches.

Kathryn Aylward said that contract funds would be used more effectively if the benefits actually got to the individuals who provide the services. As independent contractors, law firm partners determine the salaries that are paid to their associates so OPDS cannot guarantee that additional contract funds will be directed toward recruitment and retention of associates.

Chair Ellis noted that the Commission makes a distinction between public defender offices and other contractors and pays the former more. In addition, a subsidy for those practicing in low population areas would be appropriate.

Kathryn Aylward said that the rates paid in eastern Oregon were higher and that she believed that an even greater differential should be considered in the next contract period. In the past OPDS agreed to some "output" contracts under which contractors agree to handle all of the public defense cases in the area for a fixed sum. What happened in practice was that the estimated number of cases on which the contract was based tended to exceed the actual number of cases handled. Such contracts can appear wasteful. During the "BRAC" period, the caseload disappeared but OPDS still had to pay the amount agreed upon. OPDS has been flexible in trying to find solutions for fluctuations in the number of cases. For some contractors in less populated areas OPDS has agreed to a flat rate for all case types so that the contractor's income is not dependent on how

many appointments are made for each case type, just the total number of cases assigned. In addition, OPDS often allows contractors to carry over caseload deficits to the next contract period.

Commissioner Ozanne said that PDSC might always be needing to find the middle ground between these two models. The current contracting process relies on a single individual to hold the system together and it would be hard to reconstruct the process if that individual were not available. In addition, involving the Commission in service delivery reviews may not be the best use of members' time. We need to find a way for the Commission to get more involved in the contracting process. More Commission meetings during legislative sessions and contracting periods would increase the Commission's involvement in the decision making process.

Chair Ellis said that in the last contract cycle the Commission established its priorities in August and did not review the application of those priorities until December when it was asked to approve final contracts. If the Commission were to begin its discussion in May of odd numbered years it could then review the proposed plan for implementing those priorities, but not individual contract provisions, before final contracts were negotiated.

Commissioner Stevens said that she thinks public defense would be better served if the Commission simply established guidelines and trusted that it had hired good people to apply them. Guidelines are not rules. It is staff's job to identify circumstances that justify a deviation from the guideline and contracts cannot be negotiated in a public meeting.

Chair Ellis agreed that the Commission should avoid reviewing specific contracts.

Commissioner Stevens said that with the 3.1% increase, for example, OPDS should have been comfortable not applying it to those who did not need or seek it. Chair Ellis said that with that particular priority, the Commission had been clear that it wanted the increase to be applied across the board.

Commissioner Ozanne said this would have been a type of application that might have come back to the Commission for review had time permitted.

Kathryn Aylward said that she does not want to pay a contractor more than she reasonably believes the contractor needs. Chair Ellis pointed to the contractors who take more cases than they should in order to increase their income. It is appropriate for the Commission to say, "You need more money but you should not have to take additional cases in order to receive it." Kathryn Aylward said that her office maintains bid files and that a person reviewing those files might not understand why a contract was higher than the amount bid. She suggested that there be an advance discussion with contractors at the annual OCDLA conference so that they are aware of the commission's priorities. In the last cycle

OCDLA posted the Commission's priority list but there was no official notification from the Commission to contractors. Kathryn Aylward suggested that the RFP itself could include the list of priorities. She would also like to explain to providers the difficulty in applying any priority across the board. If there are five priorities, for example, they need to know that none of them might be achieved in full unless the Commission has so directed as was the case with the 3.1% cost of living increase.

Commissioner Potter asked whether OPDS had actually received competing bids for some contracts and Kathryn Aylward said it had. In order to select among competing bids she said she looked first to the current provider and whether there had been complaints about the provider. If not, she believed it was much less disruptive to organizations and individuals as well as to clients if the providers are there for the long term.

Chair Ellis said that the best measure of the success of the contracting system may be that people accept the outcome even if they don't like it.

Ingrid Swenson said that at the May 2009 Commission meeting members could determine whether their priorities would remain the same for the next contract period or would be amended to reflect changes in the budget and other factors.

Commissioner Welch said that some of the items identified as priorities are actually caveats or principles to be applied.

Chair Ellis asked whether the Commission would be reviewing caseloads as proposed in the 2008 Commission schedule. Ingrid Swenson responded that after an initial meeting of the Contractor Advisory Group to explore the issue, a major study by the Commission was not recommended. Focus during this biennium might more appropriately be placed on dramatic differences in caseloads between current providers, especially with respect to juvenile caseloads.

Commissioner Potter noted the high juvenile caseload numbers in Jackson County and asked whether OPDS would again contract for that number of cases per attorney. Kathryn Aylward said that independent contractors may agree to assign a given number of attorneys to handle contract cases but the number can change; attorneys can decide to leave or take fewer cases and it is not always possible to replace them even if the contractor is willing to do so.

Peter Ozanne said that when the income of some providers can be disproportionately increased by taking excessive caseloads it can reflect badly on the entire system.

Commissioner McCrea said that contractors need to have a certain amount of freedom to manage their own caseloads as long as they produce quality outcomes at reasonable rates. On the other hand, oversight is needed.

John Connors said that it appeared that the Commission had moved towards a free market model in Portland. He believes that public defenders should continue to have priority. In Washington County PDSC should determine whether its experiment with increasing consortium rates has actually resulted in increased quality or not. He believes that public defender offices provide better quality. Caseload shortfall is a major issue in Multnomah County. Carrying shortages over to a new contract period can be very hard on contractors. Kathryn Aylward said that after a shortfall has been carried forward for a period, it may be waived in recognition of the fact that overhead and salaries have to be paid in any case. This is the more responsible approach because of the need for organizational stability. If we want a public defender office to exist for the long term, we cannot expect it to be hiring and firing on a regular basis. Linda Bergman, the interim executive director of Metropolitan Public Defender Services, Inc. (MPD), provided Commission members with copies of recent caseload information as well as salary information comparing public defender salaries with district attorney salaries. An issue for MPD is, with caseloads declining, who will have priority for the cases that are there? Full time defenders provide services that others don't. MPD can continue to document the many valuable services beyond its contract requirements that it provides. John Connors said that another benefit of public defender offices is that they can be more flexible than other providers. Recently, for example, the Washington County office received 121% of its Measure 11 quota. Since other types of cases were down, MPD could simply move attorneys from one section of the office to another. The Washington County consortium administrator, however, would have responded by simply declining to take more cases.

Ingrid Swenson reviewed the proposed Commission meeting schedule for the balance of 2008 and for 2009.

The Commission agreed to reschedule the November 2008 meeting from November 13 to November 20 due to the anticipated absence of three commissioners on the earlier date.

Commissioners discussed the proposed schedule for establishing funding priorities for 2009-2011 and approving contracts and decided that at the May 2009 meeting it could establish initial priorities; at the June meeting held in conjunction with the OCDLA annual conference it could receive comments from contractors on its proposed priorities and then OPDS could issue the RFP in July. After receiving proposals, OPDS could outline a statewide plan for distribution of resources and the Commission could review that plan at the October meeting held in conjunction with the management conference. After receiving additional direction from the Commission, OPDS could negotiate

agreements with proposed contractors and present them for approval at the December meeting.

OPDS staff then presented its monthly report to the Commission. Ingrid Swenson said that there had been an ongoing discussion about locating at least part of OPDS's staff in Portland in view of the fact that a large number of the attorneys reside there and that the lengthy commute may result in the loss of some of these lawyers after they have been trained and are ready to become trainers themselves. She described some of the other benefits of locating an office in Portland, including the opportunity to develop closer working relations with the metropolitan area trial attorneys and the federal defenders, but also noted that such a move might undermine the agency's effort to consolidate the work of its two divisions. She said that the legislative fiscal office was doubtful that the agency could make a sufficient showing of a business need for the change to obtain legislative approval. Further discussions with legislative staff and possibly with legislators will need to occur before a move is contemplated.

Rebecca Duncan said that it is getting more difficult to recruit and retain people from the Portland area where the majority of attorneys are.

Peter Ozanne said that the decision would probably be made based on political and fiscal considerations and it might be best to avoid creating expectations when the ultimate decision may not be based on the merits.

Commissioners and staff discussed some of the benefits and disadvantages to moving all or a portion of the office and some alternative steps that are being considered to ameliorate some of the impacts of commuting.

Kathryn Aylward said that the resistance by legislative staff to a potential physical separation of the two divisions might be the result of their having supported the merger in the first place in order to address long-standing management and budget issues at the former State Public Defender office. Chair Ellis and Commissioner Ozanne both commented upon the improvements that have occurred since consolidation.

Kathryn Aylward then discussed the results of OPDS's customer service survey which indicated a high level of satisfaction with the agency's service to its customers.

Rebecca Duncan reported that the Appellate Division had filed its brief in *Oregon v. Ice* on August 1 and that argument in the Supreme Court is scheduled for October 15. A number of moot courts are scheduled in preparation for the argument. The division is filing a petition for certiorari in another matter involving the Oregon Constitutional provision that allows for non-unanimous jury verdicts in felony cases. The division also has four cases currently in the Oregon Supreme Court. Kathryn Aylward said that the juvenile section now has a functioning

database for case management in house and for referrals to attorneys outside the office. The section has hired a paralegal who is being trained and the section's first brief was filed recently.

Commissioner Welch said that she would not be able to attend the September Commission meeting but she recommended that the following issues be discussed at that meeting in creating a service delivery plan for eastern Oregon: the use of technology in law offices and elsewhere, health insurance for contractors and their employees, a research resource such as is available to prosecutors, and a recruitment initiative.

With respect to the research resource, Rebecca Duncan said that the Appellate Division does have an on duty attorney to answer questions from the trial bar but the Attorney General's office has a full trial support division which prepares manuals and sometimes even tries cases or provides a second chair in a trial proceeding. OPDS could create a resource position for general trial work, for juvenile cases or for other types of cases.

# Attachment 3

**Handout at meeting**

# Attachment 4

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Excerpts from PDSC Legal Representation Plan for Death Penalty Cases  
and from ABA Guidelines for the Appointment and Performance of Defense  
Counsel in Death Penalty Cases, Revised Edition, February 2003:

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The PDSC adoption of the ABA Guidelines was reflected in the June 14, 2007, "Delivery of Public Defense Services In Death Penalty Cases" report prepared by the Office of Public Defense Services. At page 10 the report describes what the Guidelines require, "The February, 2003 revised edition of the ABA Guidelines for death penalty cases is generally divided into two sections – a set of principles and policies that are intended to guide jurisdictions in creating a system for the delivery of defense services (Guidelines 1.1 to 10.1), and a set of performance standards defining the duties of counsel handling individual cases (Guidelines 10.2 to 10.15.2).")

The report contains the Public Defense Services Commission's Legal Representation Plan for Death Penalty Cases at pages 19-23:

1. Responsible Agency

The Public Defense Services Commission is responsible for ensuring that defendants in death penalty cases who are entitled to and financially eligible for appointed counsel at state expense receive legal representation consistent with Oregon and national standards of justice.

2. Selection of Lawyers for Specific Cases

Effective June 14, 2007, except where existing contracts provide otherwise, when the court determines that a defendant in an aggravated murder case is entitled to appointed counsel the court shall notify the Office of Public Defense Services of the need for appointed counsel and of any circumstances of the alleged offense or of the defendant that may affect the selection of counsel in the case. The Office of Public Defense Services shall then advise the court of the attorney to be appointed as lead counsel in the case.

Upon motion by lead counsel who has received authorization from the Office of Public Defense Services for the appointment of co-counsel for a specified number of hours, the court shall appoint the attorney or attorneys approved by the Office of Public Defense Services as co-counsel for the number of hours authorized. Additional hours for appointed co-counsel may be requested and authorized as provided in the Public Defense Payment Policies and Procedures.

The Office of Public Defense Services shall authorize appointment of co-counsel whenever it is reasonable and necessary considering both the circumstances of the case and lead counsel's circumstances and needs. A denial of a request for appointment of co-counsel may be appealed to the presiding judge of the circuit court as a denial of a request for a nonroutine expense under ORS 135.055(3)(c). However, a denial by the Office of Public Defense Services of a request for a particular attorney to serve as co-counsel is final.

### 3. Qualification, Monitoring, Removal, and Training of Defense Counsel

The Office of Public Defense Services shall:

...

The Office of Public Defense Services should:

...

- b. Monitor the performance of court-appointed attorneys providing representation in death penalty cases to ensure that clients are receiving high quality legal representation;
- c. Periodically review the list of approved attorneys, withdraw approval from any attorney who fails to provide high quality legal representation as provided in the attorney's contract or in the Qualification Standards for non-contract attorneys, and re-approve an attorney whose approval has been withdrawn only in exceptional circumstances;

...

- f. Investigate and maintain records concerning complaints made by judges, clients, attorneys or others about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay in accordance with the Public Defense Services Commission's Complaint Policy and Procedures and such additional policies as the Commission may adopt.

Excerpts from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February 2003:

#### Guideline 3.1

B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.

C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

#### Defender Organization

1. A "defender organization," that is, either:

- a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
- b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

#### Independent Authority

2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

...

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

- 1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;
- 2. draft and periodically publish rosters of certified attorneys;
- 3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

4. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;
5. monitor the performance of all attorneys providing representation in capital proceedings;
6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;
7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and
8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

#### GUIDELINE 7.1—MONITORING; REMOVAL

- A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.
- B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.
- C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.
- D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.
- E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.
- F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

From the Commentary:

In fulfilling its monitoring function, the Responsible Agency should not attempt to micro-manage counsel's work;<sup>126</sup> most lawyering tasks may reasonably be performed in a variety of ways. In order to preserve the nature of the attorney-client relationship, counsel for the accused must have the freedom to represent their client as they deem professionally appropriate. Clients, moreover, should have the right to continue satisfactory relationships with lawyers in whom they have reposed their confidence and trust. Rather, the responsibility of the Responsible Agency is to ensure that, overall, the attorney is providing high quality legal representation. Where counsel fails to do so,

whether because of a mental or physical impairment,<sup>127</sup> or for any other reason, the Responsible Agency should intervene. This may occur on the Responsible Agency's own motion or as a result of a request by the defendant or the court.<sup>128</sup>

In keeping with the paramount objective of protecting the rights and interests of the defendant, Subsection B provides that the Responsible Agency should have a regularized procedure for investigating and resolving complaints of inadequate representation. The procedure should recognize that many people (e.g., family members of the client, witnesses whom the attorney has interviewed or not interviewed) may be in a position to provide important information. The procedure should be publicized accordingly.

The Responsible Agency must monitor cases, and take appropriate action in the event of any substandard performance. If the jurisdiction has defender organizations, the entity monitoring them must review such problems with an eye towards rectifying both deficiencies on the part of individual staff lawyers and any structural flaws that those deficiencies may reveal. If inadequate training, office workload, or some other systemic problem has resulted in representation of lower quality than required by these Guidelines and the situation is not corrected, the office should be removed from the roster. Because of the unique and irrevocable nature of the death penalty, counsel or offices that have been removed from the roster should be readmitted only upon exceptional assurances that no further dereliction of duty will occur. The Responsible Agency should not readmit counsel or the office to the roster unless it determines that the original removal was in error, or finds by clear and convincing evidence that the problem which led to the removal of counsel or the office has been identified and corrected. It may condition readmission on specific actions (e.g., proof of reduction in workload, proof of additional training and/or experience, substance abuse counseling, or correction of systemic defects in an office).

# Attachment 5

## SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES

### INTRODUCTION

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 revision) assign to lead counsel (at Guideline 10.4(B)) the responsibility for conducting a thorough investigation relating to both guilt and penalty, regardless of any statement by the client opposing such investigation. (Guideline 10.7) To meet this responsibility, lead counsel must assemble a capital defense team consisting of no fewer than two qualified attorneys, an investigator, and a mitigation specialist – with at least one member of that team qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. (Guidelines 4.1 and 10.4 C)

Inherent in the approach to competent capital defense dictated by the Guidelines is the recognition that the mitigation function is multi-faceted and multi-disciplinary, even though ultimate responsibility for the investigation of such issues rests irrevocably with counsel. Because the mitigation function is of utmost importance in the defense of capital cases, and because counsel must rely on the assistance of experts, investigators and mitigation specialists in developing mitigating evidence, these supplementary interdisciplinary performance standards are necessary to ensure that all members of the defense team perform in accordance with prevailing national norms when representing a client who may be facing execution.

These Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases were

developed in cooperation with the ABA Death Penalty Representation Project to assist its work and to reflect prevailing professional norms. They are the result of a two-year drafting and review process by experts in the field of death penalty litigation. These Supplementary Guidelines provide comprehensive, up-to-date guidance for all members of the defense team, and will provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists. Following the Guidelines will help ensure effective assistance of counsel for all persons charged with or convicted of capital crimes. These Supplementary Guidelines explain in greater detail the elements of the mitigation function of capital defense teams. Because they are consistent with, elucidate and incorporate by reference the ABA Guidelines, these Supplementary Guidelines follow the same general organizational structure as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The skills, abilities, and functions outlined in these Supplementary Guidelines must be present throughout the defense team, and the responsibility for the development and presentation of mitigation evidence must be incorporated into the defense case at all stages of the proceedings from the moment the client is taken into custody, and extending to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, clemency proceedings and any connected litigation. The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel.

**GUIDELINE 1.1—OBJECTIVE AND SCOPE OF GUIDELINES**

- A.** The objective of these Guidelines is to summarize prevailing professional norms for mitigation investigation, development and presentation by capital defense teams, in order to ensure high quality representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. All capital defense teams must be comprised of individuals who, through their experience, training and function, strive to fulfill the constitutional mandate that the sentencer consider all evidence in support of a sentence other than death. Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.
- B.** These Guidelines apply from the moment that counsel is appointed and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, competency-to-be-executed proceedings, clemency proceedings and any connected litigation.

*Cross-References:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1—Objective and Scope of Guidelines; 4.10—The Defense Team and Supporting Services.

**GUIDELINE 4.1—THE CAPITAL DEFENSE TEAM: THE ROLE  
OF MITIGATION SPECIALISTS**

- A. In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. Applications to the court for the funding of mitigation services should be conducted *ex parte*, *in camera*, and under seal.
- B. Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must conduct such investigation of the background, training and skills of the team members as will determine that they are competent and must ensure on an ongoing basis that their work is of high professional quality.
- C. All members of the defense team are agents of defense counsel. They are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel. The confidentiality of communication with persons providing services pursuant to court appointment should be protected to the same extent as if such persons were privately retained. Like counsel, non-attorney members of the defense team have a duty to maintain complete and accurate files, including records that may assist successor counsel in documenting attempts to comply with these Guidelines.
- D. It is counsel's duty to provide each member of the defense team with the necessary legal knowledge for each individual case, including features unique to the jurisdiction or procedural posture. Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of the capital charges and

**available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars and “door-opening” doctrines; and rules affecting confidentiality, disclosure, privileges and protections.**

*Cross-References:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1—The Defense Team and Supporting Services.

ABA Model Rules of Professional Conduct 1.3—Diligence; 1.6—Confidentiality of Information; 1.7—Conflict of Interest: Current Clients; 1.8—Conflict of Interest: Current Clients: Specific Rules; 1.9—Duties to Former Clients; 1.10—Imputation of Conflicts of Interest: General Rule; 1.11—Special Conflicts of Interest for Former and Current Government Officers and Employees; 1.14—Client with Diminished Capacity; 2.3—Evaluations for Use by Third Person.

**GUIDELINE 5.1—QUALIFICATIONS OF THE DEFENSE TEAM**

- A.** Capital defense team members should demonstrate a commitment to providing high quality services in the defense of capital cases; should satisfy the training requirements set forth in these Supplementary Guidelines; and should be skilled in the investigation, preparation and presentation of evidence within their areas of expertise.
- B.** The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.
- C.** Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance.
- D.** Team members must have the training and ability to use the information obtained in the mitigation investigation to

illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

- E. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through education, professional training and properly supervised experience.
- F. Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records.

*Cross-References:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7—Investigation; 4.1—The Defense Team and Supporting Services; 5.1—Qualifications of Defense Counsel.

**GUIDELINE 6.1—WORKLOAD**

**Counsel should ensure that the workload of defense team members in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these supplementary Guidelines and the ABA Guidelines as a whole. In the case of mitigation specialists on the staff of an institutional defender office, the office should implement mechanisms to ensure that their workload is maintained at a level that enables them to provide each client with high quality services and assistance in accordance with these Guidelines.**

*Cross-Reference:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 6.1—Workload.

**GUIDELINE 8.1—TRAINING**

- A.** All capital defense team members should attend and successfully complete, at least once every year, a specialized training program that focuses on the defense of death penalty cases offered by an organization with substantial experience and expertise in the defense of persons facing execution and committed to the national standard of practice embodied in these supplemental Guidelines and the ABA Guidelines as a whole.
- B.** Funding should be provided for team members to receive effective training and continuing professional education in their respective fields of expertise.

*Cross-Reference:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 8.1—Training.

**GUIDELINE 9.1—FUNDING AND COMPENSATION**

**Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed to assist counsel with the litigation of death penalty cases. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**

*Cross-Reference:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 9.1—Funding and Compensation.

**GUIDELINE 10.3—OBLIGATIONS OF TEAM MEMBERS  
RESPECTING WORKLOAD**

**All members of the defense team in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these supplementary Guidelines and the ABA Guidelines as a whole.**

*Cross Reference:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.3—Obligations of Counsel Respecting Workload.

**GUIDELINE 10.4—THE DEFENSE TEAM: THE ROLE OF  
COUNSEL WITH RESPECT TO MITIGATION SPECIALISTS**

- A. Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.
- B. Counsel guides the defense team and, based on consultation with team members and experts, conducts ongoing reviews of the evidence, assessments of potential witnesses, and analyses of the most effective manner in which to convey the mitigating information. Counsel decides how mitigation evidence will be presented.

*Cross-References:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.4—The Defense Team. ABA Model Rules of Professional Conduct 5.3—Responsibilities Regarding Nonlawyer Assistant.

**GUIDELINE 10.11—THE DEFENSE CASE: REQUISITE  
MITIGATION FUNCTIONS OF THE DEFENSE TEAM**

- A. It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence phase strategy.
- B. The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.
- C. Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.
- D. Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and

religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

- E. It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:
1. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:
    - a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.
    - b. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.
    - c. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.
    - d. Persons with specialized knowledge of institutional life, either generally or within a specific institution.
  2. Lay witnesses, or witnesses who are familiar with the defendant or his family, including but not limited to:

- a. The client's family, extending at least three generations back, and those familiar with the client;
- b. The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;
- c. Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;
- d. Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;
- e. Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;
- f. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

- g. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.**

- F. It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.**
- G. It is the duty of the team members to aid counsel in preparing and gathering demonstrative evidence, such as photographs, videotapes and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts and letters of praise or reference.**

*Cross References:*

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1—The Defense Team and Supporting Services; 10.7—Investigation; 10.10.1—Trial Preparation Overall; 10.11—The Defense Case Concerning Penalty.

# Attachment 6

# Key Components of Drug Courts

- Drug courts integrate alcohol and other drug treatment services with justice system case processing
- Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants due process rights
- Eligible participants are identified early and promptly placed in the drug court program
- Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services
- Abstinence is monitored by frequent alcohol and other drug testing
- A coordinated strategy governs drug court responses to participants compliance
- Ongoing judicial interaction with each drug court participant is essential
- Monitoring and evaluation measure the achievement of program goals and gauge effectiveness
- Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations
- Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness

# Criminal Justice Commission

## Report to the Legislature

January 2007



Criminal Justice Commission

State of Oregon

## Drug Courts

In 2005, the 73<sup>rd</sup> Legislative Assembly approved HB 2485 and SB 907. These bills, along with their companion funding bills (HB 5174 and SB 5630), addressed the burgeoning statewide methamphetamine problem. Along with several policies aimed at reducing the methamphetamine supply in Oregon, they established a grant program through the Criminal Justice Commission (CJC) to create new drug courts and expand existing drug courts.

The budget note to HB 5174 directed the Criminal Justice Commission to "formulate performance measures for evaluating the effectiveness and performance of drug courts," and to "provide the 2007 Joint Ways and Means Committee with a report on the effectiveness and performance of new and existing drug courts."

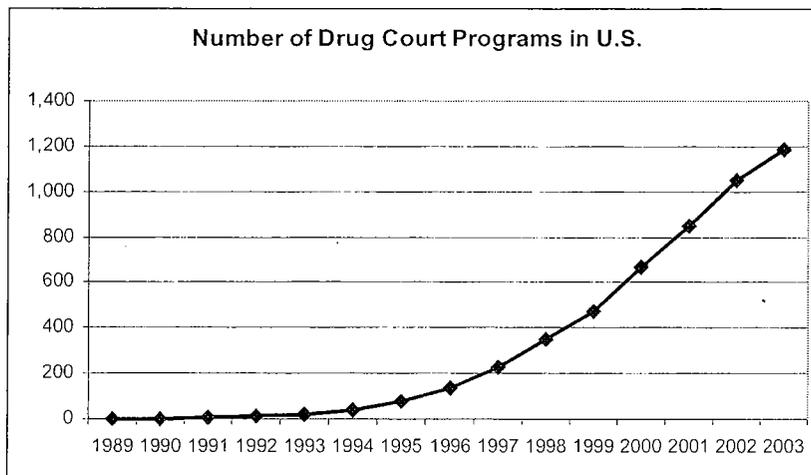
The Criminal Justice Commission worked with the Chief Justice's Treatment Court Advisory Committee to develop performance measures. The measures are included in Appendix G to this report. These measures are built in to the Oregon Treatment Court Management System (OTCMS), the drug court data system maintained by the Oregon Judicial Department. They also form the basis for evaluation of the Drug Court Implementation and Enhancement Grants administered by the Criminal Justice Commission.

***"We know that drug courts outperform virtually all other strategies that have been attempted for drug-involved offenders"***

***-Marlowe, DeMatteo, & Festinger, 2003***

This report will address the latter requirement in the budget note to HB 5174. It will review the research on Oregon drug courts and is aimed at arming policymakers with information about drug court outcomes.

A vast amount of national research has been conducted showing drug courts effectively reduce drug use and crime. In Steve Aos's "Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates" report he cites 57 well-researched studies on the topic of adult drug courts in concluding that such programs can be expected to reduce recidivism by 10.7% compared to "treatment as usual".<sup>22</sup> This report reviews the effectiveness of Oregon drug courts and the progress of the drug court grant program.



Graph 1

### Introduction

Since the founding of the first drug court in 1989, there has been a tremendous increase in the number of drug courts in the U.S (Graph 1). Drug courts offer offenders a chance to overcome addiction while offering public safety and promoting

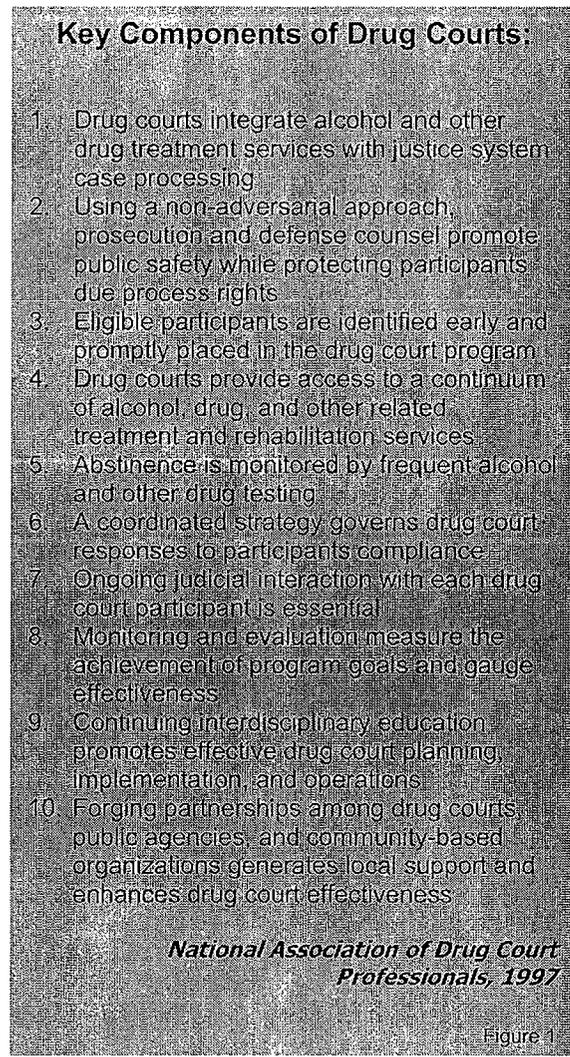
<sup>22</sup> <http://wsipp.wa.gov/pub.asp?docid=06-01-1201>, page 4

accountability through intensive monitoring. The power of the court system to compel treatment attendance is used to ensure addicts stay in treatment and are tested for drug use. The court also makes sure the whole drug court team is invested in participants graduating and succeeding. In the past 17 years, drug courts have been studied intensively, and have repeatedly been found effective at reducing drug use, criminal activity, and delivering other societal outcomes (increased employment, wages, etc). Not only have they been shown to be effective, but they have also been shown to be more cost-effective than "business-as-usual" (i.e. probation, traditional court processing). This is not surprising, since business-as-usual often involves "case banking" non-violent offenders and limited access to treatment or other resources. A system that offers long wait lists before treatment is available, and where probation supervision is inadequate to promptly identify non-compliance costs Oregon's taxpayers more in crime, jail beds and repeated arrests.

### What is a drug court?

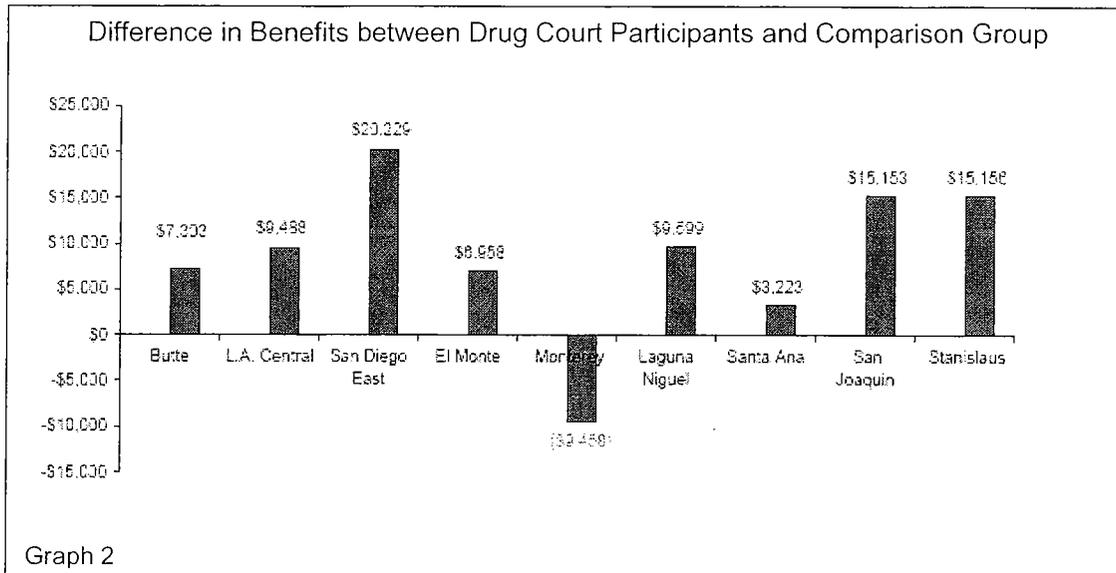
There are several types of drug courts (see "Definitions of Problem Solving Courts"). Generally, drug courts are defined by their fidelity to the Ten Key Components. There does, however, tend to be wide variation in the application of the Key Components. In Oregon, for example, most drug courts developed organically through local efforts and with limited resources. Programs were designed with local needs in mind. Oregon drug courts standardized to some extent when applying for state and federal grants, which required fidelity to the Ten Key Components.

A recent NPC study of several drug court programs in California (Graph 2) offers an illustration of the importance of the 10 Key Components (Figure 1). In that study, all the drug court programs except for the Monterey program reported better outcomes than "business as usual."



The authors describe the following problems with the Monterey program:

- Lack of local agency support. (Key Component #10)
- Practice of rotating judges presiding over drug court, making it difficult for the judges to get to know participants. Not all judges were equally invested in the program. (Key Component #7)
- Over 20 treatment providers were involved with the drug court, making it difficult for the judge to receive timely information. (Key Component #1)



### History of Oregon Drug Courts

One of the first drug courts in the country was founded in Multnomah County in 1991. The program, known as the Sanction Treatment Opportunity Progress (STOP) program became a national model for drug courts. Several evaluations of the STOP program have demonstrated significant impact on recidivism and drug use, while showing substantial cost-savings to other parts of the system.

In 1996, when there were only five drug courts in the state, the drug court judges and other team members established the Oregon Association of Drug Court Professionals (OADCP). The two primary purposes of the Association are: (1) promote and advocate for the establishment and sustainability of drug treatment courts in Oregon; and (2) provide technical assistance and support to its members.

In 2000, the Oregon Judicial Department, working with the OADCP, secured a Department of Justice Statewide Enhancement Grant to create a data collection system. Using this grant to leverage state resources, in April 2003, the Judicial Department launched the Oregon Drug Court Management System, since renamed as the Oregon Treatment Court Management System (OTCMS). The OTCMS serves the drug courts as both a case management and data depository tool.

In 2004, Oregon Supreme Court Chief Justice Wallace P. Carson, Jr. established the Chief Justice's Treatment Court Advisory Committee (TCAC). TCAC is comprised of judges, court staff, members of the Oregon State Bar, and Department of Human Services (DHS) representatives.

Currently, there are drug courts in 26 Oregon counties, with many counties running two or more programs (i.e. adult criminal, juvenile, family/dependency, DUII, or mental health). The majority are adult criminal programs. Counties that do not have drug courts are all in rural areas. Many of these counties have expressed interest in developing drug court programs, but lack resources to do so. In 2004, 831 adults, 96 juveniles, and 88 families were served in drug courts (Oregon Judicial Department). This number is expected to increase significantly in 2006 with the additional funding from state and federal drug court grants.

## Definitions of Problem Solving Courts

The definitions of problem solving courts, as found in the scientific and scholastic literature, are included below.

**Adult Drug Court:** A specially designed court calendar or docket, the purposes of which are to achieve a reduction in recidivism and substance abuse among nonviolent substance abusing offenders and to increase the offender's likelihood of successful habilitation through early, continuous, and intense judicially supervised treatment, mandatory periodic drug testing, community supervision and use of appropriate sanctions and other habilitation services (BJA, 2003).

**Juvenile Drug Court:** A juvenile drug court is a docket within a juvenile court to which selected delinquency cases, and in some instances, status offenders, are referred for handling by a designated judge. The youth referred to this docket are identified as having problems with alcohol and/or other drugs. The juvenile drug court judge maintains close oversight of each case through regular status hearings with the parties involved. The judge both leads and works as a member of a team that comprises representatives from treatment, juvenile justice, social and mental health services, school and vocational training programs, law enforcement, probation, the prosecution, and the defense. Over the course of a year or more, the team meets frequently (often weekly), determining how best to address the substance abuse and related problems of the youth and his or her family that have brought the youth into contact with the justice system (BJA, 2003).

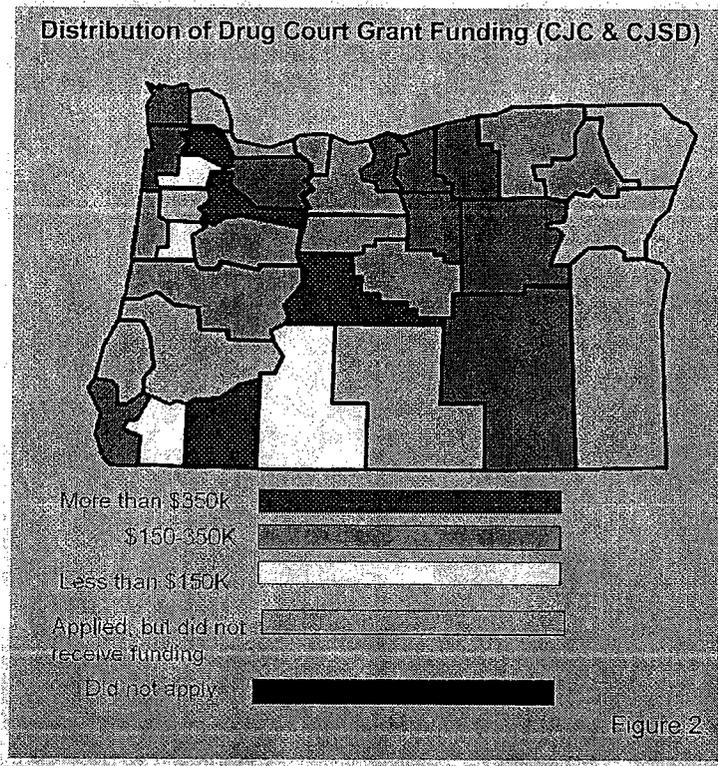
**Family Dependency Treatment Court:** A juvenile or family court docket of which selected abuse, neglect, and dependency cases are identified where parental substance abuse is a primary factor. Judges, attorneys, child protection services, and treatment personnel unite with the goal of providing safe, nurturing, and permanent homes for children while simultaneously providing parents the necessary support and services to become drug and alcohol abstinent. Family dependency treatment courts aid parents in regaining control of their lives and promote long term stabilized recovery to enhance the possibility of family reunification within mandatory legal timeframes (Wheeler & Siegerist, 2003).

## Drug Court Grant Programs

The 2005 Oregon Legislature authorized \$2,500,000 in funds for drug court grants under a process to be designed, implemented and administered by the CJC. The intent of the Oregon Legislature was to develop new drug courts and to expand existing drug court operations. These grants were intended to expand participant capacity and were not to be used to supplant or replace existing funds for drug court operations. Grant funds were to be primarily used to fund treatment capacity and court coordinators.

In October 2005, the CJC hired a Drug Court Grant Coordinator to administer the grants. The coordinator, Devarshi Bajpai, has worked in court-ordered addiction treatment as a counselor, supervisor, and program manager for 12 years. Mr. Bajpai holds advanced state and national certification as an addiction counselor, and serves on state and national counselor certification boards, and the Northwest Institute of Addiction Studies Board of Directors. Mr. Bajpai earned a Masters in Business Administration (MBA) from George Fox University in 2006. His knowledge and experience allow him to evaluate treatment practices of drug courts and to offer technical assistance.

Mr. Bajpai and CJC staff worked with the Oregon Judicial Department, Addictions and Mental Health Division, Criminal Justice Services Division (CJSD), treatment providers, members of the Governor's Meth Task Force, and the Chief Justice Treatment Court Advisory Committee to develop drug court performance measures and the grant application criteria. CJSD agreed to



contribute \$1.5 million in federal Byrne Memorial Grant funds for 2006 to drug courts that focus on women with children.

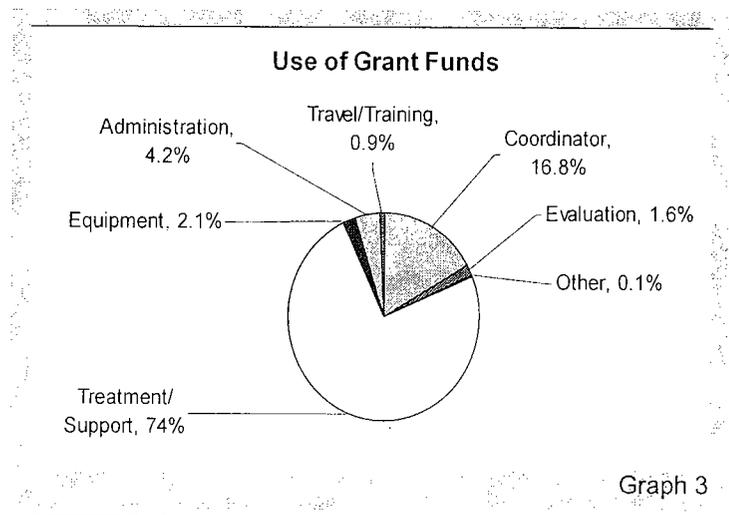
Grant requirements included cooperation among all members of the drug court team, including the judge, court administrator, district attorney, public defender, sheriff, community corrections agency (or juvenile department), and treatment provider. Additionally, the Local Alcohol and Drug Planning Council (LADPC) and Local Public Safety Coordinating Council (LPSCC) had to write letters of support for the program.

Applicants submitted a "logic model" for their programs, describing goals, inputs, outputs, and short and mid-

term objectives. They described their evidence-based practices and adherence to the 10 Key Components of Drug Courts. Applicants had to demonstrate a compelling need for a drug court program and the ability to deliver the proposed services through qualified, certified staff.

The grant proposals were evaluated by a team of experts, including treatment experts and Legislative Fiscal Office staff. The grants were reviewed according to the following criteria:

- 60 points – Proposed Program Narrative
  - 25 points – Program Description
  - 15 points - Demonstration of Need for the Program
  - 15 points - Evidence of Collaboration in Planning and Implementation
  - 5 points - Evidence of Staff Competency
- 10 points – Plan for Assessing Program Implementation and Monitoring Participants
- 15 points – Proposed Budget Worksheet and Budget Narrative
- 15 points – Ability to Leverage Other Funds and Cost-Effectiveness of the Proposed Program



The Criminal Justice Commission received 30 grant applications from 26 counties, with the total request of

\$6.7 million well exceeding the \$2.5 million available. In addition, CJSD received 18 Byrne grant applications from 16 counties for a total request of over \$2.6 million, exceeding the \$1.5 million available. That means that an additional \$5.3 million in single year funding was requested than the grant programs had available. So there were \$10.6 million in unfunded requests for the biennium. Adding the unfunded requests to the existing grants of \$4 million would require an additional \$18.6 million for the biennium to continue current drug court funding and to meet unmet demand.

Grants were reviewed and allocated primarily on the basis of criteria outlined in the Request for Proposals, although geographical distribution was also considered in determining grant awards. The Criminal Justice Commission funded 17 programs and the Byrne grant (administered by CJSD) funded 11. In many cases, State General Fund grants provided the required matching funds for the Byrne grants. While 60 percent of applicants received funding, many applicants only received minimal funding. Between the two grant programs, approximately 41 percent of the amount requested was fulfilled.

### **Grant Administration**

All 28 grants, including state and federal funds, are administered by Devarshi Bajpai and Diana Fleming (CJSD). The grant period started July 1, 2006, and the focus in the first quarterly reporting period was developing infrastructure and hiring staff. It appears drug court capacity has increased by 120 participants in the first quarter, with an increase in capacity of 500-700 expected in 2007 – 2008.

The current focus is on developing a reporting process that tracks performance measures and fidelity to evidence-based practices and the 10 Key Components of Drug Courts. Byrne Grants are required to have 10 percent of program budgets set aside for independent evaluation. CJSD staff are currently working with independent evaluators to develop specific performance measures and reporting mechanisms.

In the first two years, evaluation will focus largely on process evaluation as opposed to outcome evaluation. Outcomes are not expected during this time period because drug court programs last, on average, 18 months. Process evaluation is defined as:

“A process evaluation focuses on what services were provided to whom and how. Its purpose is to describe how the program was implemented--who was involved and what problems were experienced. A process evaluation is useful for monitoring program implementation; for identifying changes to make the program operate as planned; and, generally, for program improvement.”<sup>23</sup>

The results from the process evaluation will be used to develop performance-based contracts in the future. CJC staff are currently working with a team of researchers from Oregon Health Sciences University (OHSU) to develop a methodology for implementing and evaluating the impact of performance based contracting.

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<sup>23</sup> <http://www.ncrel.org/sdrs/areas/issues/envrnmnt/css/cs1lk55.htm>

## Are Drug Courts Effective?

### National Studies:

The US Government Accountability Office (GAO) published a review of 23 drug court evaluations in February 2005. The report was commissioned by the 21st Century Department of Justice Appropriations Authorization Act.

To meet this mandate, GAO conducted a systematic review of drug court program research, from which it selected 27 evaluations of 39 adult drug court programs that met its criteria for methodological soundness. The review describes the published evaluations of adult drug court programs, particularly relating to (1) recidivism outcomes, (2) substance use relapse, (3) program completion, and (4) the costs and benefits of drug court programs. The findings from the report are summarized below.

#### **Findings from the 2005 GAO Report: Adult Drug Courts- Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes**

- Lower percentages of drug court program participants than comparison group members were rearrested or reconvicted.
- Recidivism reductions occurred for participants who had committed different types of offenses.
- There was inconclusive evidence that specific drug court components, such as the behavior of the judge or the amount of treatment received, affected participants' recidivism while in the program.
- Recidivism reductions occurred for some period of time after participants completed the drug court program.
- Evidence about the effectiveness of adult drug court programs in reducing participants' substance use reported mixed results.
- Taking reduced recidivism into account, two of seven programs were found to cost less than "business as usual."
- All of the programs evaluated yielded positive net benefits, primarily from reductions in recidivism affecting judicial system costs and avoided costs to potential victims.

### Oregon Drug Courts

As mentioned above, Oregon started the second drug court in the country. Oregon drug courts also have the distinction of being among the most thoroughly evaluated programs in the country. One of the major reasons for this is that Dr. Michael Finigan of NPC Research is located in Portland. NPC Research is a national leader in evaluating drug courts for effectiveness and cost-effectiveness (the distinction between effectiveness and cost-effectiveness is noted because an expensive intervention may be effective, but not cost-effective). NPC has conducted numerous evaluations of Oregon drug courts, some more than once. Process, outcome, or cost-benefit evaluations have been conducted on Multnomah, Clackamas, Benton, Marion, and Malheur counties. This research is summarized in Appendix D.

Every outcome evaluation of Oregon drug courts has shown a positive effect in almost every domain. These outcomes include reduced alcohol and drug use, reduced criminal activity and recidivism, improved employment, relationships, income and housing. Many of these studies had small pools of participants and were not able to establish statistical significance, but the results have been consistent with each other and with national studies.

All cost-benefit evaluations have shown a positive net benefit for drug courts. Cost-benefit evaluations have included taxpayer and victimization costs. While most drug courts pay for their initial cost in avoided crime later, in one case (Multnomah County) the drug court was shown to cost less upfront and pay off in avoided costs due to successful treatment.

A statewide review of Department of Human Services, Addiction and Mental Health Division data offers further evidence of drug court effectiveness (see Table 1). Data from the Client Process Monitoring System (CPMS) shows that drug court participants were more likely to be retained in treatment, complete treatment, improve their employment status and not be arrested while in treatment. Perhaps most stunningly, the average length of stay in treatment for a drug court participant was 67% longer than a probationer (292 days vs. 175 days)! This is evidence of how effective court intervention is in keeping addicts engaged in treatment. Through incentives and sanctions, the court is able to increase regularity and duration of the participants' treatment, translating into better treatment outcomes.

Table 1

<b>DHS Addictions and Mental Health Division- Drug Court vs. Probation</b>		
	Drug Court (n=520)	Probation (n=2634)
Treatment Retention (90 days)	91%	79%
Treatment Completion	53%	47%
Employed at termination	62%	54%
Not arrested during treatment	93%	88%
Average Length of treatment (days)	292	175

### Research Limitations

There are several limitations to drug court evaluations that should be noted here. First, the vast majority of research reviewed for this report is focused on adult criminal drug courts. Only one juvenile court and no family dependency courts have been evaluated at this point in Oregon. This research is still in the early stages of development.

Finding an appropriate comparison group in drug court research is always difficult. It is difficult to mitigate the selection bias, i.e. that more motivated people choose to participate in drug court. Random assignment is not an option for legal reasons. Drug court evaluators have attempted to deal with this issue in a variety of ways, including looking at program drop-outs and similar probation populations.

For these reasons, it is difficult or impossible to compare drug court programs or evaluations with each other. The main conclusion we can take from the existing evaluations is that drug courts are more effective than business as usual and require an initial "up front" investment, but deliver worthwhile results.

### Drug Courts and Methamphetamine

One of the major goals of the Criminal Justice Commission Drug Court Grant Program is treating methamphetamine addiction in the state. DHS Addiction and Mental Health (AMH) Division data shows that methamphetamine is the primary drug of choice among drug court participants. In FY 2004-05, 66.6 percent of drug court participants used methamphetamine. Based on this, we attempted to quantify the impact of the CJC Drug Court Grant Program on the demand for methamphetamine.

We estimated the impact of increasing drug court capacity on methamphetamine demand following the methodology used by the RAND Corporation in 1994.<sup>24</sup> The estimate is based on the following assumptions:

- Demand for methamphetamine is reduced by 90% among drug court participants while in a drug court, simply because of intensive monitoring.<sup>25</sup>
- In order to develop a conservative estimate, we assume there is NO post treatment/drug court effect. In other words, because it is difficult to measure the use of methamphetamine after graduation, this estimate only factors in avoided use during the program.
- The average use pattern for a methamphetamine addict is about 18 grams per month.<sup>26</sup> The average price is \$50 per gram.<sup>27</sup>
- The CJC Drug Court Grant Program will increase drug court participants by about 500. Based on AMH data, 66.6% of drug court participants use methamphetamine. The average treatment length is 292 days.

Based on these assumptions, we estimate that methamphetamine demand will be reduced by approximately 118 pounds from July 1, 2006 to June 30, 2007 as a result of increasing drug court capacity. This amounts to a street value of almost \$2.7 million, much of which would have been generated by crime. For comparison, Oregon High Intensity Drug Trafficking Area (HIDTA) programs removed 139 pounds of methamphetamine from the market in 2005.<sup>28</sup>

As noted above, this is based on extremely conservative estimates and most likely underestimates the effect of drug courts. This estimate doesn't address the impact on other illicit drugs which are also addressed in drug courts. The assumptions guiding this analysis are very simplistic, and more work is needed to improve this model. These figures should be used as a starting point, and need to be further developed before being used to develop policy.

## Findings

This report makes the following findings

1. **There is compelling evidence that Oregon Adult Drug Courts are effective.** Several local studies of drug courts have been completed. All of these studies have shown positive effects, but many have been too small to show statistical significance. Further research should be conducted on a statewide level, with a particular emphasis on juvenile and family drug courts, where research is less developed.
2. **Adult drug courts are more cost-effective than other interventions.** Three Oregon studies have demonstrated the cost-effectiveness of adult drug courts. The cost savings in the family and juvenile systems have the potential to be significant. More research on juvenile and family drug courts is needed.
3. **Oregon Drug Courts may be effective at substantially reducing methamphetamine and other drug demand.** Through greater treatment retention and better outcomes, drug court participants are removed from the market for illicit drugs, temporarily or permanently. The impact on the illicit drug market is similar to that caused by very large drug seizures by law enforcement agencies.

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<sup>24</sup> Rydell, C., Everingham, S. (1994). Controlling Cocaine: Supply Versus Demand Programs. RAND Drug Policy Research Center

<sup>25</sup> Judicial Department data shows that positive UA's average about 19.7% in the first three months and are reduced to 6.1% after six months. A single offender will frequently have multiple positive UA's.

<sup>26</sup> Based on an informal survey of Oregon meth users in treatment- August 2006.

<sup>27</sup> As reported by Rob Bovett, Oregon Narcotics Enforcement Association. Rob also pointed out that prices are increasing quickly due to the supply constraints created by limiting access to pseudoephedrine.

<sup>28</sup> Oregon HIDTA 2005 Report

# Attachment 7

# ORBITS Budget Narrative

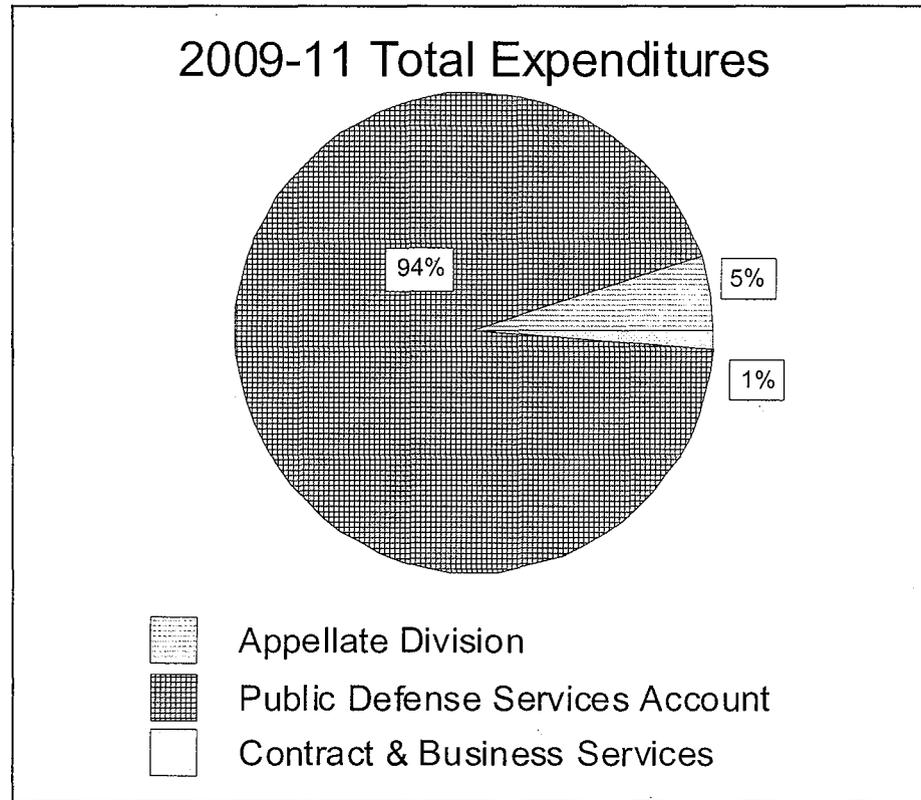
## Public Defense Services Commission

### Agency Summary

The Public Defense Services Commission (PDSC) is the judicial branch agency responsible for establishing and maintaining a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

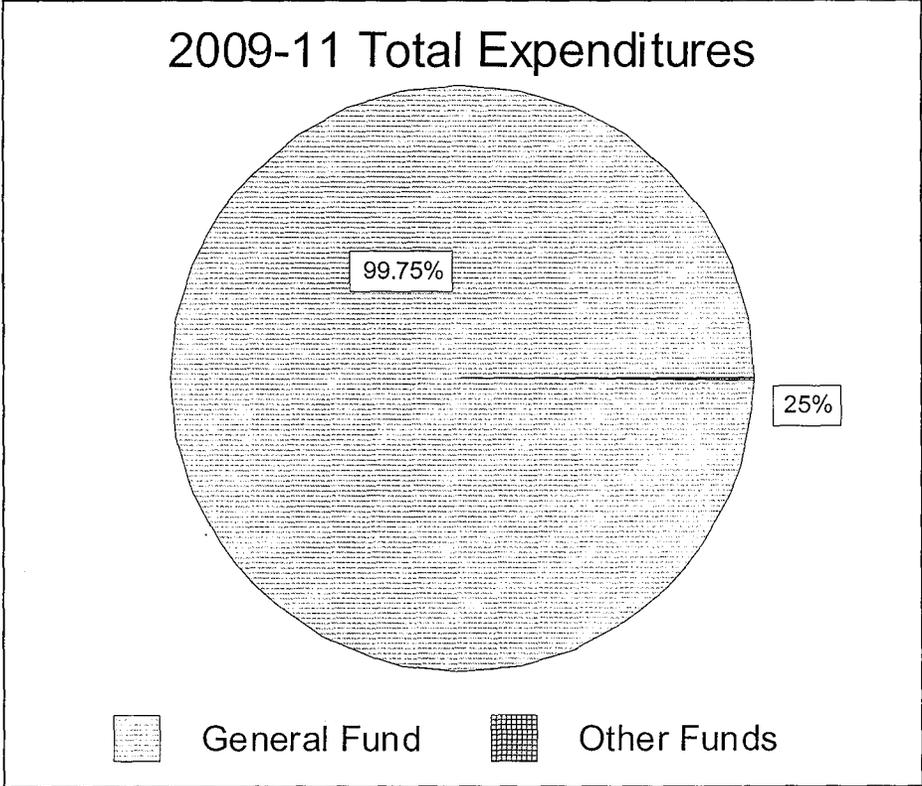
### Budget Summary Graphics

How the budget is allocated among programs or activities



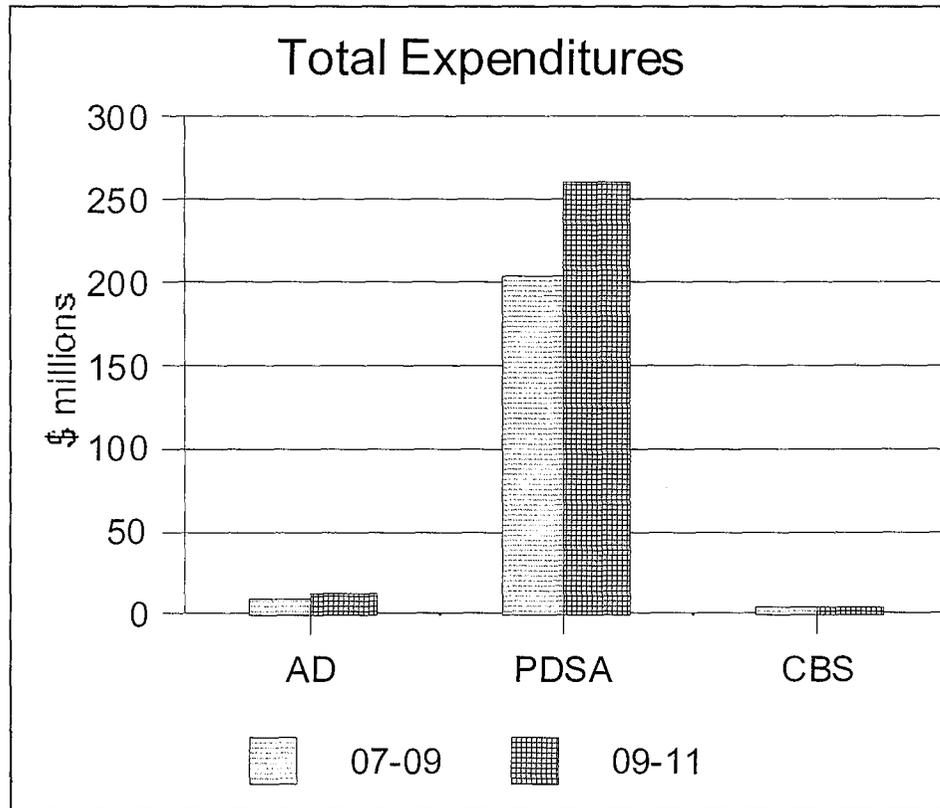
# ORBITS Budget Narrative

## Distribution by fund types



# ORBITS Budget Narrative

Comparison of 2007-09 Legislatively Approved Budget (as of April 2008) with the 2009-11 Agency Request Budget



AD = Appellate Division    PDSA = Public Defense Services Account    CBS = Contract & Business Services

# ORBITS Budget Narrative

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## Mission Statement & Statutory Authority

The Legislative Assembly enacted a mission statement for PDSC in 2001. ORS 151.216 directs PDSC to administer “a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.”

**Oregon Revised Statutes:** PDSC’s authority is derived from ORS 151.211 et seq.

## Long-Term Plan

PDSC’s long-term plan is to ensure the future viability and stability of the public defense system, which was severely jeopardized in 2001-2003 and which faces the continuing loss of older attorneys and increasing competition for younger attorneys to replace them. This plan targets the three main challenges faced by the agency: 1) the need to attract and retain more public defense providers; 2) the need to improve the quality of representation, primarily in juvenile dependency and post-conviction relief cases; and 3) the need to reduce high caseloads.

All three of these challenges are interrelated. Among the agency’s long-term providers, some of the most senior attorneys are reaching retirement age. Due to increases in the cost of living over the past two decades and the lack of a corresponding increase in the public defense budget until the 2007-09 budget, these providers have experienced increasing difficulty recruiting and retaining new attorneys. High caseloads also contribute to the loss of attorneys. The major reason that public defense caseloads in Oregon exceed national standards is that, until 2007, public defense contractors were required to accept ever-increasing caseloads in order to meet rising costs. Quality of representation as well as morale and long-term job satisfaction have been negatively affected by excessive caseloads.

In 2007 the Legislature took a major step forward by providing a mandated caseload adjustment which recognized that the agency’s budget could not absorb the increasing costs of doing business by its private providers. Prior to 2007, the state’s goods and services adjustment (3.1% in 2007), was applied across the board to the Public Defense Services Account even though more than 85% of the providers’ costs were for personal services. The 9.0% adjustment applied to the personal services portion of the Account in 2007 meant that, for the first time providers would not lose ground to inflation and would not have to take additional cases in order to stay even.

## ORBITS Budget Narrative

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Even though providers may not have lost ground in the previous biennium, many years of declining compensation (in terms of real dollars adjusted for inflation) and increasing caseloads means that the system will remain in jeopardy until some of the lost ground can be recovered through the provision of more reasonable rates of compensation.

The agency's 2009-11 budget will address the hourly rate for hourly paid attorneys and investigators, the salaries of attorneys employed by not-for-profit public defender offices (accounting for 32% of the statewide caseload), and some of the quality of representation issues in post-conviction relief and juvenile dependency cases.

In 2007 the Legislature provided funds sufficient to allow the agency to increase the hourly rate for attorneys for the first time since 1991. The rate which had been in effect for 16 years was \$40 per hour for non-death penalty cases and \$55 for death penalty cases. In 2007 PDSC was able to increase those rates by \$5 per hour. Investigator rates were also increased by \$3 per hour for non-death penalty cases and \$4 per hour for death penalty cases. In this biennium the agency is seeking funding to increase the hourly rates to the levels sought by the agency in 2007 — \$12,085,166 to increase the rate to \$70 an hour for attorneys in non death penalty cases and \$95 in death penalty cases, and \$2,785,788 to increase the hourly rate for investigators to \$35 in non death penalty cases and \$45 in death penalty cases.

In addition, in 2007 the agency was provided sufficient funding to increase public defender salaries to a level that would move them one-sixth of the way to parity with district attorney salaries in the same counties. Unfortunately, since average district attorney salaries also increased over the course of the last biennium, the cost of achieving parity with district attorney salaries would actually be greater in this biennium than it was in the last. The cost of reaching parity this biennium will be \$6,705,560. Also in this biennium the agency will address deficiencies in juvenile dependency representation by reducing caseloads by 30% to allow attorneys to devote more time to each case. Reducing juvenile dependency caseloads by 30% would require an additional \$17,274,024.

Finally, in order to address chronic quality of representation issues in post-conviction relief cases, the agency will create a post-conviction relief unit inside the Office of Public Defense Services at a net cost of \$331,651.

These steps will keep providers from leaving public defense and will improve the quality of representation in the key areas of juvenile dependency and post-conviction relief.

In the subsequent biennium, the agency will include policy packages aimed at reducing caseloads across the board to levels recommended by national standards and in accordance with the agency's mandate to provide public defense services "consistent with...national standards of justice." Reduced caseloads would be a powerful recruitment and retention incentive for public defense attorneys and would promote high-quality representation and long-term stability throughout the public defense system.

## ORBITS Budget Narrative

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If the agency achieves the goals discussed above, it can then focus on establishing and rigorously enforcing standards of representation. Policy packages during the final two-year period will likely include funding requests to meet training and resource center needs, and additional staffing to enable the agency to better monitor the quality of representation.

### 2009-11 Short-Term Plan

Agency Programs – the agency is comprised of two divisions that administer the state’s public defense system.

- The Appellate Division (“AD,” formerly the Legal Services Division) provides direct legal services in the Oregon Supreme Court and Court of Appeals on behalf of financially eligible clients appealing trial court judgments of conviction in criminal cases, and trial court judgments in juvenile dependency and termination of parental rights cases. Through best practices in performance management, results-based attorney work plans and regular performance evaluations of every employee in the office, AD plans to continue making progress in increasing office efficiencies and, as a result of such efficiencies and any additional positions that may be authorized by the Legislature, eliminating historic criminal case backlogs in the state’s appellate courts and achieving newly established timelines for briefing in these cases.
- The Contract and Business Services Division (CBS) negotiates and administers over 90 public defense contracts with individual lawyers and groups of lawyers and with nonprofit corporations for the delivery of legal services across the state in criminal, juvenile and civil commitment cases. After assuming the responsibility from state circuit courts in 2003 to review, approve and pay fees and expenses for public defense cases, CBS plans to continue developing and refining policies and practices that ensure the cost-effective administration of public defense contracts and payment of necessary and reasonable fees and expenses. (Contract costs and fees and expenses are funded from the Public Defense Services Account.)
- PDSC’s Executive Director and General Counsel in collaboration with its division heads will continue to implement quality assurance programs that evaluate the operations and performance of PDSC’s major contractors throughout the state and their adoption of best practices in public defense and law office management:
  - (1) PDSC has reviewed the public defense delivery systems in 19 of Oregon’s 27 judicial districts and will continue to hold meetings and conduct investigations throughout Oregon for the purposes of developing a “Service Delivery Plan” for every county or judicial district in the state. Such reviews are conducted with the cooperation of the public defense contractors in the area, the Circuit Court judges, the District Attorneys and many other representatives of the local criminal and juvenile justice systems. PDSC prepares written reports that include final service delivery plans for each district and that are on its website for review by any interested person or group. These plans establish the most cost-effective local organizations,

## ORBITS Budget Narrative

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structures and policies for the delivery of public defense services, taking into account the justice system practices and resources in each locality.

- (2) The agency's General Counsel performs quality assurance assessments of providers in each judicial district. This unique program involves the volunteer effort of dozens of public and private defense attorneys and other professionals who devote two and a half days to the study and analysis of the quality of representation being provided by a particular contractor or contractors in the county or district. To date 15 of these assessments have been performed. The Quality Assurance Task Force, which oversees the program, has been able to assemble a list of best practices from information obtained during the course of these assessments. Detailed reports are provided to the subject contractors identifying areas of special achievement as well as areas in which improvement is needed and recommendations for actions to be taken to address any deficits. PDSC is not aware of any other state public defense system that is able to achieve thorough assessments of its providers with the use of an all volunteer group of lawyers and other professionals. The contribution made by these volunteers is an indication of their commitment to supporting high-quality representation for public defense clients.

Environmental Factors – The public defense services that PDSC provides are mandated by state and federal constitutions and statutes.

The factors that drive the demand for these public defense services are beyond the control of PDSC. These factors include demographic factors such as population growth and growth in the at-risk population for juvenile and criminal offenses, the state's crime rate, policy decisions regarding criminal law by the Legislative Assembly and by the voters through ballot initiatives, and law enforcement policies and practices of state and local police agencies and 36 independently elected district attorneys.

PDSC is committed to ensuring that taxpayer funds devoted to public defense services are spent wisely by carrying out its mission of providing quality legal services cost-efficiently. PDSC is accomplishing that mission through results-based agency operations and management and a commitment to performance measurement and evaluation; as well as through collaborations with public defense contractors to implement best practices in law office management and quality assurance throughout the state.

Notwithstanding these efforts, state funds devoted to public defense in Oregon continued to fall further behind rates of inflation and the cost of living in every biennium until 2007. Although the agency's budget now includes a mandated caseload adjustment that will prevent PDSC funding from falling further behind, the cumulative effect of decades of losing ground means that public defender compensation is well below the compensation received for legal services not only by attorneys in the private sector but by their counterparts in public prosecutors' offices as well, and that qualified lawyers are increasingly unavailable to provide these services, particularly in rural areas of Oregon. As a result, local public safety systems throughout the state, especially in those rural areas with a short supply of lawyers, are at risk of eventual collapse because of the legal impossibility of prosecuting criminal and juvenile cases without public defense attorneys, as occurred statewide in the 2001-2003 biennium.

## ORBITS Budget Narrative

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Agency Initiatives – This budget request contains three policy packages that are designed to ensure the availability of qualified public defense attorneys throughout Oregon and the continuing operation of the state’s public safety system.

- Package No. 100 would provide funding to reduce trial-level juvenile dependency caseloads by 30% in order to address chronic and serious quality of representation issues. This package would allow the agency to ensure the delivery of quality, cost-efficient legal services in juvenile dependency matters.
- Package No. 101 would ensure the delivery of quality, cost-efficient legal services in post-conviction relief cases by bringing attorneys specializing in those services under the direct control of PDSC.
- Package No. 102 would bring public defender attorney salaries in line with deputy district attorney salaries, and increase the hourly rates for attorneys and investigators to rates that are more competitive in order to allow the public defense system to recruit and retain a sufficient number of qualified attorneys and investigators as well as to comply with PDSC’s statutory mandate to adopt policies that provide for a “fair compensation” system. ORS 151.216(1)(f)(C).

### **Criteria for 2009-11 Budget Development**

To continue to provide constitutionally and statutorily mandated legal representation to financially eligible persons while improving the quality of representation and maintaining the long-term viability of the program.

**PUBLIC DEFENSE SERVICES COMMISSION**

**Annual Performance Progress Report (APPR) for Fiscal Year (2007-2008)**

**Proposed KPM's for Biennium (2009-2011)**

Original Submission Date: September 2008

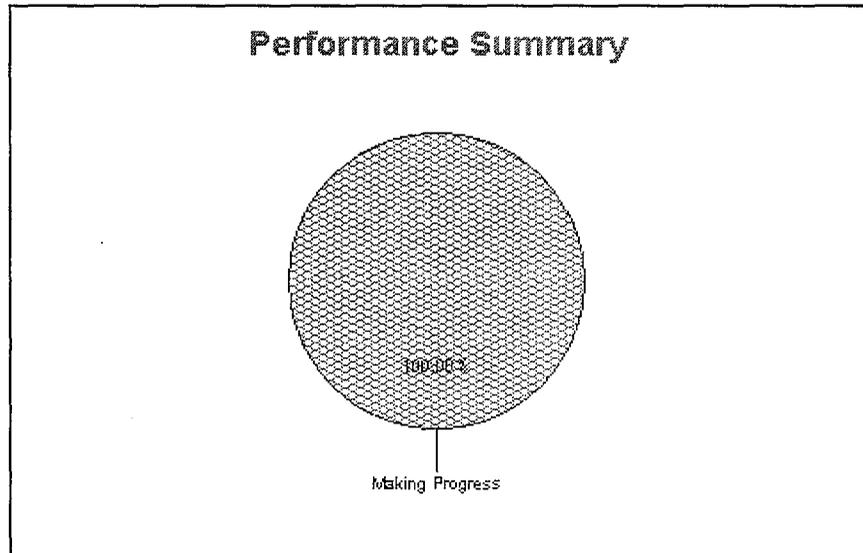
2007-2008 KPM #	2007-2008 Approved Key Performance Measures (KPMs)
1	APPELLATE CASE BACKLOG - Number of cases in the Appellate Division backlog.
2	FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing.
3	PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days.
4	REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days.
5	EXPENSE COMPLAINTS - Percentage of complaints regarding payment of expenses determined to be founded.
6	BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC's site visit process and the process's "360 degree" evaluations.
7	ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded.
8	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
9	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.

New Delete	Proposed Key Performance Measures (KPM's) for Biennium 2009-2011
NEW	<p><b>Title:</b> EFFICIENCY - Composite measure of time to process appellate cases, non-routine expense requests and fee statements.</p> <p><b>Rationale:</b> The agency proposes this KPM as a composite of three existing measures:</p> <ol style="list-style-type: none"> <li>1. APPELLATE CASE BACKLOG: This measure was originally envisaged as a way to measure the Appellate Division's productivity as a whole. In a closed system, the reduction in the backlog would reflect improved training and supervision as well as process improvements. Although such improvements do have an impact on reducing the backlog, fluctuations in caseload and staffing levels have a much greater impact on the backlog and thus make it difficult to isolate the impact that is due solely to improvement. The agency proposes changing the measure to the median number of days from record settlement to filing the opening brief.</li> <li>2. PROCESSING FEE STATEMENTS: No change in measure or target.</li> <li>3. REVIEWING EXPENSE REQUESTS: No change in measure or target.</li> </ol> <p>Since the agency is able to redirect staff and resources toward any one of these areas, a composite measure of the three will better reflect agency performance as a whole.</p>

New Delete	<b>Proposed Key Performance Measures (KPM's) for Biennium 2009-2011</b>
NEW	<p><b>Title:</b> CAPACITY FOR PROVIDING QUALITY REPRESENTATION - Reporting measure related to funding.</p> <p><b>Rationale:</b> This KPM is a replacement for: BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC's site visit process and the process's "360 degree" evaluations.</p> <p>Since the quality of representation is directly impacted by caseload, and caseload is a function of funding, the agency needs a measure that incorporates the impact of caseload. The agency will make use of the site review process and the best practices to provide a rating for contractors based on the following categories:</p> <ul style="list-style-type: none"> <li>a. Skill, knowledge and experience required to provide representation (25 points)</li> <li>b. Zealous advocacy (10 points)</li> <li>c. Efficient delivery including appropriate technology and staffing levels (10 points)</li> <li>d. Manageable caseload (25 points)</li> </ul>
DELETE	<p><b>Title:</b> PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days.</p> <p><b>Rationale:</b> This measure will be part of a new composite measure of EFFICIENCY.</p>
DELETE	<p><b>Title:</b> APPELLATE CASE BACKLOG - Number of cases in the Appellate Division backlog.</p> <p><b>Rationale:</b> This measure will be part of a new composite measure of EFFICIENCY.</p>
DELETE	<p><b>Title:</b> FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing.</p> <p><b>Rationale:</b></p> <p>This measure was intended to indicate how carefully fee statements are reviewed and the resulting reduction in expenditures. However, this measure relies on providers actually making mistakes in their bills.</p> <p>In 2006, the Secretary of State's Audits Division reviewed our procedures for processing fee statements and determined that our triple review of fee statements was a sufficient safeguard to insure that payments were appropriate and accurate.</p>

New Delete	<b>Proposed Key Performance Measures (KPM's) for Biennium 2009-2011</b>
<b>DELETE</b>	<p><b>Title:</b> REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days.</p> <p><b>Rationale:</b> This measure will be part of a new composite measure of EFFICIENCY.</p>
<b>DELETE</b>	<p><b>Title:</b> EXPENSE COMPLAINTS - Percentage of complaints regarding payment of expenses determined to be founded.</p> <p><b>Rationale:</b> This does not work as a KPM since the number of complaints the agency receives is so small. Out of approximately 40,000 payments processed per year, the agency received three complaints regarding payment of expenses in fiscal year 2007. All were determined to be unfounded.</p>
<b>DELETE</b>	<p><b>Title:</b> BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC's site visit process and the process's "360 degree" evaluations.</p> <p><b>Rationale:</b> KPM does not reflect agency's performance.</p>
<b>DELETE</b>	<p><b>Title:</b> ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded.</p> <p><b>Rationale:</b> The weakness of the data is that the total number of complaints received is quite small (59 in 2007) and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. Furthermore, the absence of complaints should not necessarily be seen as an indication that there are not problems with the quality of representation.</p>

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>		<b>I. EXECUTIVE SUMMARY</b>	
<b>Agency Mission:</b> Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.			
<b>Contact:</b> Kathryn Aylward		<b>Contact Phone:</b> 503-378-2481	
<b>Alternate:</b> Peter Gartlan		<b>Alternate Phone:</b> 503-378-2371	



**1. SCOPE OF REPORT**

Key performance measures address all agency programs.

**2. THE OREGON CONTEXT**

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

### 3. PERFORMANCE SUMMARY

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

### 4. CHALLENGES

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

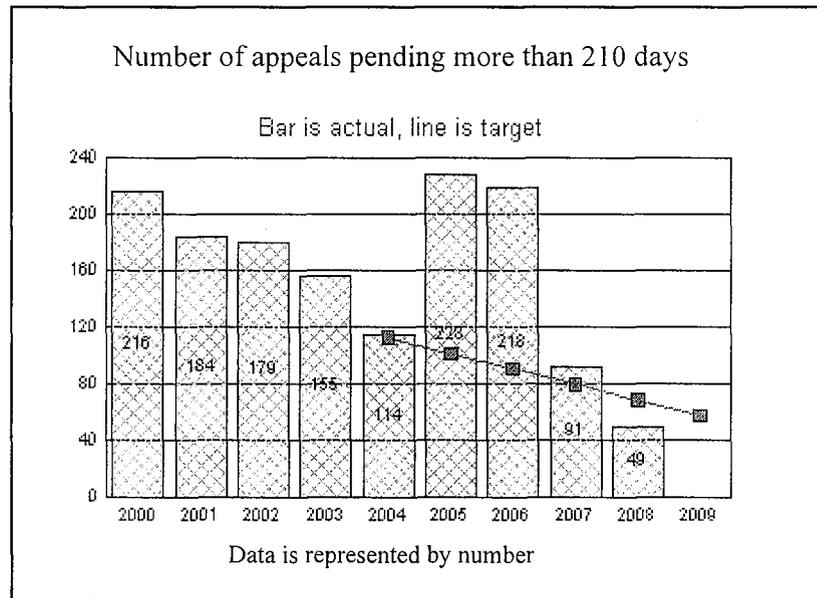
Another challenge for the agency is that workload is driven by a variety of factors outside the agency's control. The enactment of laws that create new crimes or increase penalties for existing crimes impact the agency's expenditures and workload. Federal requirements have shortened the timelines and increased the complexity of cases involving abuse and neglect of children. In 2004, the United States Supreme Court issued two landmark decisions (*Crawford v. Washington* and *Blakely v. Washington*) that directly and dramatically impacted caseload. If additional funding is not provided to address such changes, the quality of representation is further eroded.

### 5. RESOURCES AND EFFICIENCY

The agency's 2007-09 Legislatively Adopted Budget was \$215,489,928.

Two of our performance measures (KPM#3 and KPM#4) essentially measure how quickly the agency processes expense requests and fee statements. The agency has been able to exceed targets for each of those measures due to technological improvements. Within existing resources, the agency continues to convert to electronic storage and retrieval of documents; has further automated document production with improvements to the case management database; has expanded use of email instead of regular mail; and has centralized administrative functions of the two divisions.

<b>KPM #1</b>	APPELLATE CASE BACKLOG - Number of cases in the Appellate Division backlog.	2004
<b>Goal</b>	Reduce delay in processing appeals.	
<b>Oregon Context</b>	Mission Statement	
<b>Data Source</b>	Case Management Database	
<b>Owner</b>	Appellate Division, Peter Gartlan, (503) 378-2371	



### 1. OUR STRATEGY

Our goal is to reduce the delay in processing appeals. If we are able to eliminate the current backlog of cases, then we will have significantly

reduced the average time to file the opening brief. In addition, by reducing the number of open and active cases that Appellate Division attorneys are currently responsible for, attorneys will be able to devote more time to addressing and resolving cases, instead of merely “managing” cases at the cost of case resolution.

## 2. ABOUT THE TARGETS

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

## 3. HOW WE ARE DOING

The agency significantly reduced case backlog from June 2000 through June 2004, but the case backlog increased from June 2004 through June 2005, and remained high through June 2006. During fiscal year 2007, the agency reorganized its administration so that the Contract & Business Services Division would be responsible for all administrative functions of the agency. This allowed Appellate Division managers and staff to concentrate their efforts on reducing the backlog. Although still not at target, fiscal year 2007 represented a significant improvement.

The 2007 Legislature added additional attorney positions which enabled the agency to exceed the target for fiscal year 2008.

## 4. HOW WE COMPARE

The Appellate Division compares extremely favorably with national standards for attorney productivity. In 2001, the US Department of Justice issued a report entitled “Keeping Defender Workloads Manageable” which contained national data indicating that an appellate attorney should be assigned a maximum number of 25 appeals per year. By contrast, an agency attorney resolves an average of 37 cases per year, or approximately 50% more than the national average.

## 5. FACTORS AFFECTING RESULTS

In 2004, the United States Supreme Court issued two landmark decisions (*Crawford v. Washington* and *Blakely v. Washington*) that directly impacted agency caseload. The *Blakely* decision rendered virtually every sentence imposed by state judges subject to challenge and dramatically increased the number of appeals statewide. These two court decisions account for the backlog “spike” in fiscal years 2005 and 2006, and therefore the agency was unable to meet its target for 2007. The improvement in 2008 is a direct result of the increase in attorney positions as well as the restructuring of the division's management team.

#### 6. WHAT NEEDS TO BE DONE

The impact of the *Blakely* decision led to close cooperation among the Court of Appeals, the Attorney General, and the agency, resulting in the development of a streamlined appellate process for hundreds of cases. The parties identified “lead cases” whose resolution would control a category of cases, and developed a streamlined briefing format for the scores and hundreds of cases in each category. The same approach can be and has been used for similar issues.

The agency will continue to refine its evaluation system and performance measures to more closely measure attorney capacity and promote individual responsibility for case production.

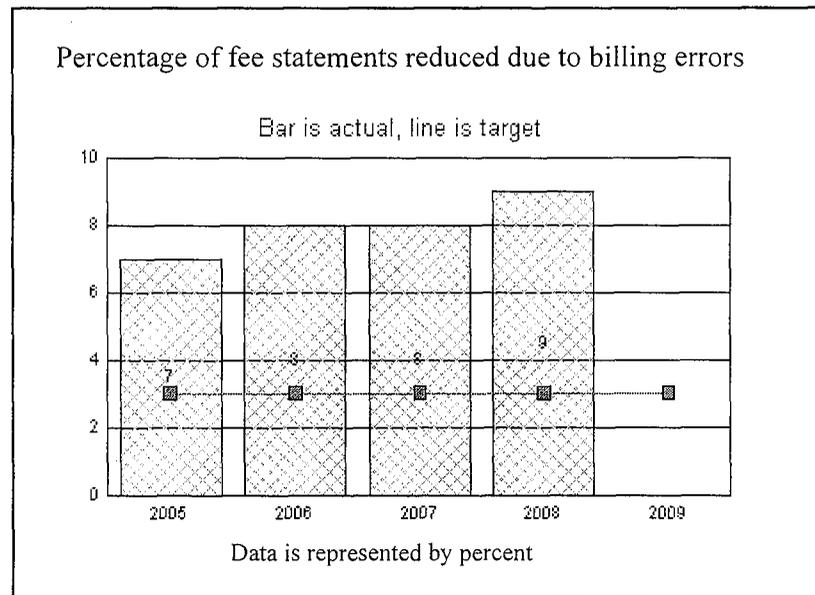
In late 2007, the Appellate Division reorganized its management structure to provide additional mentoring and supervision for both attorneys and support staff. The division will continue to develop and refine the internal procedural changes that have resulted from this restructuring.

#### 7. ABOUT THE DATA

The data is derived from the agency's case management database. The strength of the data comes from historical comparison. Its weakness is attributable to the inherent difficulty in quantifying appellate caseloads. For example, one appellate case may have a 30-page record, while another case may have a record of several thousand pages. Or, one case with a 300-page record may present one simple issue, while another case with a 300-page record may present five novel or complex issues. Apart from the conventional method of estimating production (based on raw case numbers), the agency continues to refine an additional method to measure appellate workload, based on case type, transcript length, and issues presented.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #2</b>	FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing.	2004
<b>Goal</b>	Ensure cost-efficient service delivery	
<b>Oregon Context</b>	Mission Statement	
<b>Data Source</b>	Accounts Payable Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



**1. OUR STRATEGY**

The agency carefully reviews all fee statements submitted to ensure that the correct amount is being paid for appropriate expenses.

**2. ABOUT THE TARGETS**

When this performance measure was established in 2004, data had not previously been tracked making it difficult to set a realistic target. The agency estimated that 3% of the fee statements could be reduced through careful review. Reducing a higher percentage is better.

### 3. HOW WE ARE DOING

The agency exceeded the targets for all four years for which data is available.

### 4. HOW WE COMPARE

The agency has no data with which to compare these results.

### 5. FACTORS AFFECTING RESULTS

It appears that the initial targets are too low.

### 6. WHAT NEEDS TO BE DONE

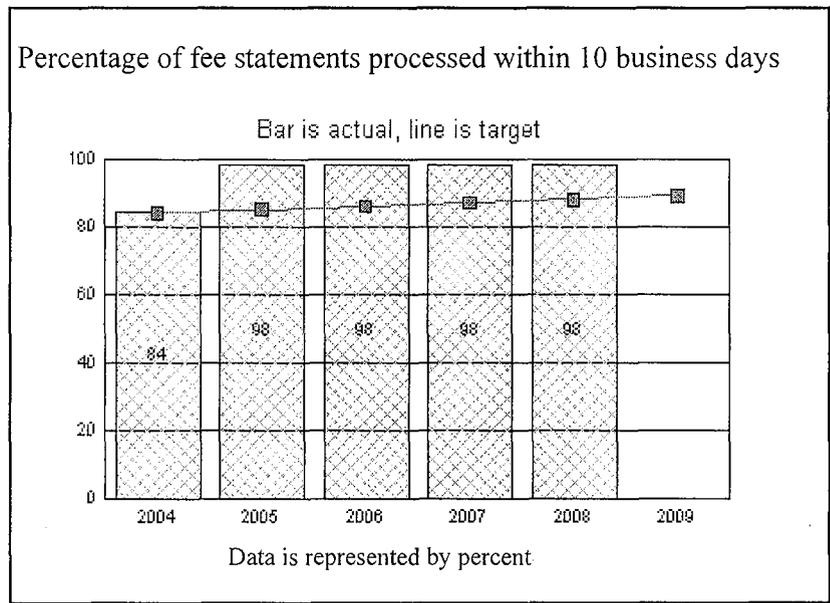
The agency has proposed eliminating this performance measure.

### 7. ABOUT THE DATA

The data is derived from the number of fee statements reduced as a percentage of the total number of fee statements received during the fiscal year (July 1 to June 30). The weakness of the data is that it is dependent on the number of fee statements submitted that include errors.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #3</b>	<b>PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days.</b>	2004
<b>Goal</b>	Ensure cost-efficient service delivery	
<b>Oregon Context</b>	Mission Statement	
<b>Data Source</b>	Accounts Payable Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



**1. OUR STRATEGY**

The agency's guideline rates paid to public defense providers are well below the rates many service providers normally charge. By assuring prompt and reliable payment, providers are more willing to work at reduced rates. This performance measure also sets an appropriate standard for employee performance as data is gathered for each employee as well as for the agency as a whole.

**2. ABOUT THE TARGETS**

The agency anticipated that as employees became more experienced and as the agency developed new procedures for processing fee statements, that there would be a gradual increase in processing speed.

**3. HOW WE ARE DOING**

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006, 2007 and 2008.

**4. HOW WE COMPARE**

The Oregon Department of Revenue averages 15 days to process an income tax refund which is comparable to the agency's measure of 10 business days.

**5. FACTORS AFFECTING RESULTS**

In late 2004, an agency employee developed a technological improvement that eliminated the need for duplicate data entry. Not only did this speed the processing of bills but it also eliminated the chance of error in the transfer of information between accounting systems. In 2007, the agency diverted staff time away from processing fee statements to assist the Appellate Division in making better progress toward its performance measure (KPM #1). In spite of this reduction in staff time, the agency has still been able to maintain the rate of fee statement processing.

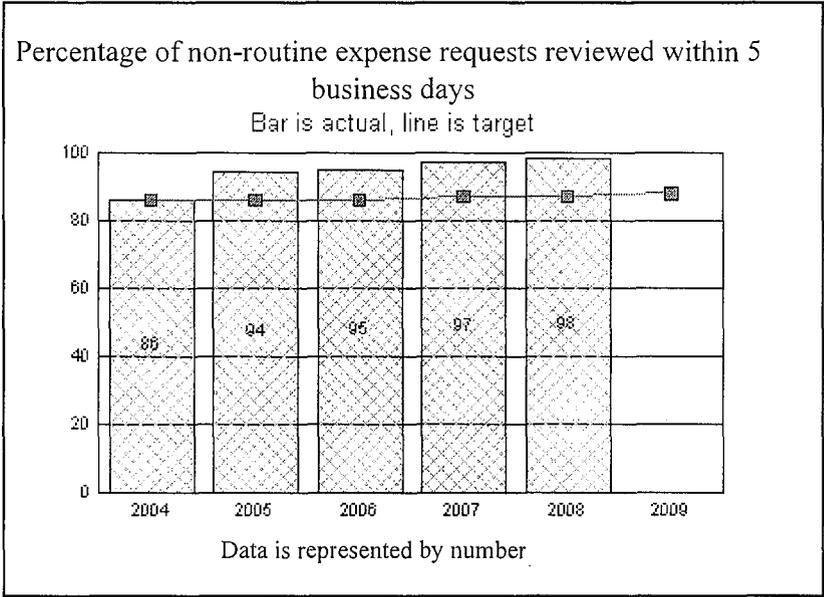
**6. WHAT NEEDS TO BE DONE**

The agency will consider diverting further resources away from bill processing so that the agency can reach other Performance Measure targets.

**7. ABOUT THE DATA**

The data measures the number of business days between the date a fee statement is received by the agency to the date the payment is issued by R\*Stars (state accounting system).

<b>KPM #4</b>	REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days.	2004
<b>Goal</b>	Ensure cost-efficient service delivery; improve the quality of representation	
<b>Oregon Context</b>	Mission Statement	
<b>Data Source</b>	Non-Routine Expense Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



**1. OUR STRATEGY**

This performance measure is designed to help the agency meet two of its goals: ensure cost-efficient service delivery, and improve the quality of representation. When a case requires the assistance of an investigator, forensic expert, or other expert service, the appointed attorney must receive pre-authorization from the agency to incur such expenses. In many instances, work begun as soon as possible after the alleged incident is more

productive than if there is a delay in the approval process. For those requests that are denied, the attorney will have more time to pursue alternatives.

## 2. ABOUT THE TARGETS

Because the data had not previously been tracked, the agency did not have baseline data from which targets could be set. The agency assumed that there would be a gradual increase in the percentage of non-routine expense requests reviewed within 5 business days as we refined our procedures and as staff gained experience.

## 3. HOW WE ARE DOING

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006, 2007 and 2008.

## 4. HOW WE COMPARE

The agency is not aware of comparative data.

## 5. FACTORS AFFECTING RESULTS

The agency is fortunate to have dedicated employees, low absenteeism and a low turnover rate so that their expertise and familiarity with the process allows the agency to exceed targets.

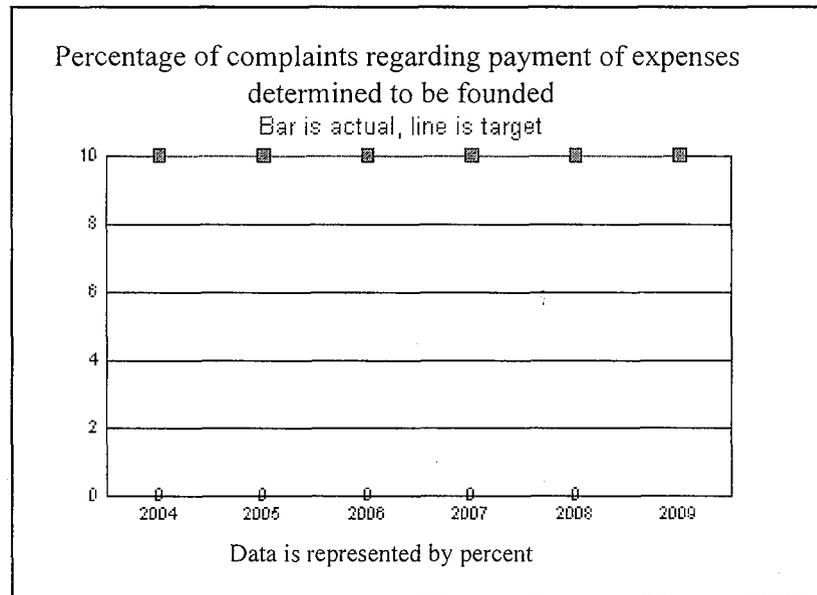
## 6. WHAT NEEDS TO BE DONE

The agency will consider whether to set a “higher” goal, e.g. review 95% of the requests within *four* business days, or whether resources should be diverted to improve results in other areas.

## 7. ABOUT THE DATA

The data measures the number of business days between the date a request is received by the agency and the date the response is issued (by email or regular mail).

KPM #5	EXPENSE COMPLAINTS - Percentage of complaints regarding payment of expenses determined to be founded.	2004
Goal	Ensure cost-efficient service delivery	
Oregon Context	Mission Statement	
Data Source	Contact Database	
Owner	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



1. OUR STRATEGY

The agency makes a determination as to whether an expense is “reasonable and necessary” for adequate legal representation of financially eligible Oregonians. The agency developed a complaint procedure and designed a database to track complaints from any source that questioned the agency’s decision to approve the expenditure.

**2. ABOUT THE TARGETS**

The assumption was that if a person made the effort to file a complaint, it was likely that the expenditure was of an unusual nature. Although the agency reviews and approves expenditure requests in advance, there may be times that in hindsight the agency would not have approved the expense. The agency hoped that fewer than 10% of the complaints would be founded.

**3. HOW WE ARE DOING**

Out of approximately 40,000 payments processed per year, the agency received no complaints regarding payment of expenses in fiscal year 2008.

**4. HOW WE COMPARE**

The agency is not aware of comparable data.

**5. FACTORS AFFECTING RESULTS**

Prior to July 1, 2003, expenditures were reviewed and processed by each circuit court. On July 1, 2003, the Public Defense Services Commission assumed responsibility for the entire public defense program. This centralization of expense approvals provides consistency and appropriate distribution of the agency's limited resources, and likely accounts for the fact that so few complaints have been received.

**6. WHAT NEEDS TO BE DONE**

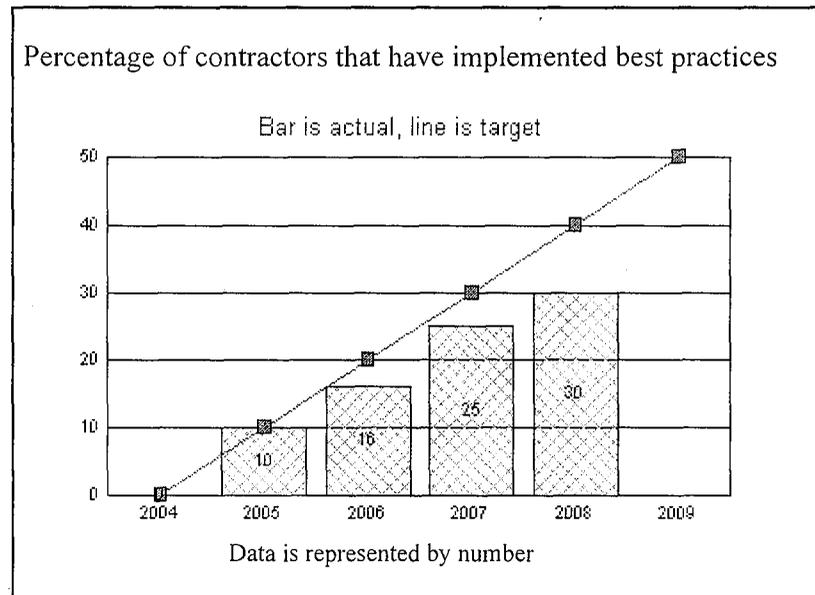
The agency has requested that this performance measure be eliminated.

**7. ABOUT THE DATA**

The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that there will likely always be a very small number of complaints and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. For example, if we receive one complaint during the year and it is founded, then our percentage would be 100%.

PUBLIC DEFENSE SERVICES COMMISSION	II. KEY MEASURE ANALYSIS
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KPM #6	BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC's site visit process and the process's "360 degree" evaluations.	2004
Goal	Improve the quality of representation	
Oregon Context	Mission Statement	
Data Source	Site Visit Reports and Contractor Follow-up Reports	
Owner	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



### 1. OUR STRATEGY

The agency formed a Quality Assurance Task Force to assist in the development of a systematic process to review the organization, management

and quality of services delivered by the agency's contractors. This "contractor site visit process" engages volunteer attorneys from across the state with expertise in public defense practice and management in a comprehensive statewide evaluation process. Teams of volunteer attorneys visit and evaluate the offices of the state's public defense contractors, administer questionnaires and interview all relevant stakeholders in a contractor's county, including the contractor's staff, prosecutors, judges, other defense attorneys, court staff, corrections staff, and other criminal and juvenile justice officials regarding the contractor's performance and operations. After a site visit and deliberations among the site visit team's members, the team submits a report to the contractor and the agency outlining its observations and recommendations. In addition to improving the contractors subject to the site visits, the process is designed to improve the operations of public defense contractors in Oregon by identifying best practices for managing and delivering public defense services and by sharing that information with other contractors across the state.

## 2. ABOUT THE TARGETS

The targets were based on the agency conducting four site visits per year and on the assumption that most if not all contractors visited would adopt the recommended best practices.

## 3. HOW WE ARE DOING

Because the targets did not anticipate the time contractors would require for implementation, the straight-line projection over-simplifies what the agency would expect to see. Although the agency has not been meeting targets, the trend shows that we are continuing to make progress.

## 4. HOW WE COMPARE

The agency is not aware of comparable data.

## 5. FACTORS AFFECTING RESULTS

In many cases, contractors are unable to adopt a recommendation that involves additional cost or staff time for the contractor because the rates currently paid to contractors are so low that attorneys are burdened with excessive caseloads.

## 6. WHAT NEEDS TO BE DONE

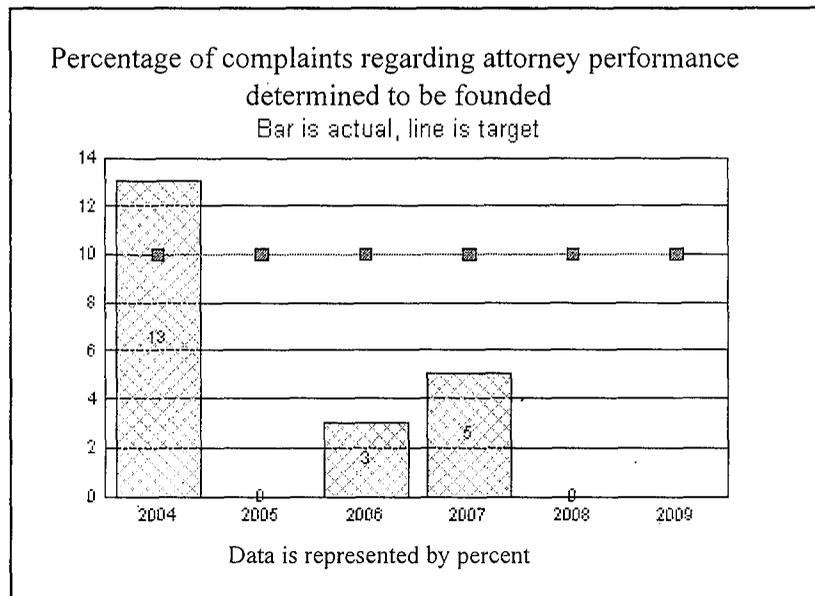
The agency will continue to conduct four site reviews per year. Although contractors are responding positively to the site review process, significant problems continue to exist; some have been addressed but many have not.

**7. ABOUT THE DATA**

The agency initially planned to conduct site visits for contractors with ten or more attorneys. After the first three site visits, the agency realized that in some cases it was more efficient to gather information about all contractors within the county during the single visit. Therefore, the agency now plans to conduct site visits for all contractors other than sole practitioners. Contractors are asked to submit a report to the agency detailing the steps they have taken to implement the recommendations. The figures indicate the number of contractors who, as of June 30th of each year, have reported adoption of recommendations as a percentage of the total number of contractors.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #7</b>	ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded.	2004
<b>Goal</b>	Improve the quality of representation	
<b>Oregon Context</b>	Mission Statement	
<b>Data Source</b>	Contact Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



### 1. OUR STRATEGY

The agency (through its small administrative office in Salem) funds the appointment of attorneys to over 170,000 cases per year all across Oregon. The information we receive through the complaint process allows the agency to know which attorneys may need additional training and/or

resources, or whether to change the types of cases an attorney is allowed to accept, or to remove an attorney from court appointment lists altogether. As the agency works to improve the quality of representation through a variety of strategies, we would expect the number of founded complaints to decrease.

## 2. ABOUT THE TARGETS

Prior to July 1, 2003, no data was kept regarding complaints. The agency hoped that fewer than 10% of complaints regarding attorney performance would be founded.

## 3. HOW WE ARE DOING

In fiscal year 2004 (the first year of operation for the agency), we did not meet the target; however, in each reporting year thereafter, the agency exceeded expectations with fewer than 10% of the complaints received being founded.

## 4. HOW WE COMPARE

Most state agencies that receive complaints use a performance measure based on the average number of days to close a formal complaint and do not use the results of such investigations as a performance measure. Because our agency selects the attorneys who provide legal representation, the quality of their performance does provide feedback on our selection and oversight procedures.

## 5. FACTORS AFFECTING RESULTS

In 2004, the agency initiated a "site visit" process (see performance measure #6) in which volunteer teams of public defense attorneys and staff visit individual contractors to provide training, advice and management expertise. In early 2006, the agency required all public defense attorneys to re-apply for inclusion on hourly paid court appointment lists. Through that process, the agency attempted to select only the best-qualified attorneys.

## 6. WHAT NEEDS TO BE DONE

The agency has requested the elimination of this performance measure.

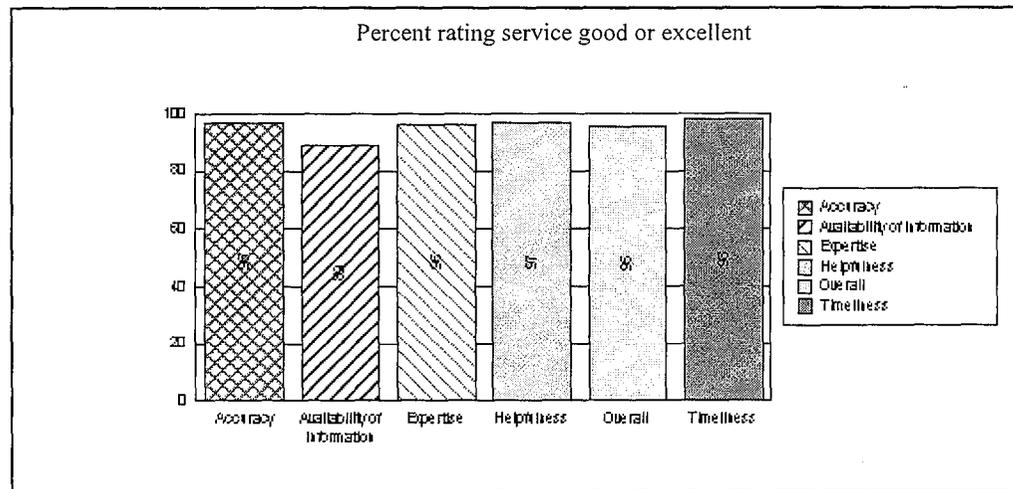
## 7. ABOUT THE DATA

The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that the total number of complaints

received is quite small (36 in 2008) and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. Furthermore, the absence of complaints should not necessarily be seen as an indication that there are not problems with the quality of representation. In 2000, the Oregon State Bar Task Force on Indigent Defense concluded that representation in juvenile cases and post-conviction relief cases was inadequate. In 2005, the Secretary of State's Audits Division rated the quality of representation in those case types as "risk areas" for the agency.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #8</b>	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	2007
<b>Goal</b>	To provide greater accountability and results from government by delivering services that satisfy customers.	
<b>Oregon Context</b>	To maintain and improve the following category ratings of agency service: overall quality of services, timeliness, accuracy, helpfulness, expertise and availability of information.	
<b>Data Source</b>	Customer Service Surveys (survey and results stored on SurveyMonkey)	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



### 1. OUR STRATEGY

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

### 2. ABOUT THE TARGETS

Targets were not set for 2007-09 as no baseline data was available upon which realistic targets could be based.

### 3. HOW WE ARE DOING

The survey results indicate a high level of customer satisfaction with the agency. Service was rated as good or excellent by more than 95% of the respondents in all categories except the Availability of Information (89%). Although the standard reporting measure for state agencies groups both "good" and "excellent" into one category, the more telling aspect of the agency's results is the percentage of respondents who rated the service as excellent.

In the categories of Timeliness, Accuracy, Helpfulness and Overall, over 60% of respondents rated the agency's service as excellent.

### 4. HOW WE COMPARE

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

### 5. FACTORS AFFECTING RESULTS

The agency is fortunate to have dedicated, knowledgeable employees and low turnover.

### 6. WHAT NEEDS TO BE DONE

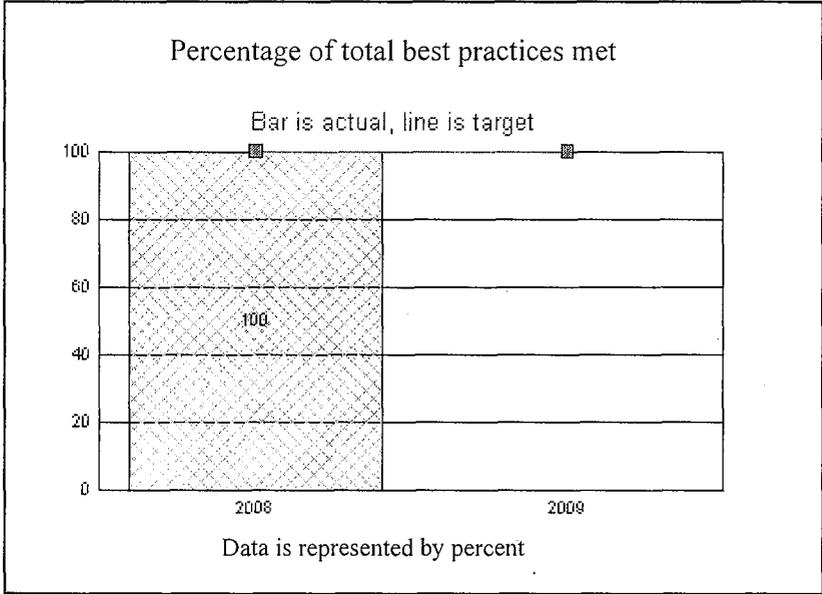
The agency's lowest satisfaction rating was in the category of Availability of Information. The agency will continue to direct customers to our website and make sure that all resources on the website are easy to locate and clearly identified.

**7. ABOUT THE DATA**

A total of 600 contract attorneys, private bar attorneys, and service providers were invited to complete the agency's Customer Service Survey. The survey was administered in July 2008 as a snapshot for fiscal year 2008. There was a 34% response rate (200 responses) to the survey.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #9</b>	<b>BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.</b>	2007
<b>Goal</b>	Best practices as a pathway to improved performance and accountability	
<b>Oregon Context</b>	Required KPM for all Oregon boards and commissions	
<b>Data Source</b>	Commission agendas and minutes	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	



**1. OUR STRATEGY**

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

**2. ABOUT THE TARGETS**

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

**3. HOW WE ARE DOING**

In fiscal year 2008, the agency met all of the best practices for boards and commissions.

**4. HOW WE COMPARE**

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

**5. FACTORS AFFECTING RESULTS**

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

**6. WHAT NEEDS TO BE DONE**

No change is needed.

**7. ABOUT THE DATA**

The Commission reviewed and discussed the best practices at its public meeting held March 21, 2008. The minutes of that meeting reflect that all of the best practices have been implemented.

<b>PUBLIC DEFENSE SERVICES COMMISSION</b>		<b>III. USING PERFORMANCE DATA</b>
Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.		
Contact: Kathryn Aylward	Contact Phone: 503-378-2481	
Alternate: Peter Gartlan	Alternate Phone: 503-378-2371	

The following questions indicate how performance measures and data are used for management and accountability purposes.	
<b>1. INCLUSIVITY</b>	<p>* <b>Staff :</b></p> <p>The agency's Management Team drafted initial performance measures.</p> <p>* <b>Elected Officials:</b> The Joint Legislative Audit Committee and the interim Judiciary Committee assisted the agency in refining and finalizing its performance measures.</p> <p>* <b>Stakeholders:</b> Input was received from the agency's Contractor Advisory Group comprised of public defense service providers.</p> <p>* <b>Citizens:</b> The agency developed, discussed and revised its performance measures during two public meetings.</p>
<b>2 MANAGING FOR RESULTS</b>	<p>KPM#1, KPM#3 and KPM#4 are used to measure an individual employee's performance and indicate how workload should be redistributed.</p> <p>The agency's Management Team will consider re-allocation of resources based on the results.</p>
<b>3 STAFF TRAINING</b>	<p>The agency has advised staff of the goals outlined in the performance measures and staff is directly involved in the data collection and/or direct daily implementation of the measures. The performance measures serve as important tools for the agency's managers as they identify and develop necessary staff skills as well as determine the best use of overall resources in order to attain the goals enumerated in the measures.</p>

**4 COMMUNICATING RESULTS**

- \* **Staff:** The Annual Performance Progress Reports are posted on employee bulletin boards. The results and future plans are discussed at staff meetings.
- \* **Elected Officials:** The agency communicates results to the Legislature through the Progress Board reports, the Executive Director's biennial report to the Legislature, and its Agency Request Budget binder.
- \* **Stakeholders:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.
- \* **Citizens:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.

# ORBITS Budget Narrative

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## Reduction Options

### Appellate Division

A 10% reduction (\$1.2 million GF) of the agency's essential budget level for the Appellate Division would require the elimination of 5 attorney positions and 2 support staff positions. The existing backlog of appellate cases would increase and the average length of time an appeal is pending would increase. The Court of Appeals may order the dismissal of pending cases that exceed 350 days from the date the record settles to the filing of the opening brief.

### Public Defense Services Account

A 10% reduction (\$22 million GF) of the Public Defense Services Account represents the level of funding required for two to three months of public defense services. Unless the 2009 Legislature acts to either reduce criminal penalties and thereby reduce the cases on which counsel must be appointed, or funds this caseload, PDSC will have to cease payment for appointed counsel and related expenses during the last quarter of the 2009-11 biennium. Generally, if counsel is not available, the courts will dismiss cases.

### Contract and Business Services Division

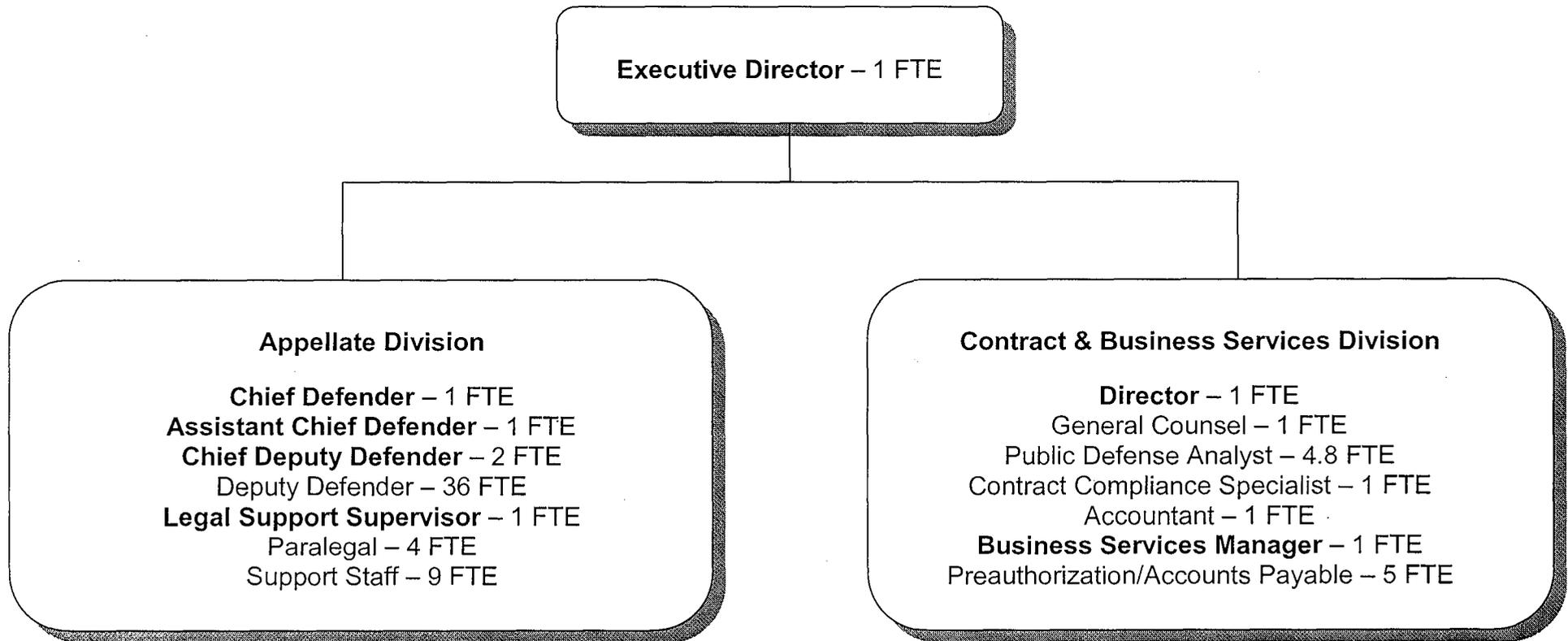
A 10% reduction (\$400,000 GF; \$70,000 OF) of the division's essential budget level will require the elimination of approximately 3 positions (contract analysts and accounting staff), which will result in delays in paying providers and a substantially reduced ability for staff to audit contractor caseload reports, fee statements and expense requests. Delayed payments will impact over 1,500 individual service providers and businesses in Oregon. Failure to adequately review payments will likely result in the inappropriate expenditure of funds.

## HOUSE BILL 3182 REDUCTIONS

ACTIVITY OR PROGRAM (WHICH PROGRAM OR ACTIVITY WILL NOT BE UNDERTAKEN)	DESCRIBE REDUCTION (DESCRIBE THE EFFECTS OF THIS REDUCTION. INCLUDE POSITIONS AND FTE IN 2009-11 AND 2011-13)	AMOUNT AND FUND TYPE (GF, LF, OF, FF. IDENTIFY REVENUE SOURCE FOR OF, FF)	RANK AND JUSTIFICATION (RANK THE ACTIVITIES OR PROGRAMS NOT UNDERTAKEN IN ORDER OF LOWEST COST FOR BENEFIT OBTAINED)
1. Appellate representation will be further delayed.	REDUCTION OF 5 FTE ATTORNEY POSITIONS AND 2 FTE SUPPORT STAFF POSITIONS WILL AT FIRST EXTEND THE CURRENT DELAY IN FILING THE OPENING BRIEF. OVER TIME, AS THE BACKLOG OF CASES GROWS, ALL CASES WILL BE DELAYED MORE THAN 350 DAYS AT WHICH POINT FEDERAL INTERVENTION IS LIKELY.	\$1,203,271 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
2. Trial-level representation will not be provided during the final 2-3 months of the biennium.	IN THE ABSENCE OF FUNDING FOR LEGAL REPRESENTATION, PROSECUTIONS CANNOT PROCEED.	\$22,064,897 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
3. Auditing of fee statements and caseload reports.	REDUCTION OF 3 FTE WOULD ELIMINATE AGENCY'S ABILITY TO AUDIT FEE STATEMENTS AND TO VERIFY CONTRACT CREDITS CLAIMED.	\$397,278 GENERAL FUND \$67,685 OTHER FUND (APPLICATION/CONTRIBUTION PROGRAM)	IN THE ABSENCE OF AUDITING, IT IS LIKELY THAT THE EXPENDITURES FROM THE PUBLIC DEFENSE SERVICES ACCOUNT WOULD INCREASE.

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## Organization Chart



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## Revenue Discussion

ORS 151.487, et seq., provide the authority for judges to order individuals who apply for court-appointed counsel to pay the administrative costs of determining the eligibility of the person and the anticipated cost of public defense services prior to the conclusion of the case. Judicial Department Verification Specialist (VS) staff assist the courts in determining whether a person will be ordered to pay what is currently a \$20 application fee and a "contribution amount" toward the anticipated public defense cost of the case. The program is referred to as the Application/Contribution Program (ACP).

ACP revenue that is collected is deposited in a subaccount of the Public Defense Services Account, pursuant to ORS 151.225(3). The same ORS authorizes funds in the subaccount to be used to reimburse the actual costs and expenses, including personnel expenses, incurred in the administration and support of the public defense system. Currently, ACP revenue funds 22.7 FTE VS positions in the courts and 2.3 FTE positions within PDSC. The VS positions are distributed throughout the state with partial FTE in a number of counties.

Anticipated revenues for the 2009-11 biennium are \$5,706,088. Of that amount, \$2,864,750 will be transferred to the Judicial Department to fund the VS positions. The remaining \$2,841,338, together with a beginning balance of \$986,399, account for a total available revenue of \$3,827,737.

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## Appellate Division

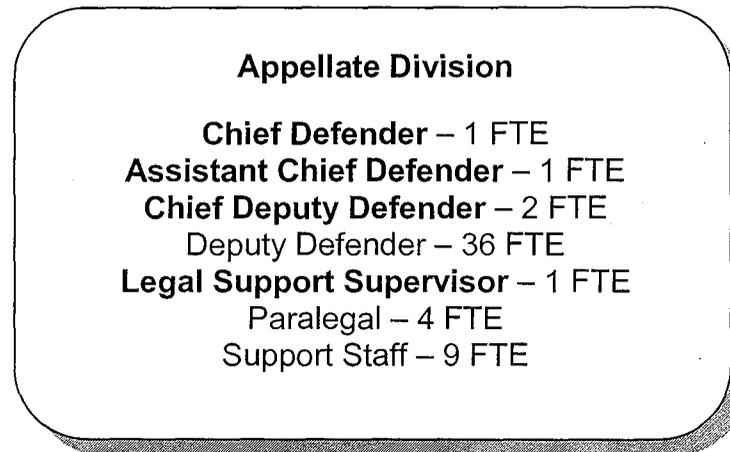
### Program Description

The Appellate Division (AD) is the defense counterpart to Oregon's Attorney General appellate division. The AD provides statutorily mandated appellate representation to financially eligible individuals convicted of misdemeanor and felony criminal offenses, inmates appealing decisions by the Board of Parole and Post Prison Supervision, and parents in juvenile dependency and termination of parental rights cases.

The overwhelming majority of the representation occurs in the state appellate courts, but the office also appears in the trial courts and the United States Supreme Court. In October 2008, the Appellate Division argued in the United States Supreme Court in *Oregon v. Ice*, \_\_\_ US \_\_\_ (2008), a case addressing Oregon's consecutive sentencing statute in the wake of U.S. Supreme Court opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

### Organizational Chart

The Appellate Division has 54 FTE, organized as follows:



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## Summary Descriptions of Attorney Positions

### Chief Defender

The Chief Defender is responsible for managing the division. The Chief Defender directly supervises state and federal Supreme Court litigation, is responsible for recruiting and training new attorneys, and carries a minimal caseload that emphasizes practice in the Oregon Supreme Court.

### Assistant Chief Defender

The Assistant Chief Defender manages the office with the Chief Defender and assumes the responsibilities of that position when the Chief Defender is unavailable. The Assistant Chief Defender carries a near full caseload and is responsible for legislative matters concerning substantive and procedural criminal law and outreach to the trial bar and law schools.

### Chief Deputy Defenders

Two Chief Deputies support the Chief Defender in managing the division. One Chief Deputy is responsible for managing personnel and the other manages operations. Each Chief Deputy carries a near full caseload.

### Deputy Defenders

The Deputy Defender classifications are part of a three-level series: Deputy Defender I, Deputy Defender II, and Senior Deputy Defender. A Deputy Public Defender I attorney provides representation in misdemeanor, simple felony, and parole appeals. A Deputy Public Defender II attorney provides representation in felony cases. A Senior Deputy Defender provides representation in the most complex cases, such as death penalty litigation, and acts as leader for a team of four to six Deputy I and Deputy II attorneys. As team leader, a Senior Deputy leads discussions and edits meritorious Court of Appeals briefs written by Deputy I and Deputy II attorneys.

## Case Assignments, Production Levels, and Backlog

There are two primary case types for direct criminal appeal: (1) a *trial-type* case and (2) a *plea-type* case. A trial-type case includes a jury trial, trial to a judge, conditional plea, parole appeal, and an appeal initiated by the Attorney General. The transcript length for a trial-

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type case varies from 50 to several thousand pages. A plea-type case refers to a guilty plea, no-contest plea, probation violation hearing, and re-sentencing proceeding. Transcript lengths typically range from 20 to 80 pages for plea-type cases.

During the 2003-05 biennium, the Appellate Division assigned 3,240 cases to its attorneys (2,075 trial-type cases and 1,165 plea-type cases). In the 2005-07 biennium, the division assigned 3,945 cases (2,104 trial-type cases and 1,841 plea-type cases). The dramatic increase in plea-type cases was attributable to the United States Supreme Court decision in *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). The *Blakely* decision directly affected Oregon's sentencing practices and drew a legislative response in the form of Oregon Laws, 2005, chapter 463, a major legislative enactment that sought to bring Oregon's Felony Sentencing Guidelines into compliance with the Sixth Amendment of the United States Constitution. Based on first-year data, the division expects to assign 3,586 cases to its attorneys during the 2007-09 biennium (1,958 trial type and 1,628 plea type cases).

AD attorneys exceed national workload standards. According to the Institute of Law and Justice, the annual appellate public defender workload ranged from 25 to 50 cases per attorney. Arizona, Georgia, and Indiana set the maximum appellate caseload per attorney at 25 cases; Florida and Louisiana set the maximum appellate caseload at 50 cases per year. *Compendium of Standards for Indigent Defense Systems* (2000). The average annual caseload for an AD attorney is 54 case assignments per year (30 trial-type cases and 24 plea-type cases).

The dramatic increase in appeal requests during fiscal years 2005 and 2006 caused an increase in the backlog of cases. (A case that has not been briefed within seven months of transcript settlement is considered a case in the backlog.) The case backlog in June 2004 (prior to the impact of the *Blakely* decision) was 114 cases; in June 2005, the backlog doubled to 228 cases; in June 2006, the backlog was 218 cases.

In response to these events, the agency developed multiple strategies aimed at reducing the backlog. The Contract and Business Services Division (CBS) assumed or improved many AD operational responsibilities, which freed the AD staff to increase case production and reduce the case backlog. Several attorney positions were double-filled on a limited-duration basis. The AD developed two chief deputy positions with specific areas of responsibility, which resulted in clearer lines of management, improved attorney mentoring and supervision, and better redistribution of backlogged cases. By June 2007, the backlog was reduced to 91 cases.

For the 2007-09 biennium, the Legislature funded eight new attorney positions in the AD allowing the agency to retain the limited-duration attorneys and to add additional attorneys. By June 2008, the backlog was down to 49 cases.

In addition to the the raw volume of cases, the Court of Appeals imposed additional case production pressure on the AD by reducing the permissible amount of time to file the opening brief. Over the past two years, the Court of Appeals has reduced the

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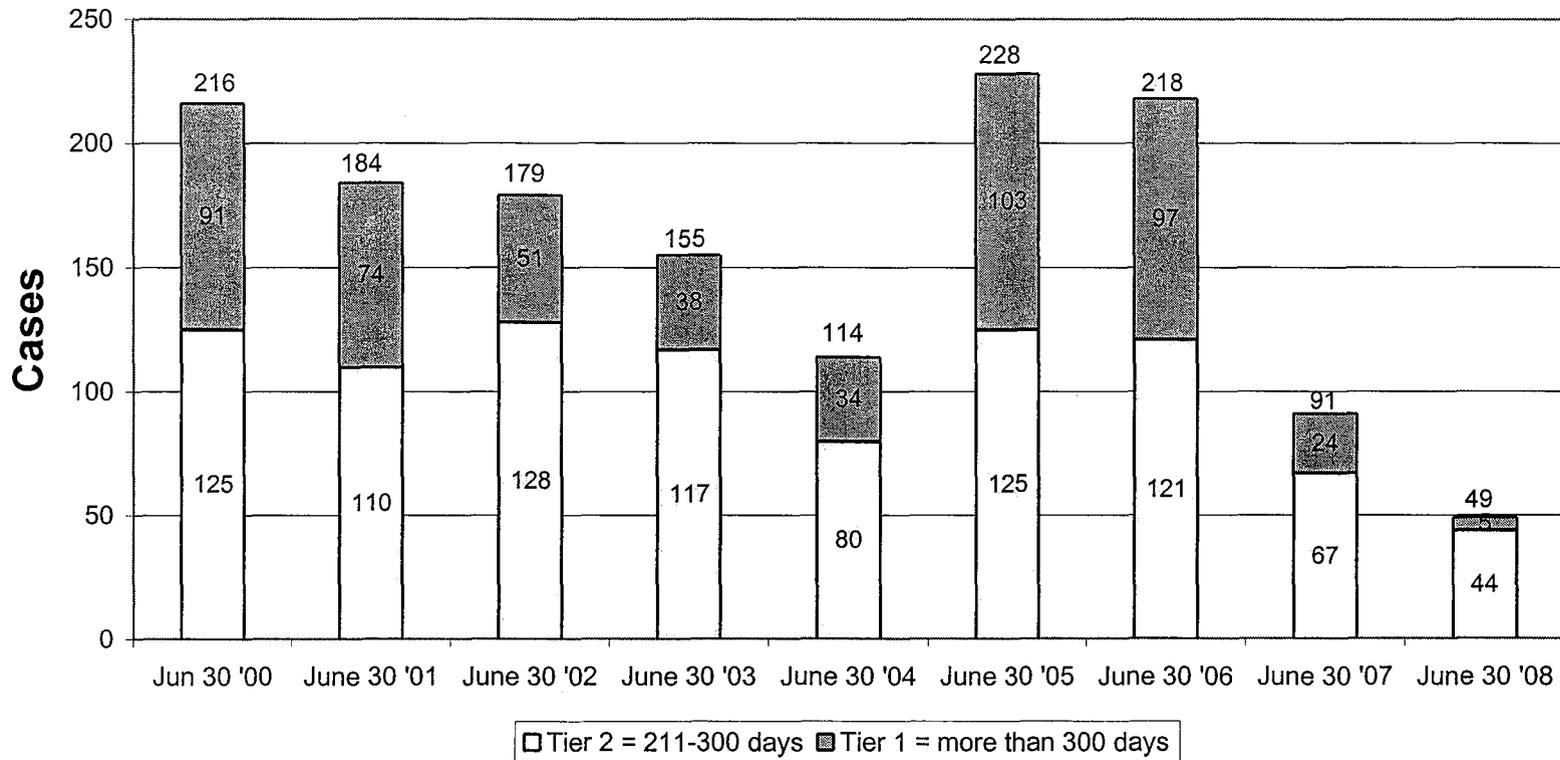
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maximum amount of time to file an opening brief in a criminal case from 350 days to 250 days, creating an additional surge of cases to be briefed by the division.

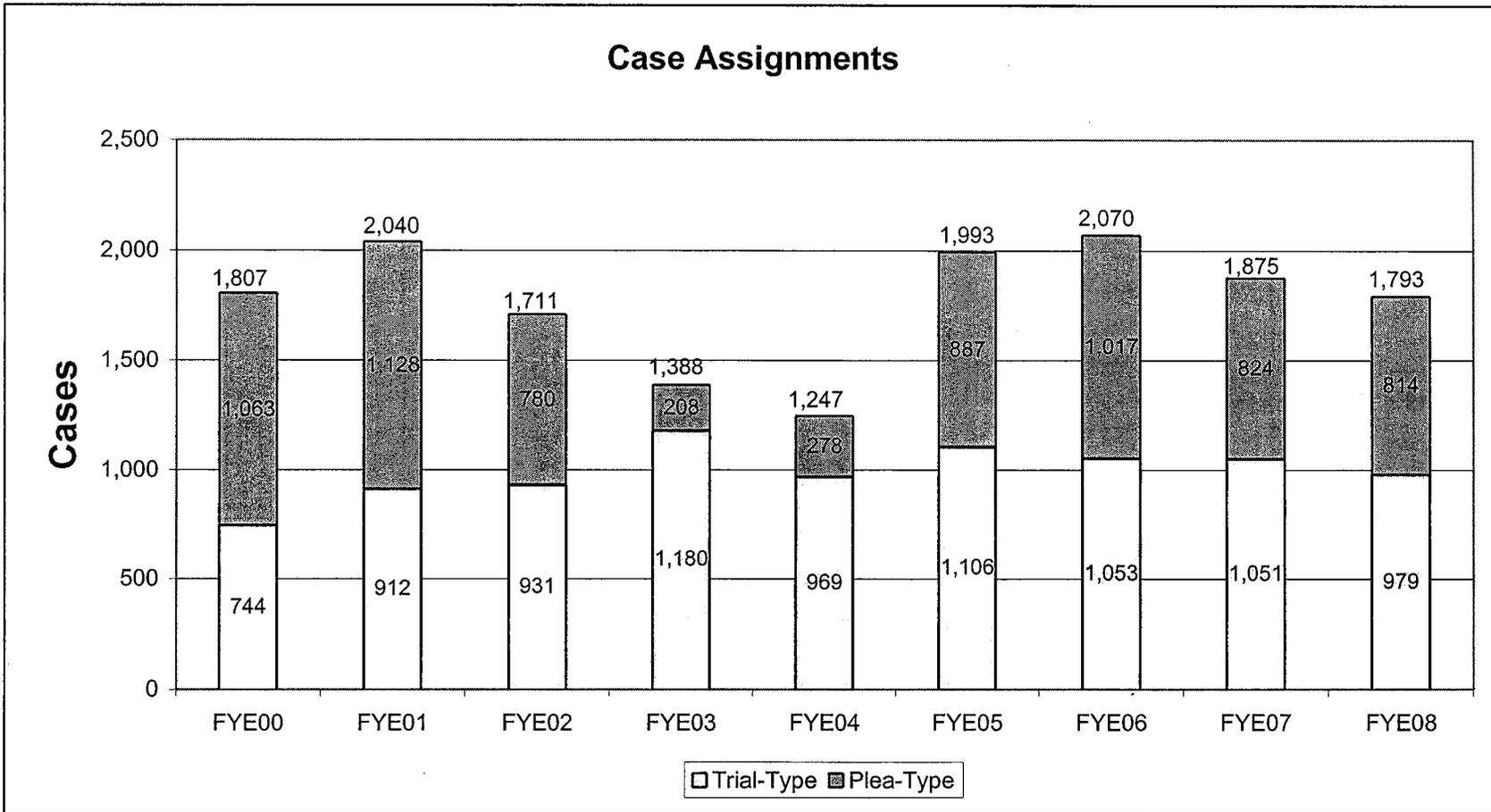
### Juvenile Section

At the end of the 2007 session, the Legislature funded the creation of a four-attorney Juvenile Appellate Section in the AD to centralize and enhance appellate representation for parents in juvenile dependency and termination of parental rights cases. Attorneys were recruited, selected and in place by April, 2008.

### Appellate Case Backlog



### Case Assignments



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### Appellate Division

#### 010 Non-PICS Psnl Svc / Vacancy Factor

##### Package Description

This package includes standard inflation of 2.8% on such non-PICS items as temporaries, overtime shift and other differentials, and unemployment compensation, including the OPE associated with them. This amount equals \$131,994 in general funds. The division's vacancy rate decreased from the prior biennium, resulting in an increase of \$44,539 in general funds, making the total amount of the package \$176,533.

#### 031 Standard Inflation & State Government Service Charge

##### Package Description

This package includes standard inflation of 2.8% on services and supplies in the amount of \$42,041 in general funds. State government services charges have increased by \$51,591, making the total amount of the package \$93,632.

#### 040 Mandated Caseload Increase

##### Package Description

This package adds five Deputy Defender 1 positions and one Legal Secretary position. The additional positions are required to address two circumstances: Two attorney positions are needed to address current case intake (no projected increase), and three attorneys are needed to comply with the Court of Appeals' reduction of the maximum allowable time to file an opening brief (180 days).

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## Appellate Division

### 101 Post-Conviction Relief

#### Package Description

##### Purpose:

To improve the quality and cost-efficiency of representation in post-conviction relief cases.

##### How Achieved:

ORS 138.590 provides for appointment of counsel at state expense to financially eligible individuals who have filed a petition for post-conviction relief. At present, the costs of representation (attorney fees and other case-related expenses) are paid from the Public Defense Services Account.

Based upon the report of the Oregon State Bar's Indigent Defense Task Force III, a consensus among PDSC members and staff, an informal survey of contractors, the agency must investigate options for centralizing the public defense representation in post-conviction relief cases to increase the quality of the public defense services delivered in these case and to control their costs. The OSB report included the following observation:

There is no procedural mechanism in the area of post-conviction relief for negotiated resolutions. Virtually all post-conviction cases go to trial. Every post-conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office has found, however, that few post-conviction cases in state court are investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Effective advocacy in this area should occur at the state court level, as well, and greater funding to attract experienced attorneys and investigators is the key to success in this area. Having less qualified attorneys review the work of other defense practitioners, without the benefit of meaningful investigative resources, is certain to fail as a safeguard against the unjust results that post-conviction relief is supposed to provide.

In February 2008 the PDSC held a hearing on the delivery of public defense services in post-conviction relief cases. It was advised that both PDSC and the Oregon Criminal Defense Lawyers Association had taken a number of steps to address the issue including contracting with attorneys who specialize in post-conviction relief and sponsoring trainings in legal developments and best practices in this field. The Commission was advised that despite these efforts PCR judges, the Federal Defender's office,

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Department of Justice attorneys, Appellate Consortium attorneys and the Client Assistance Office at the bar continued to express concern about the quality of representation provided. Testimony from invited guests and others at the February PDSC meeting highlighted these concerns and recommended centralization of services.

This package provides for the establishment of a post-conviction relief unit staffed by highly qualified attorneys. These attorneys, and particularly the supervising attorney, will carefully evaluate and rigorously screen cases so that available resources are focused more effectively on cases with the greatest merit and likelihood of success. Specialization by a full-time attorney staff will increase the quality of legal services, as well as their cost-efficiency.

**Staffing Impact:** This package adds two Deputy Defender 1 positions, one Deputy Defender 2 position, one Senior Deputy Defender position and one Legal Secretary position, for a total of 5 FTEs to handle trial-level post-conviction relief cases.

**Revenue Source:** This package increases the allocation for the Appellate Division by \$825,475 from general funds and reduces the allocation to the Public Defense Services Account by \$493,824 in general funds. The net impact is \$331,651 in general funds.

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## Public Defense Services Account

### Program Description

The Public Defense Services Account pays the cost of legal representation in criminal cases for financially eligible persons at trial, and for persons who are entitled to state-paid legal representation if they are financially eligible and are facing involuntary civil commitment proceedings; contempt; probation violation; juvenile court matters involving allegations of delinquency and child abuse or neglect; and other limited civil proceedings. The Account also funds the costs of all transcripts and the cost of appellate legal representation for cases not handled by the Appellate Division.

The United States Constitution, the Oregon Constitution, and Oregon statutes require the provision of legal representation, at state expense, for persons who are determined to be “financially eligible” (see “Financial Eligibility Guidelines” below) and who face the types of state court proceedings listed below.

- Although “court-appointed counsel” and “public defenders” generally are associated by the public with criminal cases, only 59% of the FYE 2008 public defense caseload was for representation in criminal trial court proceedings. Another 37% of the caseload, for example, was for representation in juvenile cases.
- Public defense representation was provided in over 170,000 cases in FYE 2008.

Since FYE 1995, the non-death penalty trial-level caseload has increased 40%. The most significant increase in caseload numbers since FYE 1995 has been in the juvenile court caseload which increased 155%.

Among the most difficult cases in the juvenile caseload are Termination of Parental Rights (TPR) cases. TPR cases have increased 189% since FYE 1995. Abuse and Neglect cases (dependency/reviews) have increased 265%.

The Public Defense Services Account provides funding for legal representation in the following types of state trial court proceedings for persons who are determined to be financially eligible for appointed counsel. The percentages of the total public defense trial-level caseload that each of the following case types represented in FYE 2008 are noted in parentheses.

- ▶ Criminal proceedings, ranging from misdemeanors to death penalty cases (46%);

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- ▶ Child abuse and neglect proceedings, including dependency and termination of parental rights proceedings and review hearings—all of which require the appointment of counsel upon request for children who are the subject of these proceedings and the appointment of counsel for most financially eligible parents (31%);
- ▶ Probation violation and extradition proceedings (13%);
- ▶ Contempt proceedings, including nonpayment of court-ordered child support and violations of Oregon’s Family Abuse Prevention Act (2%);
- ▶ Civil commitment and Psychiatric Security Review Board proceedings (1%);
- ▶ Post-conviction relief and Habeas Corpus proceedings (<1%); and
- ▶ Juvenile delinquency and probation violation proceedings (6%).

In addition, persons who are determined to be financially eligible are entitled by constitutional provisions or statutes to appointed counsel on appeal of any of the above types of cases.

The Appellate Division is responsible for the majority of criminal and probation violation appeals and for the majority of parents’ appeals from juvenile dependency and termination of parental rights judgments. The Public Defense Services Account provides funding for counsel in all other appeals – for all the case types set out above.

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### **Oregon's Eligibility Verification Program and Financial Eligibility Guidelines**

The Oregon Judicial Department established one of the first eligibility verification programs in the nation in 1989. For years, Oregon's program for screening applications for appointment of counsel and verifying applicants' income and assets was nationally recognized. Its structure remains intact, but the resources available for the program have been adversely impacted, particularly over the past eight years.

From implementation of the verification pilot project in 1988 until 1993, the Judicial Department's Indigent Defense Services Division had total responsibility for the verification program and verification positions in the courts. Effective January 1, 1993, the verification positions (Verification Specialists – "VS"s) and supervision of VSs were transferred to the individual trial courts. Since that time and increasingly so, these positions have been among the first in many local courts to be reduced or laid off due to reduced funding or utilized for court functions other than verification.

The verification program, which continues to be administered by the Judicial Department, historically more than pays for itself; i.e., for every dollar expended for the program, approximately \$2 is saved from the Public Defense Services Account.

VSs assist judges in their decision whether to order the appointment of state-paid counsel. The VSs are responsible for ensuring that Affidavits of Eligibility are completed and that the information provided by applicants is complete. Using an "Eligibility Worksheet", a VS performs calculations relating to an applicant's available income and liquid assets and the eligibility guidelines addressed below to make a determination whether to recommend to the judge the appointment of counsel. This process is called "screening" for eligibility.

In addition, VSs are responsible for verifying financial information provided to the court, such as income, assets and dependents. This process, which generally occurs after the applicant first appears in court, is called the "verification" process. VSs routinely verify the financial information provided by applicants, using information obtained from the Department of Motor Vehicles, local county assessors' offices (property value), federal and state agencies (e.g., Social Security, Food Stamps, Employment Division) and private businesses (credit reports).

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## Financial Eligibility Guidelines

The United States Constitution, Oregon's Constitution and/or Oregon statutes require the appointment of counsel at state expense for those who are unable to retain suitable counsel in certain legal proceedings. Generally, these proceedings are limited to those that involve the potential for the loss of one's liberty (e.g., criminal, probation violation and civil commitment cases) or the loss of other rights determined to be so essential as to demand the assistance of counsel (e.g., termination of a person's parental rights).

The following is a summary of the statutory provisions and policies/guidelines adopted with respect to the courts' determinations of whether a person who applies for court-appointed counsel will be provided such counsel, i.e., whether the person is financially eligible for state-paid counsel.

The Oregon statutory standard for determining who is financially eligible to receive services paid from the Public Defense Services Account mirrors that established under the federal constitution. Specifically, ". . . a person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family..." (ORS 135.050 and ORS 151.485). An applicant for state-paid representation is required to provide a verified financial statement, listing detailed information regarding income, assets, debts, and dependents.

The eligibility standard is implemented statewide under a two-pronged means test.

First prong: Federal food stamp guidelines (130% of the federal poverty level) serve as the first determinant of eligibility. If the applicant's income is less than or equal to the eligibility level for food stamps, the applicant is presumed to be eligible for appointed counsel, unless the applicant has liquid assets that could be used to hire an attorney. For example, the Federal food stamp gross income eligibility level for a family of four is \$27,564 per year. If only 100% of the federal poverty level were the guideline used, the income guideline rate for a family of four would be \$21,204 per year.

Second prong: If an applicant's income exceeds food stamp standards, that person is eligible for state-paid counsel only if the applicant's available income and liquid assets are determined to be insufficient to hire an attorney, depending upon the seriousness of the pending case(s). The "privately hired attorney" guideline rate currently used, for example, for a DUI case is \$850. If an applicant has available income and assets exceeding \$850, guidelines provide that eligibility verification court staff recommend that the person be denied appointed counsel.

## ORBITS Budget Narrative

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### Program Service Delivery

There is no position authority associated with the Public Defense Services Account. The Account funds mandated legal representation entirely by independent contractors or hourly paid attorneys in the private sector.

PDSC provides legal services through the Account principally pursuant to two-year contracts under which compensation is paid on a per-case basis, based upon the types of cases included within a specific contract. The contracts are negotiated and monitored for compliance by the director and staff of the Contract and Business Services Division. In addition PDSC provides legal services through “private bar appointed counsel” (individual case-by-case assignments where compensation is on an hourly rate basis).

As of June 30, 2008, legal representation was provided in approximately 97% of all trial-level, non-death penalty public defense cases pursuant to contracts entered into between the PDSC and private sector, non-state employee attorneys. These contracts are with nonprofit public defender offices, law firms, consortia of attorneys, and sole practitioners. By comparison, in FYE 1993, legal representation was provided pursuant to contracts (versus hourly rate individual case appointments) in 85% of the total caseload. Unlike public defense cases in which an attorney is appointed on a case-by-case, hourly paid basis, a number of PDSC's contractors also provide investigation, interpreter, and other non-attorney services.

As of June 30, 2008, there were 99 contracts in all 36 counties for the provision of public defense representation. The contracts vary with respect to the types and number of cases covered. The contracts range from “specialty contracts” (limited to specific case types such as death penalty, post-conviction relief, juvenile, or civil commitment) to contracts that include representation in virtually all case types for which state-paid counsel is mandated. The PDSC also has four contracts for non-attorney services, such as forensic services.

Among the agency's long-term providers, some of the most senior attorneys are reaching retirement age. Due to increases in the cost of living over the past two decades and the lack of a corresponding inflationary increase in public defense funding until the 2007-09 budget, these offices have experienced increasing difficulty recruiting and retaining new attorneys.

In 2007 the Legislative Assembly for the first time provided a mandated caseload adjustment to address increasing personnel costs of public defense contractors. Based on testimony presented to the Public Safety Subcommittee of the Joint Ways and Means Committee about the extreme difficulty one type of provider — nonprofit public defender offices — was having attracting and retaining a sufficient number of qualified attorneys to fulfill their contract obligations, the 2007 Legislative Assembly provided the agency with sufficient funding to increase public defender salaries to a level that would move them one-sixth of the way to parity with district attorney

## ORBITS Budget Narrative

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salaries in the same counties. Unfortunately, since average district attorney salaries also increased over the course of the last biennium, the cost of achieving parity with district attorney salaries is actually greater this biennium than it was in the last.

But public defense offices don't compete only with prosecutor's offices for qualified attorneys. It is also important to note that both prosecutor and public defender salaries lag significantly behind the average salaries of attorneys engaged in other types of practice. The Oregon State Bar's 2007 Economic Survey report noted that average full-time public defense attorneys' and prosecutors' salaries (\$55,388 for public defenders, and \$78,872 for public prosecutors) were well below any area of private practice. (Business and corporate litigation lawyers reported the highest average salary of \$169,769. Family law practitioners received an average salary of \$92,980 and private criminal defense lawyers received an average of \$92,021.)

Even though public defense providers may not have lost ground in the last biennium, many years of declining compensation (in terms of real dollars adjusted for inflation) and increasing caseloads (which providers had to accept in order to make ends meet) means that Oregon's public defense system will remain in jeopardy until some of the lost ground can be recovered through the provision of more reasonable rates of compensation.

With respect to the much smaller portion of the Public Defense Services Account that is expended for attorneys handling cases on an hourly rate basis, the current guideline rates (\$45 per hour for non-death penalty cases and \$60 per hour for death penalty cases) have increased by only \$5 per hour since June 1991. The funding requested in Policy Option Package 102 would allow an increase in the current rates to \$70 per hour for non-death penalty cases and \$95 per hour for death penalty cases for the 2009-11 biennium.

Persons who are financially eligible for appointed counsel are also eligible for non-attorney services that are "reasonable and necessary" for the preparation, investigation, and presentation of the case (ORS 135.055(3)). Examples of such non-attorney services are interpreters, investigators, transcriptionists, and psychologists. Non-attorney services must be sought and approved on a case-by-case basis.

Policy Option Package 102 would also allow increases in the rates paid to investigators from \$28 to \$35 per hour in non-death penalty cases and from \$39 to \$45 per hour in death penalty cases.

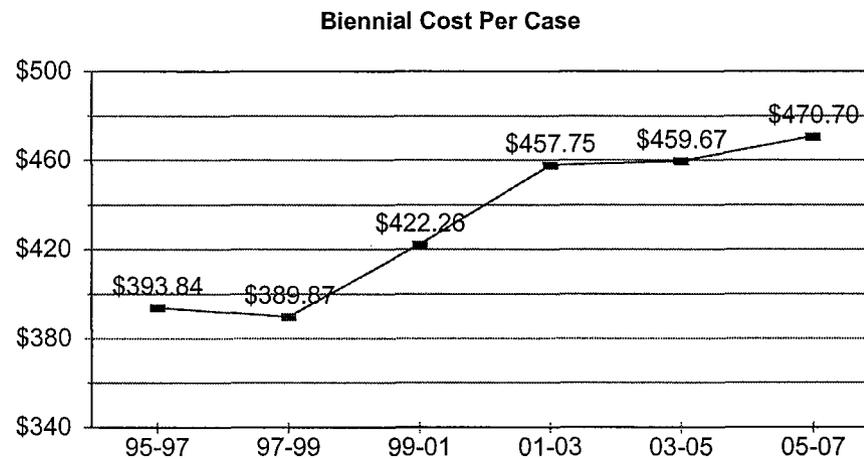
Policy Option Package 100 would provide funding to reduce trial-level juvenile dependency caseloads by 30% in order to address chronic and serious quality of representation issues. This package would allow the agency to ensure the delivery of quality, cost-efficient legal services in an important area of representation.

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## Program Costs

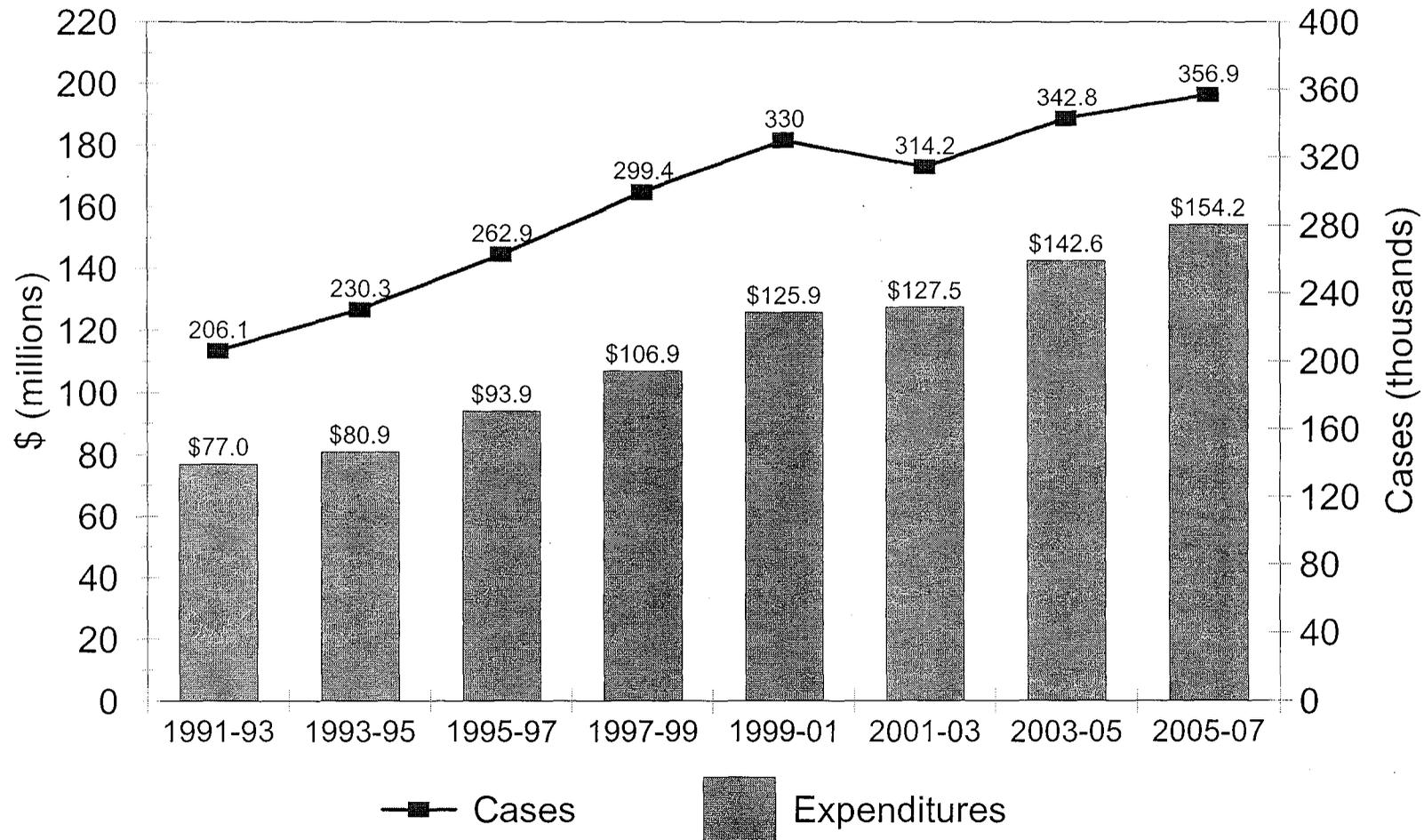
Generally, program costs have increased due to increased caseloads and the complexity of the caseloads; e.g., Measure 11, “Jessica’s Law” prosecutions, juvenile dependency and termination of parental rights and death penalty post-conviction relief cases. A chart displaying a “Comparison of Public Defense Trial Level Non-Death Penalty Expenditures and Caseloads” for the last eight biennia is included on the following page.

The below graph shows the cost per case when the total biennial expenditures are divided by the number of trial-level, non-death penalty cases from the 1995-96 biennium to the 2005-07 biennium. All death penalty, appellate, non-attorney services (e.g., investigators, interpreters, experts) and attorney costs are included in the expenditure amounts.



During the past six biennia, the cost per case has increased 20%. The Consumer Price Index during the same period increased 32%.

## Comparison of Public Defense Trial Level Non-Death Penalty Expenditures and Caseloads 1991-93 biennium through 2005-07 biennium



# ORBITS Budget Narrative

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## Public Defense Services Account

### 040 Mandated Caseload

#### Package Description

This essential package provides the additional funding required for the 2009-11 biennium. The package assumes no changes in PDSC policies regarding financial eligibility and no changes in guideline payment rates. The package does not include any additional funding that may be necessary due to the passage of ballot measures or new legislation.

There are six components to this essential package:

1. Standard inflationary adjustment

The Department of Administrative has set the standard inflationary adjustment for the 2009-11 biennium at 2.8%. For the Public Defense Services Account, the inflationary adjustment is \$5,608,190.

2. Trial-level non-death penalty caseload decrease

The caseload is projected to decrease by 0.9% from the caseload funded for the 2007-09 biennium. This component of the package reduces the Account by \$1,884,321.

3. Death penalty caseload from prior biennia

Although the annual number of new death penalty cases filed has been fairly stable in recent years, the cumulative cost of these cases increasingly impacts each subsequent biennium. After the initial trial-level case, which often spans a year or more, there is an appeal, then post-conviction relief, then an appeal of the post-conviction relief case. So every year, in addition to expending funds for representation on new cases filed, the agency continues to have expenditures for cases filed in previous years. Death sentence post-conviction relief appeals currently pending are the result of cases originally filed as far back as 1986. The additional expenditure during the 2009-11 biennium for death penalty cases from prior biennia is \$4,122,148.

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### 4. Mileage reimbursement.

The agency's mileage reimbursement rate is linked to the rate set in the Oregon Accounting Manual (currently 58.5 cents per mile). Funding in the current biennium is provided for a rate of 44.5 cents per mile; an adjustment of \$175,210 funds a rate of 50.5 cents per mile.

### 5. Non-attorney provider cost increase.

The agency's guideline rate for forensic services is \$90 per hour. Most forensic experts in Oregon have raised their rates to \$125-\$150 per hour. The guideline rate for medical experts is \$110 per hour. Many medical experts now charge \$150-\$300 per hour. Because the federal defender pays higher rates, providers have a sufficiency of work available to them and do not need to accept public defense work at the state level at reduced rates. The agency has therefore had to allow exceptions to the guideline rates in order to obtain such services.

### 6. Personal services adjustment

The standard inflationary adjustment for services and supplies is not applicable to personal services. Personal services expenditures (principally salary and health insurance) increase at a greater rate. An adjustment of 7.9% of the personal services portion of contracts corresponds to the Department of Administrative Services personal services adjustment for state employees.

The table below summarizes the components of this essential package.

1. Standard inflationary adjustment (2.8%)	\$5,608,190
2. Trial-level non-death penalty caseload decrease	(\$1,884,321)
3. Death penalty caseload from prior biennia	\$4,122,148
4. Mileage reimbursement (increasing to 50.5 cents per mile)	\$175,210
5. Non-attorney provider cost increase	\$583,134
6. Personal services adjustment	\$9,867,772
<b>Total</b>	<b>\$18,472,133</b>

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## Public Defense Services Account

### 100 Juvenile Dependency Representation

#### Package Description

##### Purpose:

The purpose of this policy package is to provide funding to reduce trial-level juvenile dependency caseloads by 30% in order to address chronic and serious quality of representation issues. This package would allow the agency to ensure the delivery of quality, cost-efficient legal services in juvenile dependency and termination of parental rights cases.

In 2004 the Oregon Audits Division of the Secretary of State's office reported two above-average management risks for the agency after a review of its operations. One of them was that the agency "may not ensure that contract and private bar public defense attorneys provide adequate representation in juvenile cases."<sup>1</sup>

Over the last four years, the agency has evaluated and sought to improve the work of its juvenile contractors through a number of approaches including comprehensive performance reviews; promotion of best practices; provision of education and training opportunities; investigation and resolution of complaints from judges, attorneys and clients; and the creation of a juvenile appellate section within the Appellate Division. Despite these efforts, a statewide survey and the agency's site visit evaluations and structural reviews disclose continuing deficiencies in the quality of representation being provided statewide.

##### How Achieved:

This policy package would permit the agency to reduce current caseload levels in juvenile dependency and termination of parental rights cases by 30%. The agency has followed with interest an ongoing effort in Washington State to address similar issues. Significant caseload reduction was a key component of a highly successful parent representation pilot project in that state. Since 2000 the program has been funded and expanded by the legislature every session. What began as a pilot project in three counties has now been extended to twenty-five counties.

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<sup>1</sup> The other area of risk was in post conviction relief. Policy Option Package 101 addresses representation in these cases.

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If this policy package were funded, the agency would ensure that reduced caseloads actually resulted in improved representation by making such reductions conditional upon agreement to the implementation of a number of established best practices, participation in mandatory training sessions, and rigorous evaluation.

**Staffing Impact:** No impact on staffing.

**Revenue Source:** \$17,274,024 from general funds.

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## Public Defense Services Account

### 101 Post-Conviction Relief

#### Package Description

##### Purpose:

To improve the quality and cost-efficiency of representation in post-conviction relief cases.

##### How Achieved:

ORS 138.590 provides for appointment of counsel at state expense to financially eligible individuals who have filed a petition for post-conviction relief. At present, the costs of representation (attorney fees and other case-related expenses) are paid from the Public Defense Services Account.

Based upon the report of the Oregon State Bar's Indigent Defense Task Force III, a consensus among PDSC members and staff, an informal survey of contractors, the agency must investigate options for centralizing the public defense representation in post-conviction relief cases to increase the quality of the public defense services delivered in these case and to control their costs. The OSB report included the following observation:

There is no procedural mechanism in the area of post-conviction relief for negotiated resolutions. Virtually all post-conviction cases go to trial. Every post-conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office has found, however, that few post-conviction cases in state court are investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Effective advocacy in this area should occur at the state court level, as well, and greater funding to attract experienced attorneys and investigators is the key to success in this area. Having less qualified attorneys review the work of other defense practitioners, without the benefit of meaningful investigative resources, is certain to fail as a safeguard against the unjust results that post-conviction relief is supposed to provide.

In February 2008 the PDSC held a hearing on the delivery of public defense services in post-conviction relief cases. It was advised that both PDSC and the Oregon Criminal Defense Lawyers Association had taken a number of steps to address the issue including contracting with attorneys who specialize in post-conviction relief and sponsoring trainings in legal developments and best practices in this field. The Commission was advised that despite these efforts PCR judges, the Federal Defender's office,

## ORBITS Budget Narrative

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Department of Justice attorneys, Appellate Consortium attorneys and the Client Assistance Office at the bar continued to express concern about the quality of representation provided. Testimony from invited guests and others at the February PDSC meeting highlighted these concerns and recommended centralization of services.

This package provides for the establishment of a post-conviction relief unit staffed by highly qualified attorneys. These attorneys, and particularly the supervising attorney, will carefully evaluate and rigorously screen cases so that available resources are focused more effectively on cases with the greatest merit and likelihood of success. Specialization by a full-time attorney staff will increase the quality of legal services, as well as their cost-efficiency.

**Staffing Impact:** This package adds two Deputy Defender 1 positions, one Deputy Defender 2 position, one Senior Deputy Defender position and one Legal Secretary position, for a total of 5 FTEs to handle trial-level post-conviction relief cases.

**Revenue Source:** This package increases the allocation for the Appellate Division by \$825,475 from general funds and reduces the allocation to the Public Defense Services Account by \$493,824 in general funds. The net impact is \$331,651 in general funds.

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## Public Defense Services Account

### 102 Public Defense Provider Compensation

#### Package Description

**Purpose:** To provide funding necessary to:

- attract and retain qualified attorneys in nonprofit, public defender organizations, primarily in Multnomah, Lane, Jackson, Deschutes, and Washington Counties;
- increase the hourly rates paid to attorneys who provide legal representation in public defense cases on an hourly rate basis (versus a flat, average cost per type of case basis under contract) — hourly-rate compensated cases represent a small portion of the public defense caseload; and
- increase the hourly rates paid to investigators who accept work on public defense cases.

#### **How Achieved:**

#### **Adjustment Toward Public Defender Contractor Parity**

The first component of this policy package would allow some adjustments to be made in response to the difficulty nonprofit, public defender organizations are having attracting and retaining qualified attorneys. Ten of the current 99 public defense contracts are with nonprofit organizations. Full-time attorneys and staff employed with these organizations are restricted to performing state-paid, public defense work only. In other words, the nonprofit contractors differ from their private law firm and consortium public defense contractor counterparts in that private, retained work is not available to the nonprofits to supplement their state-funded contracts.

One measure of their ability to attract and retain attorneys is whether the salaries of such attorneys are competitive within their local communities with attorneys engaged in comparable types of legal practice. A comparison of public defender attorney salaries and prosecution salaries in the same counties (based on the Oregon District Attorneys Association 2008 salary survey) showed that, based upon average salaries, public defender salaries for nine of eleven nonprofits were less than those for prosecuting attorneys<sup>1</sup>. The differences between public defender attorney salaries and their prosecution counterparts ranged from \$4,332 to \$34,898 per attorney

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<sup>1</sup> In two counties, Coos and Umatilla, public defender attorneys, on average, received higher salaries.

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per year. The projected full biennium cost of increasing public defender attorney average salaries to the level of prosecution average salaries in their respective counties totals \$6,705,560 based upon 2008 salary levels. Neither benefits nor non-attorney staff salaries were compared in the 2008 study.

Benefits (such as PERS) that generally are available for government-employed attorneys (versus independent contractors, such as public defenders) make it more difficult for public defender offices to attract new hires. Retirement benefits available to public defender attorneys range from 6% to 10% employer contribution programs. Two of the 6% programs have been in effect for less than thirteen years. Prior to their establishment, there was no provision for retirement.

Based on testimony presented to the Public Safety Subcommittee of the Joint Ways and Means Committee about the extreme difficulty these offices were having attracting and retaining a sufficient number of qualified attorneys to fulfill their contract obligations, the 2007 Legislative Assembly provided the agency with sufficient funding to increase public defender salaries to a level that would move them one-sixth of the way to parity with district attorney salaries in the same counties. Unfortunately, since average district attorney salaries also increased over the course of the last biennium, the cost of achieving parity with district attorney salaries would actually be greater this biennium than it was in the last.<sup>2</sup>

Approval of the amount requested would allow for some adjustments and improvements in salary for public defender offices in those counties where there is significant disparity with prosecutor salary levels. It is clear, however, that the amount does not represent the total cost of establishing salary and benefit parity for public defenders and their staff. The requested funding would be allocated to public defenders based upon greatest salary needs. For example, no improvements in the current public defenders' benefit program, such as retirement programs, are contemplated within the requested funding. Rather, the amount is viewed as a first step in establishing greater consistency in salary levels between public defender and district attorney staff. Reaching full parity in terms of both salary and benefit levels is a longer-range effort.

But public defense offices don't compete only with prosecutor's offices for qualified attorneys. It is also important to note that both prosecutor and public defender salaries lag significantly behind the average salaries of attorneys engaged in other types of practice. The Oregon State Bar's 2007 Economic Survey report noted that average full time public prosecutor and public defense attorneys' salaries, (\$55,388 for public defenders, and \$78,872 for public prosecutors) were well below any area of private practice. (Business and corporate litigation lawyers reported the highest average salary of \$169,769. Family law practitioners received an average salary of \$92,980 and private criminal defense lawyers received an average of \$92,021.)

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<sup>2</sup> The cost of reaching parity last biennium would have been \$6,211,003.

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## Hourly Rate Increase for Hourly-Paid Public Defense Attorneys

The current guideline rates (\$45 per hour for non-death penalty cases and \$60 per hour for death penalty cases) have increased by only \$5 per hour since June 1991. The requested funding would allow an increase in the current rates to \$70 per hour for non-death penalty cases and \$95 per hour for death penalty cases for the 2009-11 biennium.

The 2007 legislature provided funding for the 2007-09 biennium that permitted PDSC to increase the guideline rates for hourly-rate paid counsel statewide for the first time since 1991. Prior to 2007 public defense funding was inadequate, despite inflationary adjustments, to permit the agency to increase the rates, due to the fact that actual public defense caseloads generally exceeded the projected caseloads on which appropriations were based. Other demands on the Public Defense Services Account, such as continuing expenditures on death penalty cases filed in previous biennia, also contributed to the need to adopt a conservative approach toward administering public defense funding. A limited number of exceptions to the guideline hourly rates had been made in years just prior to 2007 on an individual case-by-case basis or for certain types of cases, such as post-conviction relief cases. For a number of years, there has been a shortage of attorneys who are qualified and willing to accept appointment to post-conviction relief cases.

The small increases in hourly rates that were implemented in August of 2007 did not result in rates that bear any relation to rates regularly charged for their services by attorneys who handle criminal and family cases for non-indigent clients. The Oregon State Bar's 2007 Economic Survey reports statewide average and median criminal defense hourly rates at \$176 and \$175 per hour. Family law attorneys statewide charge \$188 (average) and \$180 (median). Family law practice is similar to the work performed by public defense attorneys in juvenile dependency and termination of parental rights cases. To the extent attorneys who perform public defense representation at \$45 and \$60 per hour responded to the Bar's survey, those hourly rates would have helped contribute to the lower overall rates.

Just as with automobile mechanics or plumbers who are paid on an hourly basis, hourly rates paid to attorneys, whether in the public or private sector, are meant to include overhead costs such as staff salaries, taxes and benefits, rent and other office costs, and necessary capital. Overhead expenses frequently are estimated by attorneys to be 50% of the hourly rate. Assuming 50% overhead expenses and an average of 1,800 billable hours in one year, an hourly-rate paid public defense attorney working full time at \$45 per hour would receive \$81,000 per year, with half of that amount (\$40,500) paying for overhead and half being available as attorney salary.

The Consumer Price Index (CPI) for "Portland/Salem" increased 62% between 1991 and 2008. The rates of \$40 and \$55 per hour in 1991 equate to \$64.61 and \$88.85 per hour in 2008. Viewing the absence of increases in guideline hourly rates since 1991 from the vantage of attorneys' buying power, \$45 per hour in 2008 has the purchasing power of \$28 per hour in terms of 1991 dollars. And for death penalty appointed counsel at \$60 per hour in 2008, that rate is the equivalent of \$37 per hour in terms of 1991 dollars.

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### Hourly Rate Increase for Hourly Paid Investigators Who Provide Public Defense Services

The amount requested for the full 2009-11 biennium would allow increases in the rates paid investigators from \$28 to \$35 per hour in non-death penalty cases and from \$39 to \$45 per hour in death penalty cases.

Until 2007, with the exception of some investigation services in death penalty cases beginning in 1996, the public defense guideline rate for investigation services had been \$25 per hour since at least 1988. It appears that in most and perhaps all counties, the rate has been \$25 per hour since the state's assumption of responsibility from the counties for public defense in 1983. For death penalty cases, the hourly rate had been \$25 per hour until mid-1996 when that rate was increased to \$34 per hour for the most experienced investigators. In 2007 the Legislature provided sufficient funding to permit the agency to raise the rate in non-death penalty cases from \$25 to \$28 per hour and from \$39 to \$45 in death penalty cases.

Despite the increases that took effect in August 2007, investigator rates remain inadequate. The original, temporary Public Defense Services Commission, established to study the public defense system during the 1999-01 interim, received testimony from investigators and non-investigators that the number and the quality of investigators who accept public defense work has diminished overall. This is due in significant part to the lack of increases in the hourly rates paid to these investigators and the hourly rates available in other public and private sectors for the same pool of investigators.

As stated above, the Consumer Price Index (CPI) for "Portland/Salem" increased 62% between 1991 and 2008. The CPI for 2008 is 87% higher than that for 1988 and 111% higher than that for 1983.

The table below summarizes the three components of this package.

1.	Funding to increase full-time public defender salaries to corresponding deputy district attorney salaries.	\$6,705,560
2.	Funding to provide an increase in the hourly rate paid to attorneys (\$70/hour non-capital; \$95/hour capital).	\$12,085,166
3.	Funding to provide an increase in the hourly rate paid to investigators (\$35/hour non-capital; \$45/hour capital).	\$2,785,788
Package total		\$21,576,514

**Staffing Impact:** No impact on staffing.

**Revenue Source:** \$21,576,514.

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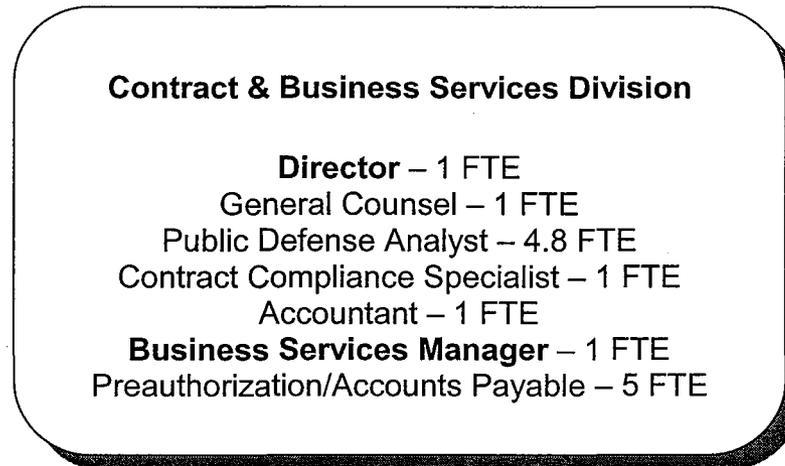
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## Contract & Business Services Division

### Program Description

The Contract and Business Services Division (CBS) is responsible for administering the public defense contracts that provide legal representation for financially eligible persons, and for processing requests and payments for non-contract fees and expenses.

### Organizational Chart



# ORBITS Budget Narrative

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## **Major functions**

### Contract Administration:

CBS staff negotiate and administer over 100 contracts for provision of legal services. Four Contract Analysts have primary responsibility for contracts assigned to them. In addition, CBS has one Compliance Specialist position to audit monthly caseload reports submitted by contractors.

### Review of Non-Routine Expense Requests:

ORS 135.055(3) requires that PDSC pay the cost of "reasonable and necessary" expenses for public defense cases. Routine expenses, such as copying costs, do not require pre-authorization. Non-routine expenses, such as investigation, must be approved by PDSC before the expense is incurred. Over 10,000 requests for pre-authorization are submitted per year.

### Accounts Payable:

Five accounts payable staff process the operating bills for both the Appellate Division and CBS as well as all fee statements submitted for payment from the Public Defense Services Account. Over 20,000 payments are reviewed and processed per year.

### Quality Assurance and Complaint Processing:

PDSC's General Counsel coordinates the efforts of the Quality Assurance Task Force made up of experienced public defense managers and attorneys from across the state. The task force developed PDSC's contractor site visit process to identify strengths and weaknesses in the management and operations of public defense contractors. PDSC measures the desired outcome of quality and cost-efficiency in the delivery of services by tracking and reporting the extent to which contractors adopt best practices and resolve problems in the management and delivery of public defense services. In addition, CBS receives and investigates complaints regarding expenditures and regarding the quality of legal representation.

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## **Contract & Business Services Division**

### **010 Non-PICS Psnl Svc / Vacancy Factor**

#### **Package Description**

This package includes standard inflation of 2.8% on such non-PICS items as temporaries, overtime shift and other differentials, and unemployment compensation, including the OPE associated with them. This amount equals an increase of \$2,976 in general funds and \$998 in other funds for a total increase of \$3,974. The division's vacancy rate decreased from the prior biennium, resulting in an increase of \$29,548 in general funds and \$6,119 in other funds for a total vacancy factor increase of \$35,667. The two components of this package result in a total increase of \$39,641.

### **031 Standard Inflation & State Government Service Charge**

#### **Package Description**

This package includes standard inflation of 2.8% on services and supplies in the amount of \$13,909 in general funds. State government services charges have decreased by \$30,818, making the total amount of the package a decrease of \$16,909 in general funds.

## **PUBLIC DEFENSE SERVICES COMMISSION'S NON-DISCRIMINATION AND AFFIRMATIVE ACTION PLAN**

### ***Introduction***

The purpose of this plan is to initiate and maintain a non-discrimination and affirmative action program consistent with directives of the Governor and applicable state and federal laws and regulations.

### ***Non-Discrimination and Affirmative Action Policy***

It is the policy of the Public Defense Services Commission that no person shall be discriminated against by reason of race, color, national origin, religion, sex, sexual orientation, marital status, age (if the individual is 18 years of age or older), or disability not directly and substantively related to effective performance. It is also the policy of PDSC to establish a program of affirmative action to address the effects of discrimination intended and unintended, which is indicated by analysis of present employment patterns, practices and policies.

PDSC's Non-Discrimination and Affirmative Action Plan shall be followed by all PDSC staff. All personnel actions of PDSC shall be administered according to this policy. PDSC's supervisory and management staff shall ensure that the intent as well as the stated requirements of the Plan are implemented. In addition, it is the duty of every employee of PDSC to create a job environment that is conducive to non-discrimination and free of any form of discriminatory harassment.

This Non-Discrimination and Affirmative Action Plan will be posted in plain sight at all times for employees' use and referral. Any agency or member of the public requesting a copy of the PDSC Affirmative Action Plan shall be provided one at no cost.

### ***Harassment in the Workplace Policy and Procedures***

Harassment is a form of discrimination that is prohibited by state and federal law and by PDSC's Affirmative Action Policy. Any person who believes that he or she has been harassed at PDSC based on race, sex, religion, national origin, age, or disability, or based on opposition to discrimination or participation in investigation or complaint proceedings under this

policy may file a formal or informal complaint with PDSC's Executive Director. Confidentiality will be maintained to the fullest extent permitted.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work or creating an intimidating, hostile, or offensive working environment.

Harassment based on race, color, national origin, religion, sex (without sexual conduct), sexual orientation, marital status, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under this policy is any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, intimidation or threat engaged in by an individual that is directed at and offensive to another person or persons in the workplace, that the individual knew or ought reasonably to have known would cause offense or harm when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work or creating an intimidating, hostile, or offensive working environment.

PDSC's informal complaint process affords an opportunity to gather information to either establish a suspicion of harassment or to attempt to resolve a disagreement without following PDSC's formal complaint procedure. An informal complaint involves the following procedures:

- The complainant submits a written or oral complaint to the Executive Director or his designee,<sup>1</sup> who advises the complainant of her or his right to file a formal complaint with PDSC or with other state and federal agencies.
- The Executive Director contacts the individual or individuals accused of harassment to discuss the alleged harmful act.
- The Executive Director develops a proposed resolution, if appropriate, and informs the parties of that proposed resolution within fifteen (15) calendar days of receipt of the informal complaint.
- If the proposed resolution is unacceptable to the complainant, she or he may file a formal complaint with the Executive Director.

PDSC's formal complaint process ensures the investigation of cases of alleged harassment, the determination as to whether or not harassment has occurred and, where appropriate, the resolution of a complaint. A formal complaint involves the following procedures:

- The complainant submits her or his complaint in writing to the Executive Director or his designee, which must be filed within 365 days of the alleged harmful act.
- The Executive Director acknowledges in a Letter of Acknowledgement receipt of the formal complaint, which includes information on the complainant's right to file a complaint with other state or federal agencies. Copies of the Letter of Acknowledgement are sent to the individual or individuals accused of harassment and the director of the relevant division of PDSC.

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<sup>1</sup> The Executive Director will appoint as his "designee" for the purposes of PDSC's informal and formal Harassment in the Workplace complaint procedures a PDSC employee who has no management or supervisory responsibilities and who possesses personal characteristics that will not discourage employees' reports of harassment. All references to "Executive Director" in the informal and formal complaint procedures are meant to include this designee.

- Upon determining that the complaint is facially valid, the Executive Director conducts a thorough investigation of the complaint.
- Within thirty (30) calendar days of receipt of the formal complaint, the Executive Director informs the complainant and all persons who received copies of the Letter of Acknowledgement of the formal complaint by a Letter of Determination of the final status of the complaint, its disposition and the complainant's rights to file a complaint with other state or federal agencies.

### ***Persons with Disabilities Policy and Procedures***

It is the policy of PDSC to comply fully with Sections 503 and 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (ADA), and other applicable federal and state laws that prohibit discrimination on the basis of disability. The Rehabilitation Act and the ADA require that no qualified person shall, solely by reason of disability, be denied access to, participation in, or the benefits of, any program or activity operated by PDSC. Each qualified person shall receive the reasonable accommodations needed to ensure equal access to employment, educational opportunities, programs, and activities in the most integrated setting.

For a disability to be protected by the ADA, an impairment must substantially limit one or more major life activities. These are activities that an average person can perform with little or no difficulty, such as walking, seeing, or working. Temporary impairments, including pregnancy, are not covered as disabilities under the ADA.

PDSC's employees or qualified applicants for employment by PDSC with disabilities shall be responsible for:

- notifying PDSC in a timely fashion of their need for reasonable accommodations;
- submitting appropriate documentation of the disability from an appropriate professional prior to receiving the accommodations requested; and
- demonstrating and documenting how the disability affects the employee's job processes, functions, responsibilities or performance evaluation criteria when requesting reasonable accommodations.

Upon receiving such notification and documentation from a disabled employee or applicant for employment requesting reasonable accommodation, PDSC shall be responsible for:

- making reasonable accommodations for a physical or mental disability, including but not limited to job restructuring, reassignment to a vacant position, part-time or modified work schedules, assistive technology, or aides or qualified interpreters, which do not create an "undue hardship" (defined as significantly difficult or expensive), and excluding the creation of new jobs or the reallocation of essential functions to another employee;
- conferring with the disabled employee or qualified applicant for employment with regard to the type of accommodation that will enable the individual to perform the essential functions of the relevant position;
- evaluating the employee's or applicant's physical or mental limitations in order to determine the accommodation that will be effective, excluding accommodations of a personal nature such as a guide dog for a visually impaired employee, or a wheelchair;
- keeping confidential any medical information obtained from a disabled employee or applicant; and
- using qualification or performance standards, tests and other selection criteria that screen out individuals with disabilities only when they are (a) job-related and consistent with business necessity and (b) cannot be satisfied through the provision of a reasonable accommodation.

### ***Employee Training and Education***

The Oregon State Bar requires every attorney licensed to practice law in the state to attend Continuing Legal Education (CLE) programs that train and educate lawyers concerning issues of elimination of bias in the legal profession and the practice of law. PDSC presents in-house training programs that satisfy these requirements. PDSC is currently developing an in-house training program that will still satisfy the Bar's CLE requirements, but will also involve all its non-attorney employees.

### ***Responsibilities for Implementation***

The person responsible for discharging this policy is PDSC's Executive Director: Ingrid Swenson, 1320 Capitol Street N.E., Salem, OR 97301; (503) 378-2515.

The Chief Defender of PDSC's Legal Services Division and the Director of PDSC's Contract and Business Services Division are assigned the following responsibilities:

- Brief all new employees on PDSC's affirmative action plan and their role in supporting it.
- Periodically review training programs and hiring and promotion patterns in order to remove impediments to attaining affirmative action goals and objectives.
- Regularly discuss PDSC's affirmative action policy with employees to ensure the policy is being followed.
- Periodically review office policies, practices and conditions to ensure that:
  - Equal Employment Opportunity information and PDSC's affirmative action policy are properly displayed;
  - all facilities for the use and benefit of employees are in fact desegregated, both in policy and use, exclusive of those areas excepted by federal laws and regulations;
  - minorities, females, and disabled employees are afforded a full opportunity to participate in PDSC's educational, training, recreation and social activities; and
  - all facilities are accessible to disabled employees or clients.

### ***Analysis of PDSC's Workforce and Job Groups (NAAPGRS Report As of 6/30/08)***

With a total workforce of 67, PDSC employs 44 females and five people of color (two Hispanic and three Asians).

PDSC has four job groups: management, professional, paraprofessional, and support staff. The management group has four positions, three of which are filled by females. The professional group has 44 positions, 24 of which are filled by females and 3 of which are filled by people of color. The paraprofessional group has two positions, one of which is filled by a female. There are 17 positions within the support staff group, 16 of which are filled by females and two of which by persons of color.

The agency meets (or is within a fraction of a position) or exceeds goals for women and people of color. The agency's current workforce does not meet the goal for disabled persons.

### ***Goals and Objectives***

PDSC will pursue the following goals and objectives in order to carry out its affirmative action policy:

- Expand employment opportunities for members of protected classes not represented in PDSC's current workforce.
- Increase the distribution of PDSC's protected class employees at all salary range levels in an effort to approximate the proportion of protected class members in the workforce from which PDSC employs.
- Assess minority group and female staffing on an ongoing basis to ensure that PDSC is making progress toward meeting these objectives.
- Refine recruitment strategies and hiring practices to facilitate the placement and promotion of minority group and female personnel.
- Actively participate on affirmative action committees, organizations and activities to promote PDSC's Affirmative Action Plan.

## **PDSC'S AFFIRMATIVE ACTION STRATEGIES AND ACCOMPLISHMENTS**

PDSC is comprised of two divisions: The Appellate Division (AD), which provides direct legal services in the Oregon Supreme Court and the Court of Appeals on behalf of financially eligible individuals appealing trial court judgments of conviction in criminal cases, and trial court judgments in juvenile dependency and termination of parental rights cases; and the Contract and Business Services Division (CBS), which administers the state's public defense contracting and payment systems.

PDSC's Non-Discrimination and Affirmative Action Plan includes both policies and procedures governing PDSC's own activities as an employer and strategies for working with the private contractors who provide the great majority of public defense representation in the state to help them attract and retain attorneys and staff that more closely reflect the diversity in their communities.

### ***PDSC's Accomplishments in 2007-2009***

- Attended and made presentations regarding employment in public defense at job fairs and recruitment events at Oregon law schools and at national and regional events sponsored by minority law student groups and others. Continued to develop working relationships with criminal law faculty, career counselors, and placement offices at Oregon's three law schools to identify and recruit law students of color who might be interested in internships and attorney positions in the state's public defense system.
- Created recruitment materials and information explaining PDSC's mission and its affirmation and promotion of equal opportunity.
- Arranged for presentation at annual meeting of public defense managers on recruitment, including recruitment of minority applicants, and innovative approaches for increasing the potential pool of minority applicants for public defense work in Oregon.

- Initiated a survey of public defense provider offices as recommended by the diversity task force convened in 2005 in order to establish a baseline from which to measure changes in the composition of staff within these offices.
- Provided an “Elimination of Bias” training regarding the representation of Latino clients to attorneys and staff at the Office of Public Defense Services as well as interested attorneys from the Marion County area.

### ***PDSC’s Strategies for 2009-11***

- Work with public defense contractors to create more recruitment opportunities, possibly in conjunction with prosecutors, to interest first-year law students and college students in the practice of criminal law.
- Work with Affirmative Action office of the Oregon State Bar to identify new strategies for increasing diversity in public defense.
- Improve outreach efforts of OPDS to attract more diverse applicants for all job categories in both divisions.
- Continue to participate in job fairs and recruitment programs throughout the Pacific Northwest and elsewhere for law students and attorneys of color who may be interested in careers in public defense.
- Review results of the statewide survey and develop a plan in cooperation with public defense contractors to address particular patterns of under-representation that are identified.
- Prepare and present additional elimination of bias trainings to OPDS attorneys and staff and other members of the legal community.

### ***PDSC's Strategies for 2009-15***

- The demand for minority attorneys and other legal professionals such as trial assistants and investigators is high in Oregon as it is elsewhere in the country. In order to attract these professionals to public defense work, PDSC needs to be able to offer compensation that is at least comparable to the compensation offered to district attorneys and other government lawyers in the state. In support of this effort PDSC has included in its 2009-2011 budget request policy packages that would help it achieve parity in compensation with prosecution lawyers for at least some of its private contractors. The achievement of parity may well take more than a single biennium.
- Over the next six years PDSC will develop and present an integrated series of trainings for its own employees designed to address some of the underlying biases and misconceptions that can impair one's judgment about members of other cultural groups. The agency's general counsel is well qualified to assist in the development of this series, having served as the trainer for the largest public defense office in the state and having planned and presented many such trainings in the past. The training series will be opened to interested contract providers and may be recorded for possible future use by others.
- Once the statewide survey has been completed and the results analyzed, PDSC intends to work with its contractors to establish appropriate goals for each year of the next six-year period to expand the number of minority attorneys and staff members employed in public defense in Oregon.
- In anticipation of the difficulty of recruiting successfully from the small group of minority attorneys graduating from Oregon law schools each year, PDSC will work with its contractors to develop strategies for promoting legal careers and, specifically, careers in public defense, among Oregon high school and college students.

# Attachment 8

## Additional Developments

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At its September 11, 2008 meeting the Commission heard testimony from Mark Burkhalter with the Jackson Juvenile Consortium. Mr. Burkhalter said that the consortium now has five full-time attorneys, that the group has met often to discuss the concerns raised at earlier commission meetings and that caseloads have been reduced from an average of 815 case credits per year per FTE attorney to 594. Although this number is still high it is no longer the highest in the state and the problem appears to be a statewide one. He said that the Commission's concern about the consortium's caseload came as a surprise since it had not been part of the discussion when the last contract was negotiated. In the future he believes the number of review hearing in the county might drop when the current juvenile judge retires at the end of the year. He believes attorneys are doing good work on their cases. He said he would like to see caseloads go down if compensation did not go down. It is hard to find qualified juvenile lawyers. It might be preferable to hire paralegals to maintain contact with clients and others involved in the case. The Southern Oregon Public Defender's Office currently handles approximately one third of the juvenile cases and the consortium handles the balance. Mr. Burkhalter said that he does not see it as the attorney's role to perform social work functions in the case.

Christine Herbert testified by phone and told the Commission that the report implied that consortium attorneys were not providing representation post-disposition. She said that was incorrect; attorneys were talking to their clients between hearings and sometimes attending meetings with them.

Ingrid Swenson said that caseloads are in issue in a number of jurisdictions but that it was appropriate for the Commission to have the discussion in Jackson County because JJC's caseload per FTE was the highest in the state. She said that the consortium's caseload had been an issue that was discussed with them a number of times in the past, including after a comprehensive site review. When OPDS's efforts to encourage the consortium to add attorneys failed, Southern Oregon Public Defender was asked to take a portion of the juvenile caseload. She also summarized the kinds of activities attorneys need to take on behalf of dependency clients after adjudication. These require advocacy outside the courtroom but are legitimate legal representation not social work.

Mark Burkhalter said that he and the other consortium attorneys spend the majority of their time in the courtroom and, consequently, are generally not available to attend meetings in other locations.

Mark McKechnie, the Executive Director of the Juvenile Rights Project said that although the caseloads handled by Juvenile Rights attorneys are less than half of

caseloads carried by JJC attorneys, he believes that Juvenile Rights attorneys need to reduce their caseloads by 20%.

With respect to the Los Abogados consortium, Chair Ellis inquired whether some greater effort should be made to persuade the consortium to follow best practices for consortium management including a more structured management system and mechanisms to permit the consortium to take appropriate actions if members cease to perform satisfactorily. Ingrid Swenson described the information that had been made available regarding the need for such management tools as well as effective models used by other consortia but that these had always been treated as recommendations rather than mandates. She said this consortium had not experienced any difficulties to date. Kathryn Aylward expressed her preference for imposing as few mandates as possible upon contractors because they make it more difficult to reach agreement.

### **A Service Delivery Plan for Jackson County**

*PDSC is grateful for the cooperation and hospitality extended to its staff and its members during its visit to Jackson County and the initial investigations made in preparation for that visit. PDSC expresses its sincere appreciation to all the members of the Jackson County criminal and juvenile justice communities for their assistance in informing the commission and helping to guide the creation of a service delivery plan for the County.*

In light of all the information provided, PDSC approves the following service delivery plan for Jackson County.

A public defender office supplemented by a consortium to handle criminal cases and a consortium to handle juvenile cases appears to be the appropriate service delivery model for this jurisdiction. The public defender office is performing many of the essential functions of a public defense system in the county. It is training new attorneys, providing on-going education to criminal and juvenile attorneys in the area, participating in policy making bodies in the criminal and juvenile justice systems and taking on new functions as needed, such as providing representation in juvenile cases.

The criminal consortium is reported to be providing superior representation despite its lack of a well- developed administrative structure.

The juvenile consortium is generally credited with providing very good representation at some stages of the proceedings and is addressing concerns regarding representation between the time of jurisdiction and the final proceedings in the case.

Excessive caseloads challenge even the ability of well-qualified attorneys to meet the needs of their clients.

While caseloads in both criminal and juvenile cases in Oregon appear to exceed national standards by approximately 30% the impact is reportedly greater in juvenile cases. PDSC has proposed Policy Option Package 100 in its 2009-11 budget request that would provide an additional \$17 million to reduce juvenile caseloads. Should the agency receive any amount of funding for this purpose, OPDS would outline for the Commission at its priority setting meetings in the summer and fall of 2009 possible approaches to the allocation of the funds that would achieve the goals of reducing caseloads and improving representation.

The Executive Director will form an advisory group of juvenile contractors to (1) plan for the agency's presentation regarding Policy Option Package 100 to the Public Safety Subcommittee of the Joint Ways and Means Committee, (2) make recommendations for the use of any funds appropriated, and (3) regardless of whether additional funds are available, make recommendations to the Commission and OPDS regarding other courses of action that could be taken to improve the quality of representation in these cases.

During the course of contract negotiations, OPDS will explore with all prospective contractors the number of attorneys and the percentage of such attorneys' time that will be devoted to work under the contract and how the contractor intends to meet the needs of its public defense clients when the proposed caseload exceeds the caseload standards included in the request for proposals.

# Attachment 9

## **PDSC Discussion at September 11, 2008 Commission Meeting**

Ingrid Swenson summarized reports and testimony previously received regarding service delivery in Josephine County. She said that the two principal providers were both functioning well - the Southern Oregon Public Defender office and the Josephine County Defense Lawyers, Inc. consortium.

Chair Ellis noted a statement in the report by Bert Putney recommending that the commission consider having a single organization provide services in each region of the state. At the chair's request Mr. Putney explained that he believed there were efficiencies in operation that could be achieved by having a single entity manage a number of offices in a particular region of the state. There would be savings in the cost of providing payroll services and CLE sessions, and a larger entity could probably negotiate better rates on employee health insurance for defender offices. The new entity would be a private non-profit that would act in an administrative capacity over the delivery of legal services but the existing public defender offices would continue to provide the legal services. Mr. Putney had not discussed the proposal with other public defense offices.

### **A Service Delivery Plan for Josephine County**

The combination in Josephine County of a public defender office and a single consortium which handles criminal, juvenile and civil commitment cases, appears to be the appropriate service delivery model for this jurisdiction. It is believed that the county is receiving the benefit of a public defense office whose senior attorneys are available to train new attorneys, which provides staff for the operation of the drug court, sponsors continuing education sessions for attorneys, and participates in justice planning and policy development groups. The county benefits as well from the quality of legal skills and the flexibility provided by the consortium.

In light of all the reports and information provided, PDSC approves a plan of continuing the service delivery system currently in place in Josephine County.

# Attachment 10

## **PDSC COMPLAINT POLICY AND PROCECURES**

**The following Public Defense Complaint Policy and Procedures (PDCPP) is adopted by the Public Defense Services Commission (PDSC) pursuant to ORS 151.216(1)(f)(j) and (h), effective October 22, 2004.**

### **Policy:**

**It is important for the Office of Public Defense Services (“OPDS”) to be aware of complaints regarding the performance of public defense providers and the cost of public defense services, to have a policy regarding the processing of such complaints, and to address such complaints in a manner which is consistent with its obligation to provide high quality, cost-efficient public defense services.**

**Certain complaints are in the jurisdiction of the courts or of the Oregon State Bar and should be conducted under procedures adopted by them for such matters. OPDS has an independent duty to oversee the quality and cost of public defense services and to take appropriate action to ensure quality and cost effectiveness.**

**The PDCPP governs the procedure for receiving, investigating, and responding to complaints regarding (1) the quality of services provided by public defense attorneys, and (2) payment from public funds of attorney fees and non-routine fees and expenses incurred in cases.**

**In order to provide OPDS with specific guidelines for the handling of complaints, the PDSC adopts the following procedures.**

### **Procedures:**

1. Complaints regarding the quality of services provided by public defense attorneys.
  - a. A “public defense attorney” is an attorney who provides legal representation at state expense pursuant to ORS 151.216 and other statutes.
  - b. A complaint regarding the quality of services provided by a public defense attorney shall be made in writing and signed by the complainant.
  - c. Upon receipt of a complaint under this paragraph, OPDS will make an initial determination whether the complaint raises a facially reasonable issue regarding the quality of services provided by a public defense attorney.
  - d. If the complaint raises a facially reasonable issue regarding the quality of services, OPDS shall determine whether:

- i. the complaint relates to a current concern or dispute which may be capable of resolution through OPDS intervention (for example, a current client contacts OPDS to report lack of contact with the client's lawyer); or
  - ii. the complaint relates to past or continuing conduct which cannot be resolved by OPDS intervention.
- e. If the complaint relates to a current concern which may be capable of informal resolution, OPDS shall provide the attorney and, if applicable, the attorney's employer or consortium administrator, with a copy of the complaint. OPDS shall attempt to resolve the issue with the attorney or the attorney's employer or consortium administrator by agreeing upon an appropriate course of action.
- f. If the concern is about past or continuing conduct which has not been or cannot be resolved by OPDS intervention, OPDS shall then determine whether the concern is one which is being or should be addressed:
  - i. by the court (for example, if the client is seeking to have counsel relieved and new counsel appointed, or if the client has filed a petition for post conviction relief alleging inadequate representation by counsel); or
  - ii. by the bar (for example, if the allegation is one of misconduct by the lawyer).
- g. If one or more of the collateral proceedings identified in *fi* and *fii* above has already been initiated, OPDS shall inform the complainant, the attorney, and, if applicable, the attorney's employer or consortium administrator that OPDS will monitor the progress of the proceeding in the court or bar.
- h. If the complaint is of a nature which would more appropriately be addressed by the court or bar and such proceedings have not been initiated, OPDS will inform the complainant of the availability of those processes and inform the attorney, and the attorney's employer or consortium administrator if applicable, that the complainant has been so advised.
- i. If:
  - i. the complaint is not capable of informal resolution and is also not properly the subject of a court or bar proceeding (such as an allegation that an attorney is continually failing to meet obligations under the attorney's contract with PDSC or fails to meet PDSC's Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense), or
  - ii. the court or bar proceedings have resulted in a determination that the lawyer has failed to adequately represent the client or has violated an OSB disciplinary rule,
- j. Then:
 

OPDS shall review information submitted and findings made in collateral proceedings, if any, and may perform its own investigation. After notice to the attorney and the attorney's employer or consortium administrator, if

any, of the information obtained by OPDS and an opportunity for the attorney and the employer or administrator to respond, OPDS shall determine whether all of the information available establishes or fails to establish that the attorney's representation with respect to the matter complained of has been unsatisfactory.

- i. If OPDS determines that the representation has been unsatisfactory it may take appropriate action to attempt to correct the problem.
  - ii. If corrective action is not possible or if the attorney or the employer or consortium administrator fails to correct the conduct complained of in a timely manner, OPDS may take such additional action as is appropriate under the circumstances, including but not limited to suspension of the attorney from ~~the~~ appointment ~~list~~ for any or all case types, in addition to ~~or~~ any action authorized under PDSC's contract with the attorney or the attorney's employer or consortium.
- k. OPDS shall notify the attorney and the employer or consortium administrator, if any, in writing of its finding and of any action taken or sanction imposed in response to a finding of unsatisfactory representation.
  - l. If a complaint is resolved informally, no written notice to the complainant is required. If a complaint is not resolved informally, OPDS shall notify the complainant in writing of its finding and of any corrective action taken or sanction imposed in response to a finding of unsatisfactory representation.
  - m. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

## 2. Complaints regarding payment from public funds of attorney fees and non-routine fees and expenses.

- n. A complaint regarding payment from public funds of attorney fees or non-routine fees and expenses shall be made in writing and signed by the complainant.
- o. Upon receipt of a complaint under this paragraph, OPDS shall make an initial determination whether the complaint raises a facially reasonable claim regarding the payment from public funds of attorney fees or non-routine fees and expenses.
- p. If the complaint raises a facially reasonable claim, OPDS shall review records related to the attorney fees or non-routine expense authorization or payment.
- q. If the matter complained of is not resolved by a review of the records, OPDS shall contact the attorney or provider for an explanation. The attorney or provider may respond orally or in writing.
- r. If, after a review of the records and any additional information obtained from the attorney or provider, a reasonable concern remains that attorney

- fees or non-routine fees or expenses may have been unreasonable, OPDS shall notify the attorney or provider of its concern and shall conduct such further investigation as may appear appropriate under the circumstances.
- s. After completing its investigation, OPDS shall determine whether all of the information available establishes or fails to establish that the fee or expenditure complained of was unreasonable.
  - t. If OPDS determines that the fee or expense was unreasonable, it may take any or all of the following actions unless the fee or expense was specifically pre-authorized by OPDS and used for the purpose authorized:
    - i. decline payment for the goods or services in question;
    - ii. seek reimbursement for any funds determined to have been improperly obtained or used;
    - iii. warn the attorney or provider;
    - iv. upon approval by the executive director of OPDS, suspend the attorney's eligibility for appointment in public defense cases or decline to authorize future fees or expenses for the provider; and
    - v. take such additional measures as may be appropriate under the circumstances.
  - u. If a fee or expense determined to be unreasonable was specifically pre-authorized by OPDS and used for the purpose authorized, OPDS shall review its policies and procedures and take such action as appears appropriate to avoid future pre-authorization of unreasonable fees and expenses.
  - v. OPDS shall notify both the attorney or provider and the complainant in writing of its finding and of any action taken or sanction imposed in response to a finding that a fee or expense was unreasonable.
  - w. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.
2. Nothing in the PDCPP prohibits OPDS from receiving information in any form from any source regarding the performance of public defense providers or the cost of public defense services, and taking such action as it deems appropriate.
  3. Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will not disclose such information, except as required by law, without the consent of the person making the submission.

## STANDARD V: QUALIFICATION CERTIFICATE AND APPOINTMENT OF COUNSEL LISTS

### 1. Certificate and Supplemental Questionnaire

~~Effective March 1, 2007, in~~ In order to receive an appointment to represent a financially eligible person at state expense, ~~unless covered under Standard III, section 2.C,~~ an attorney must ~~have~~ submitted a certificate of qualification together with a completed supplemental questionnaire, ~~unless covered under Standard III, section 2.C,~~ and ~~have been~~ approved ~~by the Office of Public Defense Services~~ for ~~inclusion on an~~ appointment ~~to the case type for which the appointment will be made list~~. The certificate and supplemental questionnaire must be in the form set out in Exhibit A to these standards. An attorney who ~~has~~ submitted a certificate prior to ~~the~~ March 1, 2007 ~~effective date of these revised standards~~ is not required to submit a new certificate unless the attorney seeks to accept appointment to cases not covered by a previous certificate, or unless submitting a new contract for execution.

### 2. Submission Requirements

- A. *Contract Attorneys (Non-public defender)*. Contract attorneys must submit their certificates of qualification and completed supplemental questionnaires to the Office of Public Defense Services (OPDS) prior to the execution of the contract and thereafter as necessary to ensure that OPDS has current information for each attorney who performs services under the contract.
- B. *Assigned Counsel (for all Noncontract Appointments)*. Certificates of qualification and completed supplemental questionnaires may be submitted to OPDS at any time. OPDS will periodically require re-submission of certificates of qualification and completed supplemental questionnaires as needed to document that an attorney continues to meet ongoing training requirements and other standards.
- C. *Public Defense Organizations*. Public Defense Organizations seeking to qualify attorneys pursuant to Standard III, section 2.C, shall submit prior to execution of its contract with OPDS and update as necessary:
  - a. A description of the organization's management, supervision, evaluation and training procedures, along with an explanation of how these procedures will ensure adequate and competent representation by the organization's attorneys;
  - b. Certificates of Attorney Qualification, with supplemental questionnaire, from the organization's supervisory attorneys;
  - c. A Certificate of Attorney Qualification for each attorney qualifying pursuant to Standard III, section 2.C, signed by an authorized representative of the organization that states the type of cases for which the attorney is eligible to receive appointment; and
  - d. A supplemental questionnaire for each attorney qualifying pursuant to Standard III, section 2.C, completed and signed by each attorney.

### 3. Supporting Documentation

An attorney must submit supporting documentation in addition to the certificate and questionnaire:

- A. At the request of OPDS; or
- B. When the attorney seeks to qualify for appointments based on equivalent experience.

#### 4. Approval for Appointment Lists

- A. *Review of Submitted Certificates.* OPDS will review the qualification certificates and may request supporting documentation as needed. Not all attorneys who meet the minimum qualifications for a case type will be approved for ~~inclusion on~~ appointment to cases of that typelists. OPDS's goal is to select attorneys who:
  - a. are more than minimally qualified,
  - b. have specialized skills needed in a particular community,
  - c. are available to cover cases in the appropriate geographic area,
  - d. are able to meet specific needs of the court such as availability at specific times,
  - e. are both effective and efficient, and/or
  - f. have other qualities which would benefit the court, the clients or OPDS.

At the completion of the review, OPDS shall notify the attorney of the case types for which the attorney has been approved for appointment and the reason for its decision not to approve the attorney for appointment in any case type for which certification was submitted.

- B. *Request for Reconsideration.* An attorney who is not approved for appointment in case types for which the attorney has certified qualification may request reconsideration by submitting to OPDS, within 21 calendar days of the notice of approval/disapproval for appointment in particular case types, additional information, including supporting documents, if any, which the attorney believes indicate that the attorney meets the criteria for selection set forth in Paragraph 4.A.
- C. *Review of Request for Reconsideration.* Within 21 calendar days of OPDS's receipt of a request for reconsideration the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. OPDS shall notify the attorney of its final determination.
- D. *Extension of Time for Good Cause.* The time for requesting reconsideration and for issuing a final determination may be extended for good cause.
- E. *Provision of Lists to the Courts.* OPDS will prepare an applicable list of attorneys approved for appointment for each county. The list will be sorted by case type and, within each case type, alphabetically by attorney name.
- F. *Updating Lists.* OPDS will update lists as necessary.

## 5. Suspension From Appointment List

- A. *Suspension from Future Appointments.* If OPDS obtains information that calls into question an attorney's ability to provide adequate assistance of counsel, OPDS shall notify the attorney of the information and shall perform such investigation as is necessary to determine whether the attorney is able to provide adequate assistance of counsel. After completing its investigation and reviewing any information provided by the attorney, OPDS shall have authority to suspend the attorney from future appointments for any or all case types until OPDS is satisfied that the attorney is able to provide adequate assistance of counsel. When OPDS suspends an attorney from future appointments, OPDS shall notify the attorney and the court of the suspension and the reason(s) for the suspension.
- B. *Suspension from Current Appointments.* The court, after reviewing the reason(s) for the suspension, shall consider whether the attorney should be relieved as counsel in any pending court-appointed cases. The court shall consider with respect to each open case: the reason for the suspension, the needs of the client, and the ability of the attorney to provide adequate assistance of counsel under all of the circumstances. The court shall comply with the Paragraph 1.7 of OPDS's Public Defense Payment Policies and Procedures relating to substitution of counsel.
- C. *Request for Reconsideration.* An attorney who is suspended from future appointments may request reconsideration by submitting to OPDS, within 21 calendar days of the notice of suspension, additional information, including supporting documents, if any, which the attorney believes establish the attorney's ability to provide adequate assistance of counsel.
- D. *Review of Request for Reconsideration.* Within 21 calendar days of OPDS's receipt of a request for reconsideration, the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. In reviewing the request the executive director or the executive director's designee may select and empanel a group of public defense attorneys to advise the executive director about the attorney's ability to provide adequate assistance of counsel and whether the attorney should be suspended from future appointment for any or all case types. OPDS shall notify the attorney and the court of its final determination and the reasons for its final determination.
- E. *Extension of Time for Good Cause.* The time for requesting reconsideration and for issuing a final determination may be extended for good cause.

**Attachment 11**

## **Lawyer and Law Student Recruitment Events**

Lewis and Clark Law School

Fall Recruiting Program, Fall, 2008

<http://www.lclark.edu/dept/lscs/employerinfo.html>

We invite you to participate in our 2008-2009 Fall On-Campus Interview Program. This year the Law School's on-campus recruiting period will be from September 10 through October 11, 2008 for employers who wish to interview students for law clerk and attorney positions.

Willamette University College of Law

On Campus Interviews, Fall, 2008

<http://www.willamette.edu/wucl/careers/students/interviews.php>

OCI (On Campus Interviews) is a national season running mid-August through mid-October. It is a time in which larger and specialty firms visit campuses throughout the country to interview (primarily) second-year students for clerkships to begin the following summer.

University of Oregon School of Law

On Campus Interviews, Fall 2008

<http://www.law.uoregon.edu/career/empinterviewprograms/>

Every fall, approximately 40 - 50 employers visit the campus to interview students for summer clerkships and associate positions. Generally, employers that recruit on-campus are larger, private law firms, though each year the employer pool includes some government offices, an occasional public interest employer, and a handful of small to mid-sized private law firms.

Portland Interview Program - Interviews are held annually at our Portland office with government, non-profit, and small firms that traditionally don't interview on law school campuses.

National Hispanic Bar Association Law Student Job Fair, September 3-6, Los Angeles, CA <http://www.hnba.com/Hnba-Hollywood-2008/JOB-FAIR.aspx>

The HNBA Job Fair is organized and provided by the HNBA as a service to the U.S. legal community. For law students and lawyers, the HNBA Job Fair is an excellent employment resource. For employers, the Job Fair is a valuable asset for meeting the best and brightest Hispanic/Latina(o) law students and attorneys from across the country. The 2008 HNBA Annual Convention will permit Job Fair participants to interact with leading Hispanic lawyers throughout the United States and to participate in enriching continuing legal education programs (CLE's).

Lavender Law 2008, September 4, 2008, San Francisco, CA  
<http://www.lavenderlaw.org/careerfair.html>

The Lavender Law Career Fair is designed to achieve a sense of community and inclusion for LGBT candidates within the legal profession's recruiting efforts. By participating in this career fair, candidates will talk directly to LGBT-friendly recruiters from law firms, government agencies, LGBT rights groups, and legal departments.

2008 Oregon Minority Job Fair, September 6, 2008  
<http://www.lclark.edu/dept/lscs/2008omjfmain.html>

The Fair targets second and third-year ethnic minority law students from the three Oregon law schools, providing a forum for students to interview for summer associate/law clerk and associate/attorney positions for 2009. By providing a forum for interviews between law students and prospective legal employers, the Fair facilitates and increases the retention of minority attorneys in Oregon.

Rocky Mountain Diversity Legal Career Fair, September 12, 2008, Denver, CO  
<http://www.rmdlcf.com/>

The Rocky Mountain Diversity Legal Career Fair provides an excellent forum for legal employers, law students and law school graduates to meet and discuss employment options with the goal of expanding opportunities and assisting the legal profession in fulfilling its commitment to diversity. Legal employers attending the RMDLCF seek to hire law students and graduates from culturally diverse backgrounds that have been traditionally under-represented in the practice of law in the Rocky Mountain region. These include law students and graduates who are ethnic or racial minorities, disabled, and/or gay, lesbian, bisexual or transgender.

National Black Law Student Association, Pacific Northwest Job Fair, September 13, 2008, Seattle, WA <http://www.nblsa.org/site/index.php>

The job fair is open to second and third-year law students, and recent graduates.

Northwest Minority Job Fair, September 20, 2008, Seattle  
<http://www.nwmjf.org/>

The Northwest Minority Job Fair's mission is to foster access to employment opportunities for historically underrepresented persons in the practice of law and to provide a networking forum for legal employers and minority law students. Based upon the original purpose of the Job Fair and limited resources, the focus of our mission is ethnic minorities.

Equal Justice Works Annual Conference and Career Fair, October 10-11, 2008,  
Washington, DC

<http://www.equaljusticeworks.org/events/ccf/general>

The Equal Justice Works Conference and Career Fair will offer its trademark features – a national career fair with employers from Alaska to New Hampshire that are interviewing for over 1,500 employment opportunities. Additionally, our national conference will provide a venue where participants can learn and network about current social justice issues and develop skills that will help them in the workplace. Each year, over 1,000 individuals attend these events.

Oregon State Bar, Affirmative Action Program, Opportunities for Law in Oregon (OLIO), Employment Retreat and Job Fair, Lewis and Clark School of Law, **January 24, 2009** <http://www.osbar.org/aap/programs.html#aapreg>

OLIO is the Oregon State Bar Affirmative Action Program ethnic minority law student recruitment and retention program. Grants, donations and the OSB Affirmative Action Program Assessment fund OLIO activities. Oregon Law Foundation (OLF) is the primary grantor for the orientation.

Northwest Public Service Career Fair, February 7, 2009, Lewis and Clark Law School  
<http://www.nwpifair.org/>

The largest career fair of interest to Pacific Northwest law students is the Northwest Public Service Career Fair, which features dozens of public service employers (prosecutors, defenders, legal aid offices, US Attorneys, grassroots, nonprofits) from the Pacific Northwest. The career fair takes place in Seattle and Portland, and is hosted by the Northwest Consortium Law Schools. Northwest Consortium Law Schools includes:

[Arizona State University College of Law](#)  
[Brigham Young University Law School](#)  
[Gonzaga University School of Law](#)  
[Lewis and Clark Law School](#)  
[Seattle University School of Law](#)  
[University of Arizona, James E. Rogers College of Law](#)  
[University of Idaho School of Law](#)  
[University of Oregon School of Law](#)  
[University of Utah School of Law](#)  
[University of Washington School of Law](#)  
[Willamette University College of Law](#)

Other recruiting events:

First Year Information Programs:

Lewis and Clark School of Law, Portland, Winter 2009

Annual reception at the Metropolitan Public Defender for students to learn about representation of clients in criminal, juvenile and mental commitment cases, and about public defense.

Willamette University College of Law, September 2008

At the request of the career services office, the Oregon Criminal Defense Lawyers Association (OCDLA) invited attorneys who are both appointed and retained to represent clients in criminal and juvenile court cases to discuss their work with students.

Other planned OCDLA events:

For third-year students, OCDLA will plan presentations at each of the three Oregon law schools for students to learn about the representation of clients, in Oregon's trial and appellate courts, in criminal and juvenile cases. The events are not yet scheduled but will occur after Thanksgiving but prior to OCDLA's New Lawyer Seminar on January 24, 2009. The following OCDLA Board of Director members will be planning the events: Greg Hazarabedian (University of Oregon); Scott Baldwin (Willamette University); and Cate Wollam and Russell Barnett (Lewis and Clark).