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PUBLIC DEFENSE SERVICES COMMISSION

Friday, October 21, 2005 Meeting
12:45 p.m. to 4:00 p.m.

Mt. Bachelor Village
19717 Mt. Bachelor Drive
Bend, Oregon 97702

AGENDA

1.	OPDS's Monthly Status Report	OPDS Management Team
2.	**Action Item:** Review and Approval of Preliminary Agreements *(Attachment 1)*	Kathryn Aylward
3.	**Action Item:** Approval of the Qualification Standards for Court-Appointed Counsel *(Attachment 2)*	Peter Ozanne Kathryn Aylward Ingrid Swenson
4.	**Action Item:** Review of OPDS's Report & Approval of a Service Delivery Plan for Marion County *(Attachment 3)*	Barnes Ellis
5.	**Action Item:** Review of OPDS's Report & Approval of a Service Delivery Plan for Klamath County *(Attachment 4)*	Barnes Ellis
6.	Meeting Schedule for the Remainder of 2005 and 2006 & New Business	Barnes Ellis

Please note: *Lunch will be provided over the noon hour for Commission members and others who ordered lunches in advance.*

Attachment 1

Attachment 1

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Action Item
October 21, 2005

Issue
PDSC approval of Preliminary Agreements (PAs).

Discussion
All PAs have been reviewed in detail and approved by the Director of the Contract and Business Services Division. Actual contract documents will be signed pending approval from the PDSC.

	County	Contractor (Kor)	Status	2005 total value	2006 total value*	Comments
1	Death Penalty	Gerald Petersen	PA to 12/31/07	$155,210	$155,220	No change in rates or hours. ($10 difference due to rounding monthly payments.)
2	Death Penalty	Wm. David Falls	PA to 12/31/07	$151,812	$151,812	No change in rates or hours.
3	Marion	Juvenile Advocacy Consortium	PA to 12/31/07	$1,644,560	$2,378,096	No change in rates; 45% workload increase.

* Terms for 2007 are the same as 2006 in all PAs.

Recommendation
Approve all preliminary agreements listed above.

Required Commission Action
Vote to approve all preliminary agreements listed above.

Attachment 2

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

Revised 10/6/05

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EXHIBIT B ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES

EXHIBIT C PRINCIPLES AND STANDARDS FOR COUNSEL IN CRIMINAL, DELINQUENCY, DEPENDENCY AND CIVIL COMMITMENT CASES (Chapters 1-4 of OSB Task Force Report adopted by the Board of Governors September 25, 1996, remainder of report (generally, appendices and annotations) not reproduced)

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL

TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

The Public Defense Services Commission ~~(PDSC)~~ adopts the following standards pursuant to ORS 151.216(1)(f)(F), effective October 21~~September 1~~, 2005.

STANDARD I: OBJECTIVE

The objective in promulgating qualification standards for counsel appointed by the state courts to represent financially eligible persons at state expense is to ensure that competent and adequate legal representation is afforded to all financially eligible persons entitled to court-appointed counsel by state or federal constitution or statute.

STANDARD II: ATTORNEY CASELOADS

Attorneys appointed to represent financially eligible persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

STANDARD III: GENERAL QUALIFICATIONS TO SERVE AS APPOINTED COUNSEL FOR FINANCIALLY ELIGIBLE PERSONS

Subject to the provisions of Standard V, the appointing authority shall appoint only those attorneys who:

1. Are active members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.241;

2. Either:

   A. Meet the qualifications specified in Standard IV for the applicable case type; or

   B. Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the Office of Public Defense Services' ~~appointing authority's~~ satisfaction that the attorney will provide competent and adequate representation;

3. Have adequate facilities such as sufficient support staff or answering service/machine and email capability to ensure reasonable and timely personal and telephonic contact between attorney and client, and between the court and attorney;

4. Have adequate legal research access through an online service or other electronic means or by being located near a law library of sufficient size to ensure the attorney has ready access to legal references and research material; and

5. Have reviewed and are familiar with the current edition of the Oregon State Bar's Indigent Defense Task Force Report, "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases." (Exhibit C to this policy statement.)

STANDARD IV: MINIMUM QUALIFICATIONS BY CASE TYPE

1. Misdemeanor Cases and Misdemeanor Probation Violation Proceedings in Trial Courts

An attorney or certified law student is qualified for appointment to misdemeanor cases and misdemeanor probation violation proceedings if he or she:

A. Has reviewed and is familiar with the current version of the ABA Standards for Criminal Justice relating to representation in criminal cases; the Oregon Rules of Professional Conduct; the Criminal and Evidence Codes of Oregon; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (current version); and

B. Satisfies one or more of the following:

a. Has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or a private attorney office in criminal cases; has undertaken such representation for at least six months; and can present a letter from the student's immediate supervisor certifying the student's knowledge of applicable criminal procedure and sentencing alternatives; or

b. Has observed five complete trials of criminal cases that were tried and submitted to a jury; or

c. Has served as counsel or co-counsel in at least two criminal cases that have been tried and submitted to a jury; or

d. Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at the majority of~~all~~ court appearances and ~~all~~ client interviews in each case; or

e. Has served as a judicial clerk for no less than six months' time for a court that regularly hears criminal cases; or

C. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B, or will be working under the direct supervision of an attorney who does have the requisite qualifications or experience.~~.~~

2. Lesser Felony Cases; Felony Probation Violation Proceedings; Contempt Proceedings in Trial Courts

Lesser felony cases include all Class C felonies other than sexual offenses and the manufacture and delivery of controlled substance drug cases.

An attorney is qualified for appointment to lesser felony cases, felony probation violation proceedings, and contempt proceedings if he or she:

A. Meets the qualifications specified in Standard IV, section 1;

B. Has continued to meet the qualifications in Standard IV, section 1 for at least nine months;

C. Has served as counsel or as co-counsel and has handled a significant portion of the trial in two criminal cases that have been submitted to a jury;

D. In at least one felony trial submitted to a jury, has associated on a pro bono or paid basis as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; and

E. On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of up to five years; or

F. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

3. Major Felony Cases in Trial Courts

Major felony cases include all A and B felonies, all manufacture and delivery of controlled substance drug felonies, and all homicides other than murder and capital murder cases.

An attorney is qualified for appointment to major felony cases if he or she:

A. Meets the qualifications specified in Standard IV, section 2;

B. Has continued to meet the qualifications in Standard IV, section 2 for nine months and has had nine months of lesser felony trial experience in a public defender or a district attorney office or in private practice; and

C. On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of 20 years; or

D. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

4. Murder Cases in Trial Courts

A. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder, if he or she:

a. Meets the qualifications specified in Standard IV, section 3;

b. Has continued to meet the qualifications in Standard IV, section 3 for three

years;

c. Has demonstrated to persons with direct knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the most serious penalties can be imposed, including handling cases involving co-defendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence;

d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict; and

e. On request, can demonstrate the above by:

(1) A written statement explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and

(2) Certification from those with direct knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:

i. Judges before whom the attorney has appeared;

ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and

iii. District attorneys or deputies against whom or with whom the attorney has tried cases; or

f. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

B. *Co-counsel.* Co-counsel in murder cases must meet the qualifications in Standard IV, section 4.A, subparagraphs a, b, c, and e or must possess significant equivalent experience under Standard III, section 2.B.

5. <u>Capital Murder Cases in Trial Courts</u>

A. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in capital murder cases if he or she:

a. Meets the qualifications specified in Standard IV, section 4;

b. Has tried major felony cases for at least five years;

c. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict. Lead counsel in capital cases

must have acted as counsel or co-counsel in at least one murder case that was tried to a jury and went to a final verdict;

d. Has completed or, prior to trial will have completed, comprehensive training in the defense of capital cases. Such training should include, but not be limited to, training in the following areas:

(1) relevant state, federal, and international law;

(2) pleading and motion practice;

(3) pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

(4) jury selection;

(5) trial preparation and presentation, including the use of experts;

(6) ethical considerations particular to capital defense representation;

(7) preservation of the record and of issues for appellate and other postconviction review;

(8) counsel's relationship with the client and his or her family;

(9) postconviction litigation in state and federal courts;

(10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science~~;~~

~~(11) the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18~~.

e. Has attended and successfully completed within the last two years at least 18 hours of specialized training on current issues in capital cases through an established training program awarding CLE credits;

f. Has demonstrated to persons with direct knowledge of his or her practice:

(1) a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;

(2) substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

(3) skill in the management and conduct of complex negotiations and litigation;

(4) skill in legal research, analysis, and the drafting of litigation documents;

(5) skill in oral advocacy;

(6) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

(7) skill in the investigation, preparation and presentation of evidence bearing upon mental status;

(8) skill in the investigation, preparation, and presentation of mitigating evidence; and

(9) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements, and

g. On request, can demonstrate all of the above by:

(1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and

(2) Certification from those with direct knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:

i. Judges before whom the attorney has appeared;

ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or

iii. District attorneys or deputies against whom or with whom the attorney has tried cases.

B. *Co-counsel.* Co-counsel in capital murder cases must meet the qualifications in Standard IV, section 5.A, subparagraphs a, b, d, e, f, and g or must possess significant equivalent experience under Standard III, section 2.B.

C. *Alternate Procedures for Meeting Minimum Qualifications.* The Office of Public Defense Services~~appointing authority~~ may determine that an attorney with extensive criminal trial experience or extensive civil litigation experience meets the minimum qualifications for appointment as lead or co-counsel, if the attorney clearly demonstrates that the attorney can and will provide competent representation to the capitally charged financially eligible defendant. For qualification under this paragraph, attorneys:

a. must be prescreened by a panel of experienced capital murder attorneys to ensure that they will provide competent representation; and

b. must have either:

(1) specialized postgraduate training in the defense of persons accused of capital crimes, or

(2) the availability of ongoing consultation support from other capital murder qualified attorney(s).

D. *Limited Caseload.* An attorney shall not handle more than two capital cases at the same time without prior authorization from the Office of Public Defense Services.

6. Civil Commitment Proceedings Under ORS Chapters 426 and 427 in Trial Courts

An attorney is qualified for appointment in civil commitment proceedings under ORS Chapters 426 and 427 if he or she:

A. Meets the qualifications specified in Standard IV, section 2;

B. Has experience handling psychiatric or psychological evidence and psychiatric or psychological experts;

C. Has knowledge of available alternatives to institutional commitment; and

D. Has knowledge of the statutes, case law, standards, and procedures relating to the involuntary commitment of the mentally ill and mentally retarded; or

E. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

7. Juvenile Cases in Trial Courts, Including Delinquency, Waiver Proceedings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights

An attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

A. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

a. Oregon Revised Statutes, Chapters 419A, 419B, and 419C, Oregon Juvenile Code.

b. Oregon Revised Statutes, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.

c. Oregon Revised Statutes, Chapter 418, Child Welfare Services.

d. Oregon Revised Statutes, Chapter 420, Youth Correction Facilities; Youth Care Centers; and Chapter 420A, Oregon Youth Authority; Youth Correction Facilities, and applicable administrative rules.

e. Oregon State Bar, Juvenile Law, (current version).

f. Pub. L. 105-89, Adoption and Safe Families Act of 1997.

g. Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC §§1901-1963 (1982) and Refugee Child Act, ORS 418.925-418.945.

h. Pub. L. 105-17 Individuals with Disabilities Education Act.

i. Pub. L. 93-112, Title V §504, Rehabilitation Act of 1975, as amended, 20 USC §794 (1982).

B. For juvenile delinquency cases, meets the qualifications for the equivalent adult crimes specified in Standards IV, sections 1-4;

C. For status offense cases, meets the qualifications specified in Standard IV, section 1;

D. For abuse and neglect cases and dependency cases, meets the qualifications specified in Standard IV, section 2;

E. For waiver proceedings, meets the qualifications specified in Standard IV, section 3. Where the underlying offense is equivalent to adult murder or capital murder, the attorney must meet the qualifications specified in Standard IV, sections 4 and 5, respectively;

F. For termination of parental rights cases, meets the qualifications specified in Standard IV, section 3, or has had equivalent experience, civil or criminal, involving complicated child-custody issues; or

G. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

For purposes of this section, a court trial in a delinquency case is equivalent to a jury trial under Standard IV, sections 1-3.

8. Appeals Other Than in Murder and Capital Murder Cases

An attorney is qualified for appointment in appeals other than in murder and capital murder cases if he or she:

A. Has reviewed and is familiar with:

a. ORS 138.005 - 138.504 in the case of appeals of criminal cases;

b. Oregon State Bar, Criminal Law (current edition) in the case of appeals of criminal cases;

c. ORS 419A.200 - 419A.211 and ORS Chapter 19 in the case of appeals of juvenile cases;

d. In the case of appeals of juvenile cases, Oregon State Bar, Juvenile Law, (current edition);

e. The Oregon Rules of Appellate Procedure; and

f. Oregon State Bar, Appeal and Review (current edition); and

B. Meets at least one of the following criteria:

a. Has experience as appellate counsel, either in practice or under the Oregon State Bar's Law Student Appearance Rule commensurate with the seriousness of the underlying case;

b. Has served as co-counsel in at least one appellate case under the supervision of an attorney eligible for appointment to appellate cases under this standard;

c. Has observed oral argument and reviewed the appellate record in at least five appellate cases, at least one of which was an appeal from conviction of a major felony or murder;

d. Has significant experience in motion practice and arguments in state circuit court or federal district court;

e. By any other evidence that shows experience, education, and skill in appellate advocacy; or

C. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

9. Appeals in Murder and Capital Murder Cases

An attorney is qualified for appointment in appeals in murder and capital murder cases if he or she:

A. Meets the qualifications specified in Standard IV, section 8;

B. For appointment as lead counsel, is an experienced and active trial or appellate lawyer with at least three years' experience in criminal defense;

C. Has demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to:

a. Capital murder cases if the appeal is in a capital case; or

b. Other murder cases, if the appeal is in a noncapital murder case;

D. Has demonstrated proficiency in appellate advocacy in felony defense;

E. For lead counsel in capital murder appeals, within two years prior to the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and

F. For co-counsel in capital murder appeals and for lead or co-counsel in other murder cases, has attended and completed a legal training or education program on

appellate advocacy in criminal cases within two years prior to the appointment.

G. *Alternate Procedures for Meeting Minimum Qualifications.* The appointing authority may determine that an attorney with extensive criminal trial or appellate experience, or both, or extensive civil litigation or appellate experience, or both, meets the minimum qualifications for appointment as lead or co-counsel in appeals of capital cases, if the attorney clearly demonstrates that the attorney can and will provide competent representation to the capitally charged financially eligible defendant. For qualification under this paragraph, attorneys:

a. must be prescreened by a panel of experienced capital murder attorneys to ensure that they will provide competent representation; and

b. must have either:

(1) specialized postgraduate training in the defense of persons accused of capital crimes, or

(2) the availability of ongoing consultation support from other capital murder qualified attorney(s).

10. <u>Postconviction Proceedings Other Than in Murder and Capital Murder Cases</u>

An attorney is qualified for appointment in postconviction proceedings in cases other than murder and capital murder if he or she:

A. Meets the qualifications for appointment to an original proceeding involving the highest charge in the postconviction proceeding; or

B. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

11. <u>Postconviction Proceedings in Murder and Capital Murder Cases</u>

An attorney is qualified for appointment in postconviction proceedings in murder and capital cases if he or she:

A. Meets the qualifications specified in Standard IV, section 4;

B. For appointment as lead counsel, has prior experience as postconviction counsel in at least three major felony cases; and

C. For capital cases, meets the qualifications specified in Standard IV, section 9 for co-counsel in capital appeals. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Standard IV, section 9.

D. *Alternate Procedures for Meeting Minimum Qualifications.* The appointing authority also may appoint as lead and co-counsel an attorney with extensive criminal trial, appellate, or postconviction experience or extensive civil litigation or appellate experience, or both, if the attorney clearly demonstrates that the attorney can and will provide competent representation to the capitally charged financially eligible defendant. For qualification under this paragraph, attorneys:

a. must be prescreened by a panel of experienced capital murder attorneys to ensure that they will provide competent representation; and

b. must have either:

(1) specialized postgraduate training in the defense of persons accused of capital crimes, or

(2) the availability of ongoing consultation support from other capital murder qualified attorney(s).

12. Habeas Corpus Proceedings

An attorney is qualified for appointment in habeas corpus proceedings if he or she:

A. Meets the qualifications specified in Standard IV, section 2; or

B. In lieu of the above qualifications, possesses significant equivalent experience under Standard III, section 2.B.

STANDARD V: QUALIFICATION CERTIFICATE AND APPOINTMENT LISTS

1. Certificate and Supplemental Questionnaire

Effective April~~January~~ 1, 2006, in order to receive an appointment to represent a financially eligible person at state expense, an attorney must have submitted a certificate of qualification together with a completed supplemental questionnaire and have been approved for inclusion on an appointment list. The certificate and supplemental questionnaire must be in the form set out in Exhibit A to these standards.

2. Submission Requirements~~Date~~

A. *Contract Attorneys.* ~~Unless expressly agreed otherwise by contract with PDSC, c~~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 ~~start date~~ 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.

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. 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 will be approved for inclusion on appointment lists. OPDS's goal is to select attorneys who are more than minimally qualified, where possible, given the volume of cases, the number of attorneys submitting certifications, and the needs of the court. At the completion of the review, OPDS will inform the attorney regarding its decision as to the case types for which the attorney has been approved for appointment.

B. *Provision of Lists to the Courts.* OPDS will prepare an applicable list of attorneys for each county. The list will be sorted by case type and, within each case type, alphabetically by attorney name.

C. *Updating Lists.* OPDS will update lists monthly with a supplemental list of any changes.

5. Suspension From Appointment List

If OPDS~~PDSC or the court~~ learns of facts that call into question an attorney's ability to provide adequate assistance of counsel even though the attorney meets the minimum qualification criteria, OPDS~~PDSC and the court each~~ shall have authority to suspend the attorney from the appointment list for any or all case types until OPDS~~PDSC~~ is satisfied that the attorney is able to provide adequate assistance of counsel. ~~If a court learns of such facts or allegations, the court must inform PDSC as soon as possible of all allegations and facts and of any action that the court takes. PDSC~~OPDS will notify the court when PDSC suspends an attorney from the court's appointment list.

Exhibit A

PUBLIC DEFENSE CERTIFICATE OF ATTORNEY QUALIFICATION

Phone Number: _____
Fax Number _____
Cell/Pager: _____

Bar Number: _____
Vendor or Tax ID# _____
Email: _____

Name: _____
Address: _____
_____
_____

Years of Experience
Practice of Law: ___ Criminal: ___
Juvenile: ___ Appellate: ___

Fluency in the following foreign language(s):
_____

For appointments in the following county(ies): _____

TRIAL LEVEL

Capital Murder
- Lead Counsel ___
- Co-counsel ___

Murder
- Lead Counsel ___
- Co-counsel ___

Major Felony ___
Lesser Felony ___
Misdemeanor ___
Juvenile
- Delinquency ___
- Dependency ___
- Termination ___

Civil Commitment ___
Postconviction Relief
- Capital Murder ___
- Murder ___
- Other Criminal ___

Habeas Corpus ___

APPELLATE LEVEL

Capital Murder
- Lead Counsel ___
- Co-counsel ___

Murder
- Lead Counsel ___
- Co-counsel ___

Other Criminal ___

Juvenile
- Delinquency ___
- Dependency ___
- Termination ___

Civil Commitment ___
Postconviction Relief ___

Habeas Corpus ___

I certify that I have reviewed the Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense, and that I meet the requirements of those standards and wish to be listed as willing to accept appointment to the case types checked above.

_____ _____
Signature Date

Mail the original signed certificate to the Office of Public Defense Services, 1320 Capitol St NE, Ste 190 Salem, Oregon 97303.

SUPPLEMENTAL QUESTIONNAIRE TO CERTIFICATE OF ATTORNEY QUALIFICATION

If this questionnaire does not address important aspects of your experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):

2. Date admitted to Oregon State Bar:

3. Oregon State Bar number:

4. Number of years and location(s) of legal practice in Oregon:

5. Number of years and location(s) of legal practice outside Oregon:

6. What percentage of your present practice involves handling criminal cases? juvenile cases? (or other cases as appropriate, such as civil commitment, habeas corpus, postconviction relief)

7. What percentage of your present practice involves handling public defense cases?

8. Briefly describe the nature and extent of your work experience in the area(s) of law which you have certified and any related areas of law.

9. Before which courts and judges have you <u>regularly</u> appeared in case proceedings which you have certified?

10. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with law related to the case types you have certified?

11. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling the case types you have certified.

12. List two cases by county and case number that have been tried and submitted to a jury in which you served as counsel or co-counsel within the last two years.

13. Are there any Oregon State Bar complaints pending against you? If yes, please explain.

14. Has the Oregon State Bar ever found you in violation of a Disciplinary Rule? If yes, please describe and cite to opinion.

15. Has a former client ever successfully obtained postconviction relief based on your representation? If yes, please describe and cite to opinion, if there was one.

I certify that the above information is true and complete.

_____ _____

SIGNATURE DATE

Attachment 3

OPDS's Report to the Public Defense Services Commission on Service Delivery in Marion County

(October 13, 2005)

Introduction

Since completing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense service and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's "service delivery planning process," which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 and the first quarter of 2005, the Commission completed evaluations of the local delivery systems in Benton, Lane, Lincoln, Linn and Multnomah Counties and developed Service Delivery Plans in those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report presents the results of OPDS's initial examination and preliminary investigation of conditions in Marion County's public defense delivery system. It also represents the first step in PDSC's service delivery planning process.

PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they provide in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services.

Second, starting with preliminary investigations by OPDS and a report such as this, the Commission will review the condition and operation of local public defense delivery systems and services in each region by holding public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's Service Delivery Plans will (a)

take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts.

Finally, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region. Any Service Delivery Plan that PDSC develops will not be the last word on the service delivery system in that region, or on the quality and cost-efficiency of the region's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region. PDSC's planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to address pressing problems in those regions.

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management, widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

A range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies PDSC has undertaken to promote quality and cost-efficiency in the delivery of public defense services. However, it is not the only one.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of experienced public defense contractors from across the state. That group advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review process and technical assistance projects for contractors

and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the Quality Assurance Task Force is planning site visits of the largest contractors in counties across the state, including Columbia, Jackson, Klamath, Multnomah and Umatilla Counties.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers.

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the behavior and performance of public defense contractors and individual attorneys. The Commission is also concerned about the "graying" of the public defense bar in Oregon and a potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

<u>"Structure" versus "performance" in the delivery of public defense services</u>. Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission's service delivery planning process. That process is aimed primarily at reviewing and improving the "structure" for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into "best practices," recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.[1] A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

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[1] Debates over the relative effectiveness of the structure of public defender offices versus the structure of private appointment processes have persisted in this country for decades. See, e.g., Spangenberg and Beeman, "Indigent Defense Systems in the United States," 58 <u>Law and Contemporary Problems</u> 31-49 (1995).

Most of PDSC's other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the "performance" of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time-to-time in the course of the Commission's service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractors Advisory Group and others, is usually in the best position to address performance issues.

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

Organizations currently operating within the structure of Oregon's public defense delivery systems. The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for "public" defenders and the advocates for "private" defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the state from among those types of organizations that have already been established and tested over decades in Oregon.

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state. The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide services in each region of the state.

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of their relative advantages and disadvantages. This discussion is by no means exhaustive. It is intended to highlight the kinds of considerations the Commission is likely to make in reviewing the structure of any local service delivery system.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

- Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.[2] Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

  While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the

[2] Spangenberg and Beeman, note 1 above, at 36.

delivery of effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

Because of the professional management structure and staff in most public defender offices, PDSC looks to the administrators of these offices, in particular, to advise and assist the Commission and OPDS. Boards of directors of public defender offices, with management responsibilities and fiduciary duties required by Oregon law, also offer PDSC an effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through the expertise on the boards and (c) ensure the professional quality and cost-efficiency of the services provided by their offices.

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.[3] As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

- Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

  Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or

[3] Id.

district attorney offices and larger law firms, but in which they no longer wish to practice law.

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar's "firm unit" rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium's administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium's administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law firm's portion of the consortium's workload among attorneys in a law firm may not be evident to the consortium's administrator and OPDS or within their ability to track and influence.

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receiving court appointments.

- Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of

quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

- Individual attorneys under contract. Individual attorneys provide a variety of public defense services under contract with PDSC, including in specialty areas of practice like the defense in aggravated murder cases and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

  This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Marion County

The primary objectives of OPDS's investigations of local public defense delivery systems throughout the state are (1) to provide PDSC with an assessment of the strengths and

weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system's structure or operation and (2) to identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC's assessment of the strengths and weaknesses of a local public defense delivery system begins with its review of an OPDS report like this.

OPDS's investigations of local delivery systems in counties or judicial districts serve two other important functions. First, they provide useful information to public officials and other stakeholders in the local justice system about the condition and effectiveness of their justice system. The Commission has discovered that this function of "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, create momentum for reassessment and improvement. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. OPDS's investigations of public defense delivery systems can correct some of those local misperceptions.

On July 28 and August 11, 2005, PDSC held public meetings in Marion County to (a) consider the results of OPDS's investigation in the county as reported in preliminary drafts like this one, (b) receive testimony and comments from the Commission's local contractors, prosecutors, judges and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Marion County.

Earlier drafts of this report were submitted to PDSC for the purpose of providing a framework to guide the Commission's discussions about the condition of Marion County's public defense system and services and the range of policy options available to the Commission — from concluding that no changes are needed in the county to significantly restructuring the county's delivery system. Those draft reports also offered guidance to PDSC's invited guests at its meetings, the Commission's contractors, public officials, justice professionals and other citizens interested in Marion County's criminal and juvenile justice systems about the kind of information and advice that will assist the Commission in improving the county's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Marion County's justice system may be the single most important factor contributing to the quality of the final version of this report and the Commission's Service Delivery Plan for Marion County. OPDS continues to welcome written comments from any interested person, which should be mailed at least five days in advance of PDSC's October 21 meeting in Bend in order to be considered at that meeting to:

Peter Ozanne
Public Defense Services Commission
1320 Capital Street N.E., Suite 200
Salem, Oregon 97303

or e-mailed at least three days in advance of the Commission's October 21 meeting to:

Peter.A.Ozanne@opds.state.or.us

A Demographic Snapshot of Marion County [4]

Located 50 miles south of the Portland Metropolitan Area and between the Willamette River and the Cascade Mountains, Marion County covers 1,200 square miles and includes 20 cities, as well as the state capital. With a population of nearly 300,000, Marion County is the fourth largest county in Oregon. It is also the fastest growing county in the Willamette Valley, with a growth rate of 25 percent from 1990 to 2000 and a projected growth rate of 16 percent from 2000 to 2010.

Although Marion County remains the largest producer of agricultural income among Oregon's 36 counties, its economy is increasingly dependent on government, with 38 of the largest state agencies located in and around Salem.

Marion County is also the home of Willamette University and Chemeketa Community College. Nevertheless, the education level of its residents is relatively low, with 13 percent of its adult population holding a Bachelor's Degree and 6.7 percent with a post-graduate degree (compared to respective statewide averages of 16.4 percent and 8.7 percent). Twenty-one percent of the county's population of adults (25 years old or older) does not have high school diplomas, compared to 15 percent of all Oregonians. Marion County also has the second highest teen pregnancy rate in the state at 22 percent, compared to a statewide average of 16.7 percent.

Although Marion County is the home of state government, it has had above average unemployment rates over the past decade and ranked only twelfth in per capita income in 2000. The county also has a relatively small proportion of professionals, scientists and managers in its workforce for a populous county with numerous state agencies (7.2 percent, compared to 11.4 percent in Multnomah County and a state average of 8.9 percent in 2000). The percentage of Marion County's residents living in poverty is 13.5, compared to 11.6 percent in Oregon and 12.4 percent in the United States.

Marion County is the third most diverse county in Oregon. Its non-white and Hispanic residents make up 23.5 percent of the county's population, compared to 16.5 percent for the state as a whole.

With juveniles (18 years old or younger) making up a high percentage of its total population at 27.4 percent, the county's "at risk" population (which tends to commit more criminal and juvenile offenses) is larger than the state's at-risk population of 24.7 percent.

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[4] The following information was taken from Marion County's official website and from data compiled by Southern Oregon University's Southern Oregon Regional Services Institute, which is contained in the Institute's Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

Marion County had the second highest index crime rate in the state in 2000 with 58.5 index crimes per 1,000 residents, following Multnomah County with 74.8 per 1,000 and compared to the state average of 49.2.[5] The fact that the county is the site of two major state correctional institutions and the state's largest mental hospital is considered by many residents and observers as a significant contributing factor to the county's relatively high crime rate

The public defense caseload in Marion County is approximately ten percent of Oregon's total public defense caseload.

OPDS's Initial Findings in Marion County

PDSC's Contractors. The Commission has four contractors that provide public defense services in Marion County: (1) the Marion County Association of Defenders, Ltd. (MCAD), which handles the bulk of the county's criminal cases; (2) the Juvenile Advocacy Consortium (JAC), which specializes in juvenile defense representation in the county; (3) Andrew Ositis, who appears in civil commitment proceedings on behalf of allegedly mentally ill persons; and (4) Harris Matarazzo, who represents persons subject to the jurisdiction of the Psychiatric Security Review Board.[6]

OPDS interviewed a significant number of judges, defense attorneys, prosecutors and corrections officials in Marion County regarding the Commission's two largest contractors,[7] the structure and operation of the county's service delivery system and the quality of local public defense services. Nevertheless, OPDS restricted these initial findings primarily to information gathered at OPDS's formal meetings with members of MCAD's Board of Directors and members of JAC, and from the consortia's written responses to OPDS's request for information.

Marion County Association of Defenders, Ltd. MCAD lists 55 members on its "Active Roster" of participating attorneys, although some of those lawyers apparently handle

[5] For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122. Crime rates in Marion County have been dropping, however, as they have been across the state. For example, from 1990 to 2000 the index crime rate in Marion County dropped by 7 percent and across the state by 14 percent. Over the same period of time, the county's crime rate for offenses against persons decreased by 21 percent, compared to a statewide decrease of 24.5 percent.

[6] See the test accompanying note 50, below.

[7] OPDS understands that the membership of the two largest consortium contractors in Marion County, MCAD and JAC, are made up of individual lawyers rather than law firms. Therefore, Marion County is unlikely to present the Commission with the policy question of whether PDSC should encourage, and perhaps eventually require, some or all consortia to be comprised of individual lawyers, presumably including individual lawyers from the same law firm. While a significant number of able and effective law firms currently participate in consortia across the state, OPDS has found that an understandable resistance to operational transparency and loss of management prerogatives by law firms increases the challenges to a consortium's administrator in addressing problems with attorneys' performance and conduct, and to OPDS in determining who is performing and who is getting compensated for legal work pursuant to PDSC's contracts.

consortium cases infrequently.[8] MCAD employs Steve Gorham for 70 percent of his time (.70 FTE) as its Executive Director and operates under the direction of a nine-member Board of Directors chaired by Salem attorney Richard Cowan.

In order to provide guidance to PDSC's two largest contractors in Marion County concerning this service delivery planning process and obtain background information from them in preparation for the Commission's two public meetings in the county, OPDS distributed copies of PDSC's Service Delivery Plan for Multnomah County and a lengthy questionnaire to both MCAD and JAC. The questionnaire (the "Site Visit Questionnaire") was designed for consortium contractors, not by OPDS, but by OPDS's Quality Assurance Task Force in preparation for its contractor site visit process.

MCAD's "Answers to Questionnaire for Consortium Administrators and Boards" ("MCAD's Answers") is attached as Appendix A, along with the following attachments: Att-1, "Articles of Incorporation; Att-2 "Corporate Bylaws;" Att-3, "Attorney Manual: Policies and Procedures," ("MCAD's Attorney Manual"); Att-4, "Position Description" for the Executive Director; Att-5, "MCAD New Member Information Sheet" and Att-6, MCAD's most recent "Email Summary." The apparent corporate formalities and the lengthy and detailed policies and procedures set forth in these materials reflect MCAD's careful attention to administrative detail and its lengthy history as the primary public defense consortium in Marion County.

On May 18, 2005, Shelley Dillon and Peter Ozanne of OPDS met with Dick Cowan and three other members of MCAD's Board of Directors. These board members expressed enthusiasm for public defense practice and a personal commitment to ensuring the quality of the legal services provided by MCAD. Recognizing that MCAD's size presented particular challenges to monitoring the performance and conduct of its attorneys and to addressing problems with the quality of their services, they noted recent improvements in MCAD's quality assurance processes, including a more systematic and rigorous review of attorney performance problems, design of more effective remedial strategies, and the delegation of greater authority to MCAD's Executive Director to intervene when such problems arise.[9] They pointed to the relatively recent removal from MCAD of one underperforming attorney as a sign of MCAD's more systematic and rigorous quality

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[8] In response to the questionnaire that OPDS requested MCAD and JAC to complete prior to PDCS's July meeting in Marion County, MCAD stated:

> Each consortium attorney decides whether or not to specialize in criminal defense. There is no limit to an attorney's practice that can be consortium related. The vast majority of consortium members who do the everyday work of the consortium "specialize" in indigent defense.

Appendix A, MCAD's Answers at page 3, Question 9. Because of an ambiguity in the relevant question, OPDS was unable to determine (a) what percentage of an average MCAD member's law practice is devoted to criminal defense practice, (b) the range of such percentages among MCAD's membership or (c) whether MCAD has policy objectives or aspirational goals regarding the extent to which any member of the consortium should specialize in criminal defense practice.

[9] See also Appendix A, MCAD's Attorney Manual at pages 2-6.

assurance process, which is administered by the consortium's Quality Assurance Committee.

MCAD's answers to the Site Visit Questionnaire describe these quality assurance processes in more detail.[10] In light of the importance of this topic, OPDS urges the reader to review in their entirety MCAD's answers to Questions 21 and 22 in the Site Visit Questionnaire in Appendix A.

All four board members were adamant in their support for MCAD's attorney compensation system, which is based on billable hours and supported by detailed policies and procedures and a specially-designed electronic billing system. They believe this compensation system is far superior to a per case rate of compensation because hourly rates reward actual work required and performed in a case.[11] At the same time, they expressed pride in the detail and rigor of MCAD's policies and procedures to cap total attorney billings and non-routine expenses in individual cases.[12] MCAD's billing system, which was develop by a founding member of the consortium and to which nearly half of its 40-page Attorney Manual is devoted,[13] reflects a commitment to accurate and prompt billing and payment. MCAD's four board members also expressed confidence that, as a result of its compensation and billing systems, their consortium was providing public defense services at a lower cost than most, if not all, other contractors in the state.[14]

MCAD's process for admitting new members to the consortium remains unclear to OPDS. The four board members indicated that they recently interviewed and hired several new attorneys through a relatively new formal hiring process. They explained this process as beginning with an interested attorney's letter of inquiry, followed by an interview with the Executive Director and members of the board, and concluding with a vote of the Board of Directors to grant or deny the applicant's admission to the consortium. This process appears to be memorialized in MCAD's Attorney Manual as follows: "New members must be voted in by a majority of the Board of Directors."[15] MCAD does not appear to have any formal policies or procedures to actively recruit qualified candidates for membership other than responding to the applications of interested lawyers.[16] Several past and present MCAD members with whom OPDS spoke indicated that MCAD's admission process has historically been quite informal, based upon a candidate's personal contacts with

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[10] Appendix A, MCAD's Answers at pages 7-8, Question 21 and 22.
[11] See also Appendix A, MCAD's Attorney Manual at pages 13-20 and 31-34.
[12] Id. at pages 21-30 and 30-40.
[13] Id.
[14] See also Appendix A, MCAD's Answers at page 11, Question 29. Presumably, Yamhill County Defenders, Inc., which adopted MCAD's compensation and billing systems, can make the same claim. PDSC plans to visit Yamhill County in November 2005.
[15] Appendix A, MCAD's Attorney Manual at pages 1-2, section 1.0 D. Prior to July 13, 2005 when MCAD's Attorney Manual was modified, Section 1.0 D. of the manual stated that "[m]embership is currently closed" and that "[a]ction must be taken by both the Board of Directors and the membership in order to open the MCAD membership." OPDS concluded that such actions must have been taken recently.
[16] In Appendix A, MCAD's Answers, MCAD does state that, in the event its membership becomes too small or too imbalanced between experienced and inexperience attorneys, MCAD "will advertise for new membership by communicating this need" to law schools and in relevant professional publications. (at pages 4 and10.)

consortium members and the assessment of a candidate's qualifications by the most influential members of MCAD.[17]

In response to the Site Visit Questionnaire, MCAD indicated that it has a formal mentoring system for new and inexperienced members, which is described in its Attorney Manual.[18] OPDS was unable to locate that description in the Attorney Manual at the time, though Section 1.0 D. of the manual does set forth a requirement that "[a]ll new members are required to develop and complete a personal mentoring program" and Section 1.0 G. refers to a "Quality Assurance Mentor Program."[19] MCAD's "New Member Information Sheet" also refers to a mentoring program, stating that "[a]ll new members are required to enroll in MCAD's mentoring program,"[20] but does not contain a description of the program either.

Court-appointments of MCAD members are made on a "rotational basis" in which attorneys sign up for specific dates as "attorney-of-the-day" and receive all the cases generated by a particular court or court docket on that date.[21] OPDS was uncertain of the extent to which MCAD's cases, other than murder and aggravated murder cases, are assigned to individual attorneys based upon the complexity of a case and the qualifications of the lawyer, other than by the categories of cases set forth in the Attorney Manual such as "felony," "misdemeanor" and "Spanish speaking misdemeanor."[22] At least one of MCAD's board members expressed opposition to this case assignment system due to the resulting uncontrolled and unequal distribution of cases among MCAD's attorneys. The majority of MCAD's members apparently favor this system, however, on the ground that it promotes early personal attorney contact with clients in the courtroom.

Based upon its May 18 meeting and informal conversations with MCAD's Executive Director and Board members, OPDS gained the impression that MCAD is in the process of trying to move away from an organizational structure in which its members historically regarded consortium membership as a vested right and significantly limited their delegation of authority to MCAD's Board and Executive Director to affect that right or to manage the organization[23] – akin to the traditional relationship between a university

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[17] MCAD's Answers tend to confirm these reports. In response to Question 12 of the Site Visit Questionnaire – "How do you insure that new attorneys can become part of the consortium?" – MCAD stated: "In the past, [by] word of mouth . . . ." Id. at page 4, Question 10.
[18] Id. at page 4, Question 12.
[19] Appendix A, MCAD's Attorney Manual, page 1-2; page 3, section 1.0 G.3) b.). MCAD's Answers also state that "MCAD encourages new members to observe Marion County Court procedures and to call any MCAD member with questions." MCAD's Answers at page 4, Question 10.
[20] Appendix A, MCAD's Answers, Att-5, page 2.
[21] Appendix A, MCAD's Attorney Manual at pages 11-12, section 3.5.
[22] Id.
[23] Perhaps this organizational structure and allocation of authority arose from MCAD's origins. MCAD's Answers state, in relevant part:

> MCAD was created to both protect the then current indigent defense providers in Marion County from arbitrary and capricious actions that had in the past been taken against them.

* * * * *

president and tenured faculty. MCAD now appears to be moving in the direction of an organizational structure in which MCAD's Board and Executive Director are authorized to exert more control over the admission of new members, remedying members' underperformance or misconduct, the suspension or termination of rights to membership, and the day-to-day operations of the organization – much like a law firm's delegation of such authority to a managing partner, an executive committee or a firm administrator.[24] The extent to which MCAD has accomplished this change in organizational structure and distribution of authority remains unclear.

The board members who met with OPDS on May 18 did not appear to be enthusiastic about changing an organizational structure that has evolved over time to address the need for public defense services in Marion County. For example, they did not believe that adding outside members to their board would improve MCAD's management or relations with the community, observing that MCAD's current board members have sufficient business and management expertise and ties to the local community.

These MCAD board members expressed general satisfaction with their members' professional relationships and dealings with judges, prosecutors and other justice professionals. They did express concern, however, over the rate of turn-over among the Circuit Court's staff and the resulting difficulties for MCAD's attorneys in understanding local court processes and working efficiently with the court.

MCAD provided a lengthy response to the request in the Site Visit Questionnaire to describe "some of the things your consortium does well," including MCAD's (1) high quality legal services, (2) management, planning and personal services in support of Marion County's judicial and justice systems, (3) innovative administrative processes and management systems that have benefited OPDS and contractors across the state, (4) an hourly rate system based on payment for actual work done in an efficient and accountable manner and (5) a wealth of experience in post conviction relief and habeas corpus cases.[25] In summarizing its strengths, MCAD stated: ". . . if one chose to compare

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> MCAD . . . provides to its members the protection, pride of membership, and power of the group to allow them to do their job without outside political or other influence.

Appendix A, MCAD's Answers at pages 10-11, Question 29.

[24] MCAD's Attorney Manual seems to reflect this potential shift in organizational structure and redistribution of management authority. MCAD's policies and procedures afford extensive protections for its members in the context of complaints about their performance. See Appendix A, MCAD's Attorney Manual, pages 3-6, section 1.0 H. and I. On the other hand, other subsections of the Attorney Manual governing membership establish the authority of the Executive Director or the Board of Directors to suspend a member "for good cause shown" and terminate a member "with the recommendation of the Quality Assurance Committee." Id. at pages 2-3, section 1.0 G 2.) 2.) (sic) and 3). Other than "prior notice and an opportunity to be heard," Id. at section 1.0 G 3), it is unclear whether the protections afforded to members facing a formal complaint in MCAD's Attorney Manual also apply to members facing termination. Section 1.0 G. of the Attorney Manual governing "Membership Termination" does not cross-reference MCAD's formal complaint process, other than references to the "Quality Assurance Committee" and a "Quality Assurance Mentor Program." Finally, MCAD's lines of authority or responsibility regarding membership and its members' rights with regard to these matters are further complicated by Section J. of the Attorney Manual, which provides for binding arbitration for "[a]ny disagreement between MCAD and the member attorney." Id. at page 6.

[25] Appendix A, MCAD's Answers, pages 9-11, Question 29.

MCAD's representation of the indigent accused against any other current actual system with the same resources available, based on any set standard, that MCAD's representation would be equal or exceed that other group or system."[26] OPDS urged readers to review this response to the Site Visit Questionnaire in its entirety.

In response to the final question in the Site Visit Questionnaire regarding "areas in which you think improvement is needed," MCAD concluded:

> At this time it is best to leave areas of improvement for others to suggest. That is not to say that MCAD and its members cannot improve. One can always incrementally and individually strive to improve oneself and the work that we do. Given the resources provided improvement might need to be left to this type of individual improvement. Given more resources, especially in the hourly rate and the lessening of caseloads (read more time to work on fewer cases) could not help but improve the system.
>
> More resources to expand training or fund a full time trainer would also at least theoretically improve quality.[27]

Juvenile Advocacy Consortium. JAC specializes in juvenile law and handles most of the juvenile caseload in Marion County. It is a much smaller and, therefore, more tightly-knit organization than MCAD.[28] Until the beginning of this year when JAC added two new lawyers, the consortium had 10 members. Because of the rapidly growing juvenile caseload in the county, JAC plans to recruit three more lawyers in the next 30 to 60 days.[29]

On June 22, 2005, Shelley Dillon and Peter Ozanne met with five of the most senior members of JAC. Their comments and responses to the questions of those representatives of OPDS during that meeting, as well as JAC's written "Responses to Questions" ("JAC's Responses") to the Site Visit Questionnaire (which is attached as Appendix B, along with a copy of the questionnaire), generally reflect a serious commitment to juvenile law practice, rigor in their selection and mentoring of new lawyers, pride in the quality of the lawyers in their consortium and a willingness to consider changes to improve the way JAC operates and manages itself.

Because of the consortium's relatively small size, JAC's members have traditionally shared management responsibilities among its members and reached decisions affecting the consortium by consensus.[30] While the consortium has no formally designated administrator or executive director, Salem attorney Richard Condon has been primarily responsible for negotiating and administering JAC's public defense contracts in recent

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[26] Id. at page 11.
[27] Id., Question 30.
[28] For example, JAC's members meet for lunch once a week and participate in a retreat once a year. Appendix B, JAC's "Responses to Questions" ("JAC's Responses") at Question 1 and 17.
[29] Id. at Question 6.
[30] Id. at Question 2.

years.[31] The members of JAC recognize that the recent growth in Marion County's juvenile caseload, the resulting increase in the size of their consortium and PDSC's interest in systematic quality assurance and management processes, require them to develop a more formal organizational structure and more explicit policies and procedures, including designation of a consortium administrator, formal bylaws, more structured contractual relationships among JAC's members, and a board of directors with outside members.[32]

Among JAC's most apparent strengths are the commitment of its members to recruiting and retaining highly motivated and capable juvenile law practitioners and their pride in the legal skills and civic contributions of their colleagues.[33] JAC's members also expressed a commendable desire to increase the cultural diversity of their consortium.[34] Nevertheless, and without implying any criticism of JAC's worthy objectives of promoting quality and diversity, the consortium has no formal application process for the admission of new members, and apparently recruits potential members informally, based upon direct observations of a candidate's personal attributes and legal skills and the assessments of judges and other legal professionals.[35] While such practices are common, particularly among private law firms in relatively small legal markets, they can also be subjective and exclusionary.

The assignment of cases to JAC's members seems to be governed principally by juvenile court staff, which results according to JAC in an "equal number of cases" assigned to each lawyer.[36] Other than adjustments in caseload assignments for its new and relatively inexperienced members, JAC apparently does not attempt to match complex cases with its most experienced or qualified lawyers.

JAC appears to rely primarily on its relatively rigorous admission standards to address potential problems with the underperformance or misconduct of its attorneys. It also relies on the fact that JAC's size has, in the past, permitted its members to directly observe each other's performance in the courtroom on a regular basis. Among the potential structural

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[31] Id. at Question 3.

[32] JAC suggested in its response to OPDS's questionnaire that formalities like a board of directors will change the consortium's management style. See Appendix B, JAC's Responses at Question 3. OPDS would hope that JAC retains the collaborative and collegial approach to governing itself that has apparently promoted the quality of its law practice and the enthusiasm and commitment to that practice of its members.

JAC also proposed that its new board of directors "will meet weekly or biweekly" and handle all major issues for the consortium, "including but not limited to: hiring, mentoring, performance review, conflicts issues, division of workload [and] committee assignments." Id. at Question 2. Given its apparent interest in attracting (and retaining) competent, influential and presumably busy people as outside board members, JAC should consider delegating some of the foregoing tasks of operational significance to its new administrator and an executive committee made up of rotating consortium members; and reserving to its board the more traditional policymaking and oversight roles, such as approval of bylaws and operating policies and procedures, advising the consortium on its business planning and its dealings and relationship with PDSC, periodic evaluations of the administrator's performance and the consortium's legal operations, and formal reviews of the consortium's business and financial records and operations.

[33] Appendix B, JAC's Response at Question 29.

[34] Id. at Question 6.

[35] Id. at Question 7.

[36] Id. at Question 13.

and operational changes to address its increasing size, JAC is apparently not considering additional systematic processes to review and evaluate the professional performance and personal conduct of its members.

JAC described how it addresses quality assurance and the underperformance of its attorneys as follows:

> Periodically, we check with judges to determine if there are any concerns from the bench. We contact district attorneys, DHS officials and probation officers regarding performance issues – particularly, with new members. We have almost daily contact among the group and know and discuss performance concerns.
>
> The issue [of attorney underperformance] rarely occurs. However, we have addressed the issue in the past by discussing the issues with the individual and have the individual work with a mentor. Then we regularly review the performance issues with the attorney, mentor, judges, caseworkers and district attorneys. If the performance issues continue then we make it clear that the attorney will not be included in the bidding for the next contract period.[37]

The most immediate and important challenge facing JAC appeared to be its shortage of lawyers to handle Marion County's rapidly increasing juvenile caseload. Fortunately, JAC's members did not express the kind of resistance to increases in their membership that PDSC has sometimes encountered in other parts of the state.[38] JAC has conferred regularly with CBS about the issue, admitted two new members at the beginning of this year, and committed itself to the admission of three more members in the next few months.

JAC also provided extensive comments regarding "some of the things your consortium does well" in response to the Site Visit Questionnaire, including (1) its members' commitment to children, families and their community, (2) their collaboration with each other and (3) their ability to resolve cases and manage clients well.[39] OPDS again urges readers to review these comments in their entirety.

In response to the Site Visit Questionnaire, JAC identified the following areas in need of improvement:

> We need to create a structure that will provide continuity for the future. We need to recruit younger members and develop their skills to the point where they can eventually handle full case loads.[40]

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[37] Appendix B, JAC's Responses at Question 21 and 22.
[38] Indeed, JAC clearly recognized this challenge. Id. at Question 6 and 10.
[39] Id. at Question 29.
[40] Id. at Question 30.

Without directing particular criticism at JAC or MCAD, OPDS suggested an issue for the Commission's consideration which may have statewide implications. The presumably common use of informal recruitment or hiring practices by consortia across the state under contract with PDSC may raise the following policy question: should a public contractor supported by public funds and organized solely to deliver services to the state in exchange for those funds, like PDSC's consortia,[41] follow formal recruitment and hiring procedures to ensure equal access and fair consideration? Of course, if the answer to that question is "yes," then any such procedures would need to be simple, straightforward and easy to administer. Three suggestions come to mind: (a) formal announcements in appropriate publications of openings in a consortium within the relevant county, region or market for legal services; (b) a formal screening of applications for admission and accompanying resumes; and (c) a formal interview process for the relatively few, screened applicants. These suggestions would not preclude the continued use of the more informal and subjective recruitment practices used by PDSC's consortium contractors across the state. But the addition of more formal recruitment and hiring practices might promote inclusiveness and reduce the appearance, if not the reality, of bias or favoritism.

Public Comments and Discussions at PDSC's July 28, 2005 Meeting in Salem[42]

The Commission's Chair first welcomed Circuit Court Judge Pamela Abernethy as the Commission's first guest witness to provide comments on the public defense delivery system in Marion County. Judge Abernethy confined her comments to the operations and performance of the Juvenile Advocacy Consortium (JAC) due to the fact that she has served exclusively as Juvenile Court Judge over the past four years. The Judge indicated, in general, that she is very pleased with the quality of JAC's work and that everyone in the consortium is dedicated to juvenile law and the interests of their clients. Besides the obvious need for additional juvenile lawyers at JAC, Judge Abernethy expressed her hope that JAC will recruit more Spanish-speaking attorneys with multi-cultural backgrounds and her belief that JAC needs to develop long-term plans for handling the juvenile caseload and adjusting to the demands for growth over the next 10 years.

The Commission next welcomed Presiding Circuit Court Judge Paul Lipscomb to offer his comments on public defense in Marion County. Judge Lipscomb reported that JAC provides excellent service and that the juvenile system is working very well. In terms of the overall operation of public defense services in Marion County, however, he has become convinced that the county needs "a more structured system," concluding that the current decentralized system provided by the Marion County Association of Defenders Ltd. Consortium (MCAD) cannot ensure operational efficiency or a consistent level of quality legal services. Without faulting MCAD's management, Board of Directors or the majority of dedicated criminal defense attorneys at MCAD, Judge Lipscomb expressed his belief that the Commission needs to restructure the delivery system for criminal cases in Marion

[41] In counties like Marion, where PDSC contracts with consortia to handle all cases or an entire category of cases except cases involving conflicts of interest, some observers have expressed the view that the Commission has created a public monopoly in the delivery of legal services, which might arguably give rise to special obligations on the part of the contractors in question.
[42] A full transcript of these public comments and discussions is attached as Appendix C.

County by establishing a case rate compensation system with a more tightly organized consortium and stronger supervision and quality assurance processes or, as he would prefer, a public defender office staffed by full-time public defense attorneys.

The Chair invited the Chair of MCAD's Board of Directors, Dick Cowan, and MCAD's Executive Director, Steve Gorham, to describe their operations and answer the Commission's questions. Mr. Gorham reviewed the history and origins of MCAD and its many strengths which, in his view, include the delivery of high quality, efficient legal services for the county and other areas of the state at one of the lowest levels of compensation in the state. Mr. Gorham felt that the biggest problem in Marion County's public defense system is the inadequate level of state resources devoted to representation of the allegedly mentally ill. In his opinion, that should be the first priority of the Commission, rather than any changes to MCAD. Mr. Gorham emphasized that MCAD's diversity of lawyers is one of its greatest strengths and challenged the Commission to prove that the quality of MCAD's services was lower than any other provider in the state. While observing that "[n]o one can really know what quality service is," he assured the Commission that MCAD has "a vigorous quality assurance process" that predates the state's complaint policy. Mr. Gorham explained MCAD's "attorney of the day" case assignment process, noting that some judges think it is a great system, while some judges don't think the early establishment of an attorney-client relationship that this system ensures is important. He also noted that the Circuit Court judges' individual docketing systems in the county make scheduling for attorneys very difficult and might prevent a traditional public defender office from operating effectively in the county.

Mr. Gorham and Mr. Cowan were asked by the Chair to address the following concerns of the Commission: training, supervision, Continuing Legal Education and assignment of cases based on attorneys' skills and experience. In the course of attempting to address those concerns, Mr. Cowan expressed his view that MCAD's classification of attorneys as qualified to handle misdemeanors, felonies and similar categories of cases satisfies the need to match cases with the skills and experience of the consortium's individual lawyers. Mr. Gorham expressed the view that, if the Commission paid MCAD an additional $100,000 a year, then the consortium could hire a trainer improve its training, supervision and quality assurance processes.

Mr. Gorham also informed the Commission that he believed MCAD's system of hourly rates and internal cost controls saves PDSC $300,000 per year. He assured the Commission that, if MCAD were paid higher rates and received that additional $300,000 as a result, then he and the Board would reduce the size of MCAD to address the management concerns of the Commission and Judge Lipscomb. Mr. Gorham did not explain why MCAD needed additional funds to implement this change.

The Chair next welcomed Circuit Court Judge Terry Leggert to offer her comments on the public defense system in Marion County. Judge Leggert currently handles criminal cases at the Circuit Court Annex. Her primary concern is to ensure that Marion County has a good process for providing quality representation to criminal defendants. Based upon eight years of experience as a prosecutor and over ten years as a judge in Marion County,

Judge Leggert has concluded that the quality of criminal defense services has declined in the county, probably due to increases in the county's caseloads and the number of attorneys at MCAD. Moreover, many, though certainly not all, of the most experienced and skilled defense attorneys in the county have moved away from public defense work at MCAD, leaving the work to an increasing number of lawyers who lack the interest or ability to do the work. A number of the most skilled lawyers have also moved to JAC. As a result, there are lawyers at MCAD handling cases in which they are "over their heads." While there is mentoring available at MCAD, the mentors have too little input or control over the cases handled by inexperienced or unskilled "mentees" to ensure competent representation. Another problem for the Court at the Annex is contacting and communicating with MCAD members. These attorneys should either have staff to answer their phones or answering machines with sufficient capacity to accept messages and updated greetings to let callers know whether the attorneys are even in town. These and other kinds of law practice standards need to be required and enforced by MCAD. Judge Leggert criticized MCAD's case assignment system based upon a distinction between misdemeanor and felony cases. An Assault IV domestic violence case, for example, is frequently far more complex and triable and involves many more collateral consequences than many felony cases. Judge Leggert also noted that post-conviction relief cases are a unique challenge to Marion County's justice system. Although it is difficult to find attorneys willing to handle these cases, the attorneys at MCAD who do handle them "do a very good job keeping those cases moving." Judge Leggert concluded with the observation that any trainer or quality assurance lawyer for MCAD should be employed outside of MCAD because it is too hard to evaluate, criticize or sanction friends and colleagues.

Finally, the Chair invited Richard Condon and Jeff Carter of JAC to discuss their consortium's operations and law practice. Richard Condon described JAC's history, organization and operations. JAC currently has 14 members, all of whom are specialists in juvenile law. JAC recognizes that it needs to hire more attorneys and to recruit younger and more diverse attorneys. JAC relies primarily on mentoring to train its lawyers. Although JAC has a history of decision-making by consensus, its members also recognize that as JAC grows they will "need to add structure in the form of a board and to assign responsibilities for administrative management."[43] They do not believe, however, that they need a full-time administrator at this time and they do not currently have a formal coordinator or administrator. Mr. Condon feels that JAC can manage itself through committees appointed by the board of directors. New and inexperienced attorneys are assigned delinquency cases to gain basic skills and experience. Moreover, quality assurance is performed to a significant extent by the juvenile judge who works with and directly observes the performance of JAC's attorneys on a regular and ongoing basis. JAC is considering the addition of outside lawyers with business law experience on its board of directors.

OPDS's Findings following PDSC's July 28, 2005 Meeting

By the time it released the second draft of this report following PDSC's July 28 meeting, OPDS had interviewed 10 of Marion County's 14 judges, the Trial Court Administrator, the

[43] Appendix C, Tr. 26.

staff of the Circuit Court's Drug Court and Early Disposition Programs, representatives of MCAD's Board of Directors and its Executive Director, attorney members of MCAD and JAC, other criminal defense attorneys in the county, the District Attorney and his senior staff, the Sheriff and his corrections staff, the staff and members of local Court Appointed Special Advocates (CASAs) and the Citizens Review Board. Although the perceptions of these observers varied, several themes or general impressions emerged from the interviews that were similar to the impressions and observations that were communicated to the Commission at its July 28 meeting:

- JAC is generally regarded as a small group of excellent to above-average lawyers who, as a result of their small size and high standards, maintain a high-quality, collegial juvenile law practice that serves the best interests of their clients and the local community. Besides a few isolated complaints about particular cases and individual lawyers in particular circumstances, the only concern expressed generally is the need for more lawyers at JAC, particularly Spanish-speaking lawyers with culturally relevant backgrounds.

- MCAD is frequently complimented for the quality of its senior or experienced lawyers, its responsiveness to the complaints of judges and other public officials and its contributions to the development of justice policy and the administration of justice in Marion County. There is also a general impression among observers with lengthy experience in the county that MCAD has contributed to improvement in the general level of public defense practice since its founding 1993. On the other hand, there is also a general impression, consistent with the comments of Judges Lipscomb and Leggert at the Commission's July 28 meeting, that the average quality of MCAD's legal services has slipped in recent years, and that too many of it most skilled and experienced lawyers have moved on to other areas of law practice, including privately retained criminal law practice and juvenile practice with JAC. Many of these observers also feel that MCAD has become too large and that its managers are unwilling or unable to address problems with the quality of some of its members' legal skills and services. A number of these observers expressed the view that MCAD's remedial efforts to retrain or mentor underperforming lawyers have proven to be inconsistent and frequently ineffective. Most observers were unaware of how lawyers qualify to become members of MCAD, though some perceive that the process depends on personal relationships between applicants for membership and individual members of the consortium.

- As Judge Lipscomb noted at PDSC's July 28 meeting,[44] the opinions of Marion County's judges vary considerably with regard to the need for change in the structure and quality of the county's public defense delivery system as well as what those changes should be. Among the judges who were interviewed for this report, nearly all of them expressed praise of MCAD's accomplishments and concerns about its size and the quality of its training, management and legal services, as described immediately above. OPDS estimates that about half of

[44] Appendix C, Tr. 6.

these judges would support in varying degrees the establishment of a public defender office in the county. A majority of them hold the view that Judge Leggert expressed at July 28 Commission meeting when asked what kind of delivery system she would prefer: "I will support whatever you say."[45] At least two of the 10 judges who OPDS interviewed for this report think, as Judge Lipscomb reported, that "[the current] system has served Marion County well for many, many, many years and they don't see the need for change . . . ." To the extent that individual judges favor a public defender system over a private defender system, or vice versa, the relevant considerations breakdown pretty much along the lines of the historic debate over the relative advantages claimed for these two systems. On the one hand, by offering an employer-employee relationship, full-time attorney specialization and systematic training and mentoring, a public defender office will presumably raise the average level of public defense services in a jurisdiction by improving the skills and performance of potentially underperforming public defense attorneys. On the other hand, by providing public defense practice opportunities for a relatively small number of highly skilled and experienced criminal defense attorneys, whose diversity of styles and personalities, individualism and "anti-corporate" attitudes would make them ill-suited for life in a public defender office, a private defender system will presumably ensure that a jurisdiction will have an adequate supply of attorneys who are qualified to handle the most difficult and complex criminal cases.

- Members of the Marion County District Attorney's senior staff who OPDS interviewed appeared to make a conscientious effort to convey a fair and balanced assessment of the county's public defense system and the contractors and attorneys who deliver the legal services. Prefacing their remarks with a warning that their observations are obviously influenced by their roles as zealous advocates on behalf of the State, these lawyers essentially echoed the complimentary and critical assessments of JAC and MCAD reported above. They also generated a short list of underperforming lawyers at MCAD that largely coincided with similar lists that OPDS elicited from local judges. They were particularly critical of MCAD's attorney-of-the-day case assignment system, noting that it resulted in misallocations of cases in terms of the number of cases assigned to individual lawyers and mismatches between the seriousness and complexity of particular cases and the skills and experience of individual lawyers. Several of these prosecutors complained about encountering Attorney of the Day lawyers who they had never seen or heard of before. One indication of the declining quality of MCAD's legal services from this group's perspective is the apparent inability of MCAD's less-experienced lawyers to assess their clients' cases accurately and counsel their clients to accept reasonable plea bargains. In a similar vein, several of these prosecutors were convinced that a few MCAD lawyers, including some experienced ones, proceed to trial instead of accepting a reasonable plea bargain simply to generate more revenue. While these last two observations may simply reflect the perspectives of advocates in an adversarial system, they did serve to remind OPDS that the methods of compensating

[45] Appendix C, Tr. 25

lawyers under PDSC's contracts create economic incentives and disincentives to protecting the interests of clients who are confronted with the choice of proceeding to trial or accepting a plea bargain.

- As all of the witnesses who appeared at PDSC's July 28 meeting observed, Marion County's Circuit Court does not have a centralized docketing system. This system, combined with the location of a Court Annex where most criminal cases are handled, presents scheduling challenges for lawyers and judges alike. Several of the judges who have spoken with OPDS report that most attorneys prefer the county's individual docketing system because it ensures that one judge will handle a case from beginning to end. Perhaps these judges were referring to civil attorneys because OPDS has been unable to identify a criminal defense lawyer or prosecutor who is happy with the current system, possibly due in large part to the location of the Annex. In any event, in light of the flexible and pragmatic attitudes of the judges it has interviewed, as well as the comments of the judges who have appeared before the Commission, OPDS is hopeful that by working closely with the Presiding Judge and his colleagues PDSC will be able to implement changes in the public defense system that will improve rather than aggravate the scheduling and calendaring of criminal cases in Marion County.

In preparation for the Commission's August 11 meeting, OPDS offered the following observations regarding the events at PDSC's meeting on July 28 to suggest what might be most helpful to the Commission and beneficial to its contractors at the August 11 meeting. Most of these observations are consistent with the initial impressions that OPDS gained from its initial meetings with representatives of JAC and MCAD, which are reported above.

Both JAC and MCAD are made up of many able and dedicated lawyers who appear, for the most part, to provide high-quality, cost-efficient legal services in Marion County. Not surprisingly, both consortia face a number of immediate challenges and difficult problems. Some of JAC's challenges and problems are obviously smaller and more manageable than MCAD's because JAC is a much smaller organization. In OPDS's view, however, the relative nature and extent of the challenges and problems facing these two consortia are due to a significant degree to their differing approaches to the prospect of change and to the reality of administrative oversight by a new commission.

The representatives of JAC made it clear at their initial meeting with OPDS, and again at PDSC's July 28 meeting, that they believe JAC has developed a superior organization and efficient operations, which they wish to preserve. Yet they also expressed a willingness to accept direction and guidance from PDSC and to work with the Commission and OPDS to develop mutually acceptable strategies to improve JAC's organization, management structure and operations.

During their meetings with OPDS and PDSC, MCAD's representatives, on the other hand, appeared resistant to, if not threatened by, the prospect of change and oversight by the Commission. OPDS recognizes that part of this reaction may be due to the fact that MCAD is a mature organization with well-established policies and procedures in which its

members and management can take some justifiable pride; however, there appear to be two other reasons for MCAD's apparent resistance to change and oversight, the first less obvious than the second.

First, MCAD's current approach to change and oversight appears to be influenced to a significant degree by the consortium's history and origins. MCAD's representatives report that MCAD was established in apparent reaction to a hostile environment that included "autocratic" judges and a court-appointment process that "blackballed" lawyers based on their "personality quirks," rather than on their skill and experience.[46] Even though the environment in Marion County appears to OPDS to have changed significantly, MCAD seems to approach change and oversight as if the surrounding conditions are the same as they were when the consortium was established 12 years ago. Second, and more obviously, MCAD is approaching the prospect of change and administrative oversight with the belief that the Commission is intent on "throwing MCAD out" of Marion County's public defense system.[47] OPDS can only speculate about the evidence that MCAD must be relying upon for this belief. Perhaps comments by the Marion County's Presiding Judge and one member of the Commission at its July 28 meeting, which expressed support for the establishment of a public defender office in the county,[48] provided evidence for MCAD's belief that the Commission is out to get the consortium. But those comments were qualified by the acknowledgement that MCAD would continue to operate in the county. Furthermore, comments by Commission members at this stage of the service delivery planning process do not represent the intent or a decision of the entire Commission. Indeed, at least two other members of the Commission posed questions and offered comments on July 28 that reflected an interest in retaining MCAD, albeit with changes and improvements.[49]

In conclusion, OPDS suggested that the Commission and MCAD would both be better served if MCAD's representatives spent their time at the Commission's August 11 meeting in Salem to (a) fully inform the Commission of the consortium's current policies, practices and procedures, (b) directly answer Commissioner's questions and (c) engage in a dialogue with the Commission that explores options for improving MCAD's organization and operations.

OPDS's Interim Recommendations at PDSC's August 11, 2005 Meeting

Based upon its investigations in Marion County and the comments and discussions at the Commission's July 28th meeting, OPDS recommended at PDSC's August 11 meeting that the Commission devote the remainder of its time and energy in Marion County to evaluating the structure for delivering criminal defense services in the county and the operations and management of MCAD. Other critical issues involving public defense in Marion County can be addressed by the Commission over the coming years. For example, OPDS has recommended that PDSC examine the delivery of public defense

[46] Appendix C, Tr. 9
[47] Id. at 25.
[48] Id. at 5, 29.
[49] Id. at 6, 30

services in juvenile delinquency and dependency cases across the state through a separate service delivery planning process in 2006. At that time, OPDS and PDSC can engage major juvenile defense contractors like JAC in a dialogue to address issues of quality assurance and advocacy, from effective training and mentoring programs to more conceptual matters, such as a juvenile attorney's appropriate regard for the express wishes of clients (be they children or parents) and the best interests of children, families or the community. OPDS also advised the Commission that it would soon be recommending that PDSC address through a statewide planning process in 2006 two other critical issues in public defense that affect Marion County: (1) the representation of criminal defendants in post-conviction relief cases, which OPDS and PDSC have been striving to improve since the Commission first assumed responsibility for the state's entire public defense system in July 2003 and (2) the representation of allegedly mentally ill persons in civil commitment and Psychiatric Security Review Board proceedings, which many observers have noted is in need of substantial improvement. Accordingly, OPDS proposed to defer consideration of Mr. Ositis's and Mr. Matarazzo's contracts and operations involving representation of the allegedly mentally ill, as well as MCAD's representation in PCR cases, until the Commission's statewide planning processes in 2006.[50]

To ensure that the time remaining for PDSC to address critical issues involving the delivery of criminal defense issues in Marion County is used effectively, OPDS offered several additional observations with regard to potential issues involving MCAD's operations and management. First, OPDS and the Commission needed to receive more specific information about MCAD's management and operations. While MCAD provided many pages of written material to OPDS and PDSC and made extensive presentations to the Commission on July 28, PDSC still lacked critical information about the specifics of MCAD's hiring, quality assurance and management processes and the current allocation of authority and responsibility within MCAD's processes of governing itself.[51] Second, significant aspects of MCAD's written materials and oral presentations to the Commission needed to be clarified, including whether MCAD recognized the need for <u>any</u> changes to improve its operations and management and, if so, what those changes might be.

Accordingly, OPDS recommended that PDSC, in the course of its August 11 meeting, inquire about, and that MCAD, at that meeting or as soon as possible afterwards,[52] provide

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[50] See the text accompanying note 6, above.

[51] OPDS accepted responsibility in an earlier draft of this report for assuming that PDSC's previous service delivery planning processes in other counties would provide MCAD with sufficient guidance regarding the Commission's critical need for specific information about such matters at the outset of this service delivery planning process. While the Commission welcomes advice regarding the directions it should take with regard to improving local and state public defense system in the course of this process, and expects contractors' pride in and defense of current practices and past accomplishments, the first step in the process is to obtain accurate and relevant information. Furthermore, significant portions of MCAD's written policies and procedures appear to have been update quite recently, making it difficult to determine on their face whether they reflect the reality of current practices or aspirations for future practices.

[52] OPDS recognizes that MCAD will not be able to provide all of the information requested below, particularly information in writing, by August 11, given the length of the notice it is receiving by this draft of OPDS's report. OPDS requests MCAD, however, to delivery all of this information to OPDS no later than September 16, 2005 in order to analyze it and make preparations for PDSC's October meeting.

the following specific information and clarifications regarding MCAD's operations and management:

- Describe specifically the current allocation of management authority and responsibility among MCAD's Board of Directors, Executive Director and members, including decisions to (a) add and remove members, (b) establish and implement qualification standards and practice requirements for MCAD's members, and (c) sanction members for substandard performance or misconduct?

- To what extent do the written materials that MCAD has submitted to OPDS and PDSC accurately reflect the current allocation of management authority and responsibility within MCAD, as opposed to the aspirations of MCAD's current management to move the consortium away from past practices to a new management and governance structure? More specifically, MCAD revised its Attorney Manual on July 13, 2005, one day before it submitted its original materials to OPDS for PDSC's July meeting. What significant changes were made in the July 13, 2004 version of MCAD's Attorney Manual and to what extent do those changes reflect the consortium's current practices?

- The materials that MCAD originally submitted to OPDS and PDSC contain references to MCAD's mentoring program "described in the Attorney Manual." The Attorney Manual, however, does not contain such a description. At PDSC's meeting on July 28, MCAD submitted a detailed written description of its mentoring program,[53] but it does not appear to have been adopted yet by the consortium's Board of Directors. If the program has in fact been adopted by the Board, why did the Board chose to encourage "mentees," including new members and members on probation, to select their own mentors (albeit with the approval of MCAD's Quality Assurance Committee), rather than directing MCAD's management to assign mentors to mentees? How many members are currently participating as mentees and mentors? Among the mentors, how many mentees have been assigned to each mentor?

- MCAD's Executive Director appeared to have taken the position in his presentation to the Commission on July 28 that the quality of an attorney's professional performance is impossible to determine, or that such a determination is so subjective that it depends on (a) who is making the determination or (b) unreliable judgments about a lawyer's individual personality traits.[54] OPDS considered this view of service quality to be inconsistent with the concept of law practice as a profession with recognized standards and practices and irreconcilable with MCAD's position that it administers a systematic and meaningful quality assurance process. MCAD should be given an opportunity at the Commission's August 11 meeting to explain or clarify its views on this subject.

[53] Appendix C, Tr. 25.
[54] Id. at 9, 23.

- With regard to a key component of MCAD's quality assurance process – i.e., procedures to sanction attorneys for substandard performance or misconduct that cannot otherwise be remedied – MCAD's Executive Director spoke to the Commission at its July 28 meeting with apparent pride and conviction regarding the due process MCAD affords its members who face such sanctions. In his view, MCAD's elaborate due process procedures serve as the alternative to "a pre-autocratic system where attorneys got blackballed because someone in the system did not like them or because of their personality quirks."[55] OPDS observed in response, first, that it has failed to detect such a "pre-autocratic system" among Marion County's current circuit court judges, at least to the extent that the risk of abuse of judicial discretion so far outweighs the risk of attorney underperformance that it calls for procedural protections for MCAD members that appear to exceed the rights of civil service employees. Second, OPDS finds it hard to imagine how busy lawyers serving in MCAD's management positions are able to easily undertake or efficiently negotiate their way through such a sanctioning process, which apparently includes various levels of appeal and rights to binding arbitration. Finally, can't MCAD establish some middle ground involving a more workable sanctioning and removal process for underperforming members that falls somewhere in between the extremes of full-blown due process and autocratic decision-making?

- Three judges expressed their opinions concerning the quality of public defense services in Marion County at PDSC's July 28 meeting in Salem, and OPDS has solicited the opinions of at least seven other judges on the subject. Moreover, there was considerable discussion between MCAD's representatives and Commission members on July 28 about views on the quality of lawyering by judges past and present. Judicial opinions about the performance and ability of lawyers are but one factor, albeit an important one, in the determination of a public defense attorney's skills, abilities and quality of performance. Indeed, one of the reasons for establishing an independent commission like PDSC was to avoid placing the authority for determining the qualifications and eligibility of attorneys for court-appointments solely in the hands of judges before whom those attorneys will appear. OPDS has detected no interest on the part of any judge in Marion County to regain that authority. Nevertheless, in light of the foregoing actions and discussions, as well as MCAD's description of its responsiveness to judge's complaints about the consortium's attorneys, an observer might conclude that the primary or exclusive "trip wire" for MCAD to initiate investigations into its lawyers' potential underperformance or misconduct is a judge's complaint. What other systematic processes or indicators does MCAD employ, including, for example, periodic surveys of judges, prosecutors, defense attorneys and MCAD members and periodic courtroom observations or peer reports, to detect problems with its attorneys' performance or conduct?

- During its meeting with some of MCAD's directors, as well as the Commission's meeting on July 28, OPDS did not detect much enthusiasm on MCAD's part for

[55] Id.

changes in its long-established organizational structure and operations. Is MCAD considering, or is it willing to consider, any changes in its current organization or operations? For example, the MCAD Board members who OPDS met with did not see the need for adding any outside directors with business experience or political acumen. Is that the official position of MCAD? MCAD has noted that the membership on its Board of Directors has remained the same for some time. Has MCAD weighed the advantages of greater participation and support by its attorney members and the new ideas that might be generated by more frequent turnover in the membership of its Board of Directors?

- Many judges and prosecutors in Marion County and some members of MCAD are critical of the consortium's "Attorney of the Day" process of assigning cases to attorneys, including MCAD's attorney qualifications for case assignments based solely or primarily on crime classifications such as "felony" and misdemeanor." This criticism is based on the fact that MCAD's case assignment process results in (a) wide variations in the number of cases assigned to individual attorneys and (b) the assignment of cases to attorneys who are unsuited to handle them by virtue of skill, training or experience. MCAD's Executive Director pointed out that he makes changes in individual case assignments when specific circumstances or complaints by judges indicate the need for a change. Mr. Gorham estimated, however, that such a change occurs "12 times a year."[56] What changes, if any, is MCAD willing to consider making to this cases assignment process? If changes will be considered, how will the decision to implement the changes be made (e.g., by majority vote of the Board of Directors; by majority vote of the membership)?

- The public comments and discussions at PDSC's July 28 meeting revealed a concern for the level of specialization and amount of public defense work preformed by MCAD's attorneys. Although MCAD's active roster of attorneys apparently numbers between 50 and 55, there was much discussion and many questions about a "core group" of somewhere between 20 and 30 attorneys who specialize in criminal defense law and handle most of MCAD's caseload.[57] OPDS requests MCAD to provide the Commission with a written inventory of its active members and their caseloads, including the number of hours each member billed for work performed for MCAD during the last twelve months.

- During the Commission's July 28 meeting, MCAD's Executive Director estimated that, due to efficient administrative practices and close-oversight of attorney billings, MCAD saves PDSC at least $300,000 annually in administrative costs, attorney fees and non-routine expenses.[58] OPDS requests MCAD to provide the Commission with a written description of that analysis and breakdown of those cost estimates.

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[56] Appendix C, Tr. 14.
[57] Id at 12, 15, 16.
[58] Id. at 11-12, 17.

- MCAD requested PDSC during its July 28 meeting to return this $300,000 in estimated savings for the purposes of improving MCAD's operations and the quality of its services. MCAD indicated that it would reduce the size of its membership and retain a higher proportion of full-time criminal law specialists, without explaining why $300,000 in funds would be necessary to accomplish that result. MCAD should provide the Commission with an explanation of why those funds are necessary to implement its proposed changes, as well as any alternative plans it may be considering for the use of those funds.

- At the July 28 meeting, MCAD also requested that the Commission remit $100,000 of the $300,000 in annual estimated savings to hire a full-time attorney to train and supervise MCAD's lawyers.[59] This request raises at least two issues that MCAD should address at PDSC's August 11 meeting or in subsequent written materials that it provides to the Commission. First, does MCAD need a full-time trainer? For example, how many lawyers will that trainer train and supervise at any one time? Does MCAD believe that all of its lawyers will require training and, if so, what kind of training? Second, MCAD's request for a full-time trainer calls for an inventory of its current staff and their deployment. Mr. Gorham indicated to the Commission that MCAD employs three part-time and three full-time employees,[60] including 70 percent of his time at just under $70,000 per year.[61] How much staff time is devoted to the administration of MCAD's operations and its contract with PDSC, as opposed to monitoring, training and supervising the consortium's attorneys. More specifically, what proportion the Executive Director's position is allocated to these functions, and how many hours per week does Mr. Gorham devote to his own public defense and retained caseload?

- In many of the counties in which it has conducted investigations as part of PDSC's service delivery planning process, OPDS has encountered law firms and consortia in which one, two or a handful of underperforming lawyers – lawyers who observers and stakeholders in the justice system consistently observe should not be practicing criminal law – have compromised the general reputation of the law firm or consortium and its members and affected perceptions of the quality of the services of those organizations and their lawyers. The inability or unwillingness of law firms and other legal joint ventures to address the substandard performance of its members is certainly not unique to criminal law practice or the delivery of public defense services. Nevertheless, OPDS has found it necessary to encourage and assist some law firms or consortia in the difficult process of removing such underperforming attorneys. Without exception, while the process was painful, the benefits in terms of improved reputations and perceptions of quality, not to mention the protection of clients, have justified the effort. Based on its investigations in Marion County, OPDS concluded that MCAD has a small number of lawyers that are compromising the reputation of the

[59] Appendix C, Tr. 17, 25
[60] Id. at 8.
[61] Appendix A, MCAD's Answers, page 2, Question 3.

consortium and its members, perceptions of the quality of their legal services and the interests of their clients. Does MCAD recognize the possibility that OPDS's conclusion may be accurate? If so, what does the consortium plan to do about it? What processes and procedures will MCAD employ in the event that it reaches the same conclusion as OPDS?

At its August 11 meeting in Salem, PDSC directed MCAD to submit a written response to the foregoing inquiries in time for consideration at the Commission's October 20, 2005 meeting in Bend. On September 20, 2005, MCAD submitted its written response to PDSC, which is attached as Appendix D.

Public Comments and Discussions at PDSC's August 11, 2005 Meeting in Salem[62]

The Commission welcomed Circuit Court Judge Joseph C. Guimond as its first guest at PDSC's August 11th meeting to provide additional perspectives on the delivery of public defense services in Marion County and the organization, operations and performance of MCAD. Judge Guimond briefly reviewed the history of public defense in the county and observed that, while MCAD is "an extremely effective service provider," the consortium needs improvement.[63] But he also expressed his concern that the establishment of a public defender office in the county would cause the very best, most experience lawyers in MCAD to stop participating in the consortium and accepting court-appointments. Judge Guimond further noted that the current consortium system can efficiently handle conflicts that a public defender office cannot. With regard to improvements in MCAD's operations, Judge Guimond believes that the consortium needs to implement a more effective "hands-on" mentoring process for new, inexperienced and underperforming lawyers, a more aggressive quality control system, and a more formal process to recruit new attorneys.[64]

In response to questions from the Commission, Judge Guimond indicated that he would be "less adamant" in his opposition to establishing a public defender office in Marion County if PDSC retained a "blended system" that included MCAD and its ablest and most experienced attorneys, though he still did not see advantages to a public defender office.[65] He also agreed that MCAD's attorney-of-the-day system for assigning cases to its attorneys was not "the best system" because it does not take the skills and experience of individual attorneys into account. In the judge's view, the logistics of covering court appearances at the Circuit Court's different locations in Marion County, however, make any improvements in this system difficult to imagine.[66] Judge Guimond strongly agreed with his colleagues on the court who have complained about the difficulty of communicating with some of MCAD's attorneys and that some kind of reliable messaging system should be a requirement for participation in MCAD. He also emphasized that

[62] A full transcript of these public comments and discussions is attached as Appendix E.
[63] Appendix E, Tr. 2.
[64] Id. at 3.
[65] Id. at 4.
[66] Id. at 5.

MCAD should establish a more formal and regular process for evaluating the performance of its attorneys, rather than simply waiting for complaints from judges.[67]

Judge Albin W. Norblad also appeared to provide his perspective on public defense in Marion County. Judge Norblad indicated that he "liked the system the way it is," though he believes MCAD needs to adopt "some controls," such as a separate committee or group that monitors the performance of the consortium's attorneys in order to ensure the courtroom competence of defense attorneys, as well as their responsiveness to the court and their clients.[68] He opposes the establishment of a public defender office because he is "not convinced I want to deal with another bureaucrat."[69] Instead, Judge Norblad would "set up an authority that had the duty to set down standards and guidelines," and that would review and evaluate the performance of MCAD's attorneys.[70]

Courtland Geyer, a senior deputy at the District Attorney's Office, appeared on behalf of District Attorney Walt Beglau. Mr. Geyer first acknowledged the positive things about his office's working relationship with the Marion County defense bar and MCAD, and then reviewed areas of concern to his office.

Based on 12 years of experience as a prosecutor in Marion County, Mr. Geyer reported that his office has a "solid working relationship with members of MCAD" leading to a significant level of trust and open communication.[71] He also noted that MCAD's members work well with the staff of the District Attorney's Office and respect the rights of crime victims in the community. The county's effective Early Disposition Program, planning meetings with judges at the Circuit Court Annex and meetings with the Sheriff and the Security Committee are good examples of the open communication and cooperation between Mr. Geyer's office and MCAD.

Areas of concern to the District Attorney's Office primarily involve, in Mr. Geyer's words, "skill and judgment – because, without both, quality representation really is lacking."[72] Mr. Geyer has seen MCAD lawyers who are "too fresh and too green" handling complex cases that require greater experience, or who are experienced but lack the judgment to serve their clients interests by deciding when to take a case to trial and when to settle a case. MCAD's attorney-of-the-day case assignment process aggravates the problem of inexperienced attorneys handling complex cases or too many cases. He also observed that, in light of the court calendaring system, MCAD lawyers, "who are scheduled to be in multiple places at the same time," frequently miss or are late to court appearances.[73]

In response to the Commission's questions, Mr. Geyer explained how the 26 lawyers in the District Attorney's Office are organized and how they are assigned cases based on their

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[67] Appendix E, Tr. 7.
[68] Id. at 11.
[69] Id.
[70] Id. at 12.
[71] Id. at 13.
[72] Id. at 14.
[73] Id.

areas of specialty, training and experience.[74] While he has not personally reported complaints regarding MCAD's lawyers to Steve Gorham, he understands that others in his office have, including complaints regarding one attorney who allegedly asserted that it is in his financial interest to always take cases to trial rather than to settle them. Mr. Geyer believes this is an isolated example and that the "right amount" of cases go to trial in Marion County; though too often "for the wrong reasons" due to a lack of judgment of some defense attorneys.[75] He also noted that one MCAD attorney, in particular, regularly misses court appearances and that he is "amazed every time it happens that nothing gets done."[76] Mr. Geyer concluded that his personal preference, shared by other attorneys in his office, would be to "return to the time when a small number of judges handled the criminal docket. . . . Since going to the individual calendaring system, coverage has been more difficult because of the fact that it is basically on any given day, any given place, any given time type of situation . . . [that] is just mathematically far more difficult to provide coverage."[77]

Dick Cowan and Steve Gorham appeared once again on behalf of MCAD at the Commission's August 11th meeting. Mr. Cowan presented prepared remarks that conveyed assurances to the Commission that MCAD was willing to cooperate and collaborate with PDSC and OPDS and welcomed recommendations for improving the consortium.[78] Mr. Cowan stated that he was shocked by some of the things the Commission was told about MCAD at its last meeting, which "served as a wake-up call for us to continue striving to improve the provision and management of indigent defense services in Marion County."[79] He also indicated that MCAD's Board of Directors and management did in fact believe that the quality of their attorneys' conduct and performance could be determined and evaluated, though "what is difficult for MCAD to determine is how to manage the professional who underperforms once [the applicable professional] standards have initially been met."[80] Nevertheless according to Mr. Cowan, MCAD has removed three underperforming lawyers over the past three years.

Mr. Cowan also reported on MCAD's recent survey of Marion County's judges regarding the competence and performance of its attorneys, as well as his recent efforts to recruit an outside member to MCAD's Board of Directors. Contrary to statements in an earlier draft of this report, Mr. Cowan confirmed that membership on the board changes on a regular basis in accordance with MCAD's bylaws. He also confirmed MCAD's willingness to provide the written information requested by PDSC and set forth on pages 27 to 31 of this report. Mr. Cowan conceded that MCAD's attorney-of-the-day case assignment system "isn't perfect," but expressed his belief that the requirements of Bar membership and qualification under the Commission's standards for eligibility to receive court-appointment, along with case assignments based on the categories of "misdemeanor, felony, Spanish speaking, EDP and SED" attorneys-of-the-day, promotes appropriate individual case

[74] Appendix E, Tr. 16.
[75] Id. at 19-20.
[76] Id. at 20.
[77] Id. at 22.
[78] Id. at 22-25.
[79] Id. at 23.
[80] Id.

assignments based on MCAD attorneys' skills and experience.[81] After reiterating MCAD's willingness to work with the Commission and officials in Marion County to address the issues identified this report, Mr. Cowan concluded his prepared remarks with a summary of MCAD's efforts to educate and train its members on a regular basis.[82]

Steve Gorham offered to answer the Commission's questions on behalf of MCAD.[83] In response to those questions, Mr. Gorham indicated that the inability of the courts and others to communicate with some MCAD members is a "minor problem" while agreeing that missing court appearances is a "very serious matter."[84] He also described how his own time is allocated between administering MCAD and handling his own caseload. Finally, Mr. Gorham told the Commission that he preferred not to comment on the matters set forth at pages 27 to 31 of this report pending MCAD's written responses,[85] and declined its invitation to offer suggestions for change and improvement in Marion County's service delivery system on the ground that "what you are asking us to do here is not appropriate for us to do in this forum [but] . . . is appropriate in other planning forums that [OPDS] runs . . . ."[86]

A Proposed Service Delivery Plan for Marion County

The following recommendations represent potential components of a Service Delivery Plan for Marion County for consideration by PDSC at its October 21, 2005 meeting. They are based on public comments and discussions at the Commission's two meetings in Salem in July and August 2005, written materials submitted to PDSC in preparation for those meetings and the Commission's deliberations and directions to OPDS since July.

OPDS also bases these recommendations on what it understands to be four underlying principles or concerns of PDSC regarding the delivery of criminal defense services in Marion County:

(1) In order to promote quality and cost-efficiency in the delivery of public defense services in a populous county with a relatively large criminal defense caseload like Marion County, PDSC should seek to contract with more than one service provider to enhance creative management and innovative practices among its providers and to reduce the Commission's dependence on any one contractor;

(2) Given its size and role as the seat of state government, Marion County is an appropriate site for a public defender office (a) headed by a professional manager with a commitment to promoting the quality and cost-efficiency of the state's entire public defense system, (b) staffed by a corps of full-time public

[81] Appendix E, Tr. 24.
[82] Id. At 25.
[83] Id. at 27.
[84] Id.
[85] See Appendix D for those written responses.
[86] Appendix E. Tr. 30.

defense attorneys and support staff who are held accountable for performance through an employer-employee relationship and (c) supported by internal management, quality assurance and training practices and procedures that serve the interests of the public defense community in the county and across the state;

(3) There will always be a role for qualified consortia or private attorneys in Marion County to handle a portion of the county's public defense caseload; and

(4) MCAD may be able to continue serving as a public defense contractor in Marion County if its membership and management demonstrate to the satisfaction of PDSC that they (a) accept the Commission's role in overseeing the quality and cost-efficiency of its legal services, (b) are willing to address and resolve the problems identified throughout this report and (c) recognize, in particular, that MCAD must strengthen and enforce its practices and procedures governing (i) the management, oversight and accountability of the consortium's lawyers regarding their professional performance and conduct, (ii) the assignment of cases to attorneys commensurate with their skills and experience and (iii) the recruitment, training, retention and removal of its members.

Accordingly, OPDS proposes two components of a Service Delivery Plan for Marion County, along with some details concerning implementation of the plan:

1. Establish a high-quality, cost-efficient public defender office in Marion County. For the reasons set forth above, PDSC should establish a public defender office in Marion County with a qualified public defense manager, and starting with a legal staff of approximately six full-time public defense lawyers to ensure that this initiative is manageable. The Commission should review the progress and performance of the public defender office on a regular basis to determine the extent to which the size of the office should be increased. The size of the office's caseload should be proportionate to the number of lawyers who are employed to work in the office. The nature of the office's caseload, or its mix of cases, will depend on the skills and experience of the lawyers in the office.

OPDS proposes two approaches to recruiting a new manager and full-time attorneys for a public defender office:

- Use CBS's regular Request for Proposals (RFP) process to solicit proposals for the office from groups of interested attorneys; and

- Develop an RFP process for the selection of a qualified public defense manager, which would include the requirement of a strategic plan that proposes a design for the office, how that design would be implemented, and a recruitment process for the office's attorneys.[87]

[87] These two approaches may not be mutually exclusive. They could be implemented at the same time in order to promote the openness of PDSC's process for establishing the office and to increase the opportunities for identifying the strongest public defense manager and proposal.

Before undertaking either approach, however, OPDS recommends that it take the following steps to develop a design for a new public defender office, which will promote the quality and cost-efficiency of the legal services provided by the office and the acceptance of the office by Marion County's legal community:

- Develop a preliminary design for the new office;
- Present that design to OPDS's Contractors Advisory Group and Quality Assurance Task Force for input by experienced public defense managers and attorneys;
- Present the design to the Commission for its review and preliminary approval;
- In cooperation with the Circuit Court, form a local advisory group of justice professionals and citizens in Marion County to review and comment on the proposed design; and
- Submit the revised design to the Commission for final approval.

PDSC should first evaluate the mission, operations and size of the new public defender office in Marion County after its first 18 months of operation, taking into account the performance of the management and lawyers in the office and input from the key stakeholders in Marion County's justice system.

2. Provide MCAD with the opportunity to strengthen its management and operations over the coming year. Assuming MCAD and CBS can reach agreement on the terms and conditions of a new contract acceptable to PDSC during the current round of contract negotiations, the duration of MCAD's new contract should be one year. This will provide MCAD with an opportunity to resolve the problems identified in this report and address the concerns of the Commission regarding the strength of the consortium's practices and procedures governing the management, oversight and accountability of its lawyers, the assignment of its cases, and the recruitment, training, retention and removal of its members. If MCAD addresses these problems and concerns to PDSC's satisfaction, then PDSC could agree to a longer-term contract consistent with this Service Delivery Plan.

Therefore, OPDS recommends that PDSC direct MCAD to submit a report no later than August 1, 2006 containing detailed descriptions and documentation of the specific actions MCAD has undertaken to resolve the problems identified in this report and to address the foregoing concerns of the Commission. OPDS further recommends that MCAD be directed to consider the following points in developing its 2006 report to the Commission:

If PDSC identified and contracted with a qualified manager through the second approach, then the Commission could direct that manager to recruit and hire attorneys and establish an office in accordance with the new office's strategic plan, and subject to PDSC's review and approval.

- MCAD's management and Board of Directors should share this report and Service Delivery Plan, including the appendices hereto, with all of MCAD's members. They should also meet and confer with MCAD's members regarding the actions the Board proposes to take in response to this report and the Commission's plan, as well as the contents of the consortium's 2006 report to the Commission. Based on informal contacts with members of MCAD during this planning process, OPDS has concluded that a significant number of MCAD's members are not fully aware of the Commission's deliberations and concerns regarding their consortium, MCAD's presentations to the Commission during this planning process, the opportunity for MCAD and its members to continue providing public defense services in Marion County, and the steps that must be taken to take advantage of that opportunity.

- In determining the actions it should take to address the Commission's concerns, MCAD should confer with OPDS's Contractor Advisory Group and Quality Assurance Task Force, as well as the administrators and boards of other consortia in the state, such as those in Clackamas, Klamath and Yamhill Counties. In order to ensure meaningful input from these groups and take advantage of the experience and expertise of their members, MCAD should present them with specific proposals for change rather than general requests for ideas and assistance.

- In preparing its 2006 report to PDSC, MCAD should update, reconsider and revise its responses to the written inquiries of OPDS and the Commission, which are contained in Appendices A and D of this report, to ensure that the Commission receives current, accurate and complete information regarding its concerns about the management and operations of the consortium. MCAD corrected and clarified some of its initial responses to the Contractors' Site Visit Questionnaire in Appendix A. Some of its responses to PDSC's follow-up questions in Appendix D, however, are unclear or unresponsive.[88]

- During their presentations to PDSC at its July and August meetings and in their written submissions, MCAD's representatives asserted that the Commission must provide the consortium with additional funds in order for the consortium to address PDSC's concerns, such as establishing more rigorous mentoring and oversight programs for its lawyers. Those proposals were not accompanied by specific program designs or plans that would assure the Commission that additional funds would be spent wisely or produce the desired results. In any event, PDSC should inform MCAD's members and management that they must address the

[88] For example, rather than explaining how MCAD can deal effectively with an apparent requirement in its procedures for binding arbitration in the event the consortium decides to sanction an underperforming member, MCAD proposed that PDSC "can make this process easier" by providing additional funding. Appendix D, p. 4. In response to widespread criticism of MCAD's attorney-of-the-day case assignment system and PDSC's express concerns about the effectiveness of that system and about MCAD's willingness to consider change in any form, MCAD asserted that "[u]nless there is a consensus that these changes [in its case assignment system] would bring about at least better service to the indigent defendant, why make them?" MCAD then argued, apparently in the alternative, that it should receive over $123,000 in funds, like "Portland" purportedly receives for its case assignment system, without explaining how MCAD's system or issues are similar to Portland's or why changes in MCAD's current system should cost more money. Id. at 6.

Commission's current concerns about the consortium's management and operations and assure the Commission that MCAD can better manage the resources that it already has before PDSC will consider the consortium's proposals for additional funding.

- If the Commission shares OPDS's concern that, with three full-time employees and $70,000 devoted to a part-time Executive Director, MCAD appears to be devoting too little attention to the evaluation, mentoring and oversight of its lawyers, then the consortium's Board of Directors should be asked to consider the redeployment of the consortium's FTE, including the reallocation of some of the funds now devoted to its Executive Director position to a separate position responsible for the evaluation and mentoring of its lawyers, and to present the Commission with the viable options in MCAD's 2006 report.

APPENDIX A

Marion County Association of Defenders Ltd. (MCAD) Answers to Questionnaire for Consortia Administrators and Boards

1. Does your consortium have formal by-laws and a set of written operating policies and procedures? If so, please provide.

Yes. A copy of the Articles of Incorporation (Att-1) and By Laws (Att-2) are attached. A copy of the Attorney Manual Policies and Procedures (Att-3) is attached. (This addition of the Manual still needs to be updated. Recent changes concerning the indigent defense payment rules have not necessarily been made to this edition.)

2. Does the consortium have a board of directors? If so describe the role that your board plays. Who are the members? How often does it meet? What kinds of issues are directed to the board? Are there limits on how long a board member can serve or how long one member can chair the board? Are there seats designated for "lay" or "community" board members?

Yes, MCAD has a Board of Directors. The Board is the policy making body of MCAD as described in the attached Articles and By Laws.

The current members of the Board are Dick Cowan, Chairperson. Olcott Thompson, Secretary. Craig Rockwell, Treasurer. Members: Tara Sinks, Velda Rogers, Steve Wall, Phil Swogger, Ted Coran, and Martin Habecost.

The Board meets once per month.

All policy matters concerning MCAD are directed to the Board. In addition, at each meeting, updates as to the statewide indigent defense system, the Marion County Court system, and/or MCAD are brought to its attention for discussion as it relates to indigent defense issues in Marion County.

There are no limits as to how long a board member can serve or how long one member can chair the board.

All of MCAD's Board members are members of MCAD.

3. How is the administrator of your consortium selected? Compensated? Evaluated? Are there formal qualifications to be the administrator? Does the consortium or its board of directors have a "plan for succession" to insure an orderly transition from one administrator to the next?

MCAD has had one Executive Director (administrator) since its inception. This Executive Director was selected by the members of MCAD and the MCAD Board after consultation with the Marion County Courts and the then administrator of statewide indigent defense.

Currently the MCAD Executive Director, Steven H. Gorham, is a .7 FTE part time position. Compensation is $5800.00 per month gross.

The Board has for the past several years conducted a formal performance evaluation of the Executive Director. The Board is currently in the middle of this years performance evaluation of the Executive Director. The Board intends to conduct yearly evaluations of the Executive Director.

Article III, Section 6, of the attached Articles of Incorporation, the attached By Laws, the attached Executive Director Job Description (Att-4) and the attached Attorney Manual set forth the functions of, and the qualifications of the Executive Director. The Executive Director is an attorney and a member of MCAD.

The "plan of succession" for the MCAD Executive Director is the same as any small organization that has a Board of Directors and employees. In all likelihood, it is the same "plan of succession" as the Executive Director of the Office Public Defense Services. The Executive Director is an employee of the organization. If the Executive Director moves on, then the Board of Directors will hire a new one under whatever procedure is decided to be best for the organization at the time.

MCAD staff, membership and Board is highly cross trained. Staff: Our highly trained staff knows the procedures of MCAD and to some degree, statewide indigent defense. As the Office of Public Defense Services is acutely aware, MCAD staff is of the highest quality. OPDS has hired two of MCAD's office managers to fill vacant positions at OPDS. This speaks well not only of these employees but of MCAD's training, management, and organization. MCAD has continued with barely a hic-up after these transitions because of the quality of these individuals in making sure that their replacements were themselves well trained and the MCAD organization.

The Board and membership: MCAD's Board and membership is also up to date on the organization and the processes that must be done to keep the organization going in its place in the criminal justice system. While not every member or every Board member could substitute for the Executive Director, if need be, within a short period of time there are members and Board members with enough knowledge and experience with MCAD's systems to make sure that the functions of MCAD both administrative and substantive can continue in an emergency or other absence of the Executive Director.

4. What percentage of the administrator's overall workload is related to consortium matters? Is there a formal limit to the percentage?

The Executive Director is a .7 FTE paid employee of MCAD. The only formal limit to the actual amount of time that the Executive Director, actually works or volunteers for MCAD is only limited by State and Federal wage and hour laws.

5. How are administrative problems and demands met when the administrator is in trial or otherwise unavailable? Is there a formal or informal back-up administrator?

The Executive Director of MCAD arranges with other members of the consortium to perform the functions of Executive Director if he is unavailable. Some of these functions are formally assigned to other members. For example, if the Executive Director is not available to sign checks, then one of the other check signers of the organization is available to sign checks. If the Executive Director is not available to approve NRE's (EEA's) then usually the Chairperson or the Chairperson of the Fee Review Committee is available. This is mainly an informal system since most of these day to day functions can be delayed a short period of time or done by alternative communication methods (telephone or e-mail) and in the history of MCAD the Executive Director has either made alternative arrangements, or has continually been available.

Also see answer to number 3 above.

6. What are the requirements for membership in the consortium?

A member of the consortium must be eligible to serve as appointed counsel in an Oregon Court under the rules of the Office of Public Defense Services. Thus a member must be an attorney who is a current active member of the Oregon State Bar. In addition a member must have an office in Marion County or West Salem.

7. What is the process for applying for membership?

An Oregon Attorney, or someone who will be an Oregon Attorney in the near future, may apply for membership by sending a resume to the MCAD office with cover letter asking to become a member. In the past the Board has appointed a "hiring" committee composed of Dick Cowan, Olcott Thompson, and Steve Gorham to interview the candidate. The committee makes a recommendation to the Board and the person becomes a member if they receive a majority vote of the Board.

8. How long has each of the attorneys been a part of the consortium?

This information still needs to be compiled and will be supplied when it has been. MCAD has approximately 50 members of various lengths of service to MCAD. Some members are brand new and some have been members since the beginning of the organization in November of 1993.

9. To what extent do consortium attorneys specialize in criminal and juvenile defense? In public defense? Is there a limit on the percentage of an attorney's practice that can be consortium related?

Each consortium attorney decides whether or not to specialize in criminal defense. There is no limit to an attorney's practice that can be consortium related. The vast majority of consortium members who do the everyday work of the consortium "specialize" in indigent defense. In the previous contract with statewide indigent defense that included stipends the percentage of our members work in the contract was spelled out more or less

specifically and if necessary can be referred to if exact percentages of criminal defense is necessary.

10. How do you insure that new attorneys can become part of the consortium?

In the past, word of mouth, or in 2000 advertising, has led to a sufficient number of individuals, applying for membership to meet MCAD's needs for new members. If one looks at the current roster of MCAD members and compares it to the first MCAD member roster, one will notice that there has been sufficient turnover of MCAD membership to keep MCAD membership sufficiently stocked with "new" attorneys. Thus the mix of new members and experienced members is almost ideal. Enough new members for new ideas and enough experienced members to supply the new members with training and history to do quality indigent defense work in Marion County.

If this ever becomes a problem for MCAD as it was in 2000, MCAD will advertise for new membership by communicating this need with the Oregon Law Schools, in particular Willamette because it is here in Salem; the local and state bar association bulletins, OCLA and Oregon newspapers.

11. What materials and orientation are provided to new consortium members?

New members are provided with the materials attached to this Answer as well as the New Member information sheet (Att-5). In addition, new members are provided with a MCAD's computer billing system (Boojum). They are also advised as to who in the consortium they can contact if they have any questions. In general, the office manager orients the new member on billing and administrative matters; the computer expert orients the new member on the computer billing system, and the Executive Director orients the new member on these matters and on the criminal justice system in Marion County.

12. Is there a procedure for insuring that less experienced attorneys have access to more experienced attorneys when they need advice? Do you have a formal mentoring system? Please describe your system.

MCAD encourages new members to observe Marion County Court procedures and to call any MCAD member with questions. The Executive Director and others are always available for this advice. MCAD has a formal mentoring system that is described in the Attorney Manual which is attached.

13. How are cases distributed among attorneys? Do you have a process for assigning cases based on the seriousness and complexity of the case? If so, how do attorneys progress from handling less serious and complex cases to handling more serious and complex cases?

The method of assigning cases is set forth in the MCAD-Commission Contract as well as the documents that are attached to this answer. For the normal criminal case, MCAD has

an Attorney of the Day system with exceptions. We have a misdemeanor, felony, SED, and Spanish speaking misdemeanor, Attorney of the Day lists. An MCAD attorney signs up as one of these Attorneys of the Day. Normally an attorney can sign up for the list that they qualify for, once every month and a half. Attorneys of the day can be substituted and/or traded amongst the membership. All defendants which appear at the criminal arraignment Court (at the Marion County Court Annex except for the SED calendar) are appointed the appropriate Attorney of the Day. In some cases the Attorney of the Day trades cases (defendants) that they are not qualified to do, or another MCAD attorney who is present is appointed. The default attorney to be chosen by a Marion County Court is the Attorney of the Day. In special cases the Court contacts the Executive Director for assignment of an attorney to be appointed. On average most MCAD attorneys are busy and have the caseload that they wish to have although all would prefer to have a higher hourly rate than is now provided. The fact that we are an integrated organization, leads to the fact that MCAD attorneys agree to change defendants when it is requested either by the Court, the Executive Director, or in the best interest of the defendant.

In Post Conviction and Habeas Corpus cases the MCAD office holds rotating lists of MCAD attorneys willing to be appointed. The Court calls the MCAD office for the name of the next available attorney and normally appoints this attorney. At times the Court requests additional names and these are submitted for appointment.

In Murder and Aggravated Murder cases the Court requests a list of available attorneys from the Executive Director and picks from said list who to appoint. Normally this list contains the next three names on the MCAD Murder or Aggravated Murder list. In exceptional cases the Court and the Executive Director consult as to the best attorney to appoint and then the Court appoints said attorney.

All attorneys are appointed based on their qualifications under the indigent defense qualification standards. When an attorney has sufficient experience to progress to more serious cases then they request to be on an additional rotation and or list. The Felony Attorney of the Day sometimes is split into a minor and major felony Attorney of the Day to ensure that qualified experienced attorneys are doing the major felonies.

14. How soon are attorneys notified of appointment to a case? Do attorneys routinely meet with clients within the timeframes set forth in the contract with PDSC?

Please see answer to Question 13. Yes, attorneys routinely meet clients within the timeframes set forth in the contract with PDSC.

15. Does your system provide continuity of representation when possible? If a client has been represented by a consortium member in the past are future cases involving that client generally assigned to the same attorney?

Yes and no. It depends on the specific circumstances of the case; communication between the client, attorney and the Court; and the timing of the new case in relation to the old case. See also answer to number 13.

16. Does your organization have a standardized procedure for identifying conflicts or does each attorney or law firm have its own procedure? When are conflict checks conducted? How soon is a case reassigned after a conflict is identified?

MCAD, because of its structure does not normally have internal attorney conflicts. Each attorney and firm has its own procedure to determine whether that attorney or firm has a particular type of conflict. In most cases since most MCAD attorneys are either sole practitioners or members of small firms, conflicts individual to an attorney and a particular defendant are normally apparent immediately or relatively early in the case. The only conflicts that MCAD is normally concerned with, is multiple defendant cases and that is usually apparent at the first appearance. When apparent another MCAD attorney present is usually appointed for subsequent defendants in this type of case at the time of arraignment. Because MCAD is an hourly rate contractor, the financial impact of conflicts is minimal.

17. Do consortium members meet regularly as a group? If so, how frequently?

Yes, MCAD has regular monthly meetings, the third Tuesday of each month. In addition, one of these meetings, either in October or November is the mandatory annual meeting to elect Board members and conduct corporation business.

18. Is there a mechanism for regular communication among consortium members such as a newsletter, e-mail list, website, regular mailing?

All of these mechanisms are used for regular communication among consortium members. MCAD has a bi weekly newsletter. The latest newsletter is attached as Att-6. MCAD has its own "pond" similar to the OCDLA "pond" list-serve.

19. Is there a mechanism for sharing research or forms?

Yes, there is both a formal and informal method. MCAD has a research and form bank attached to its web site. MCAD has a law clerk responsible to help members find this research and/or forms and of course the email list-serve and other communication between members helps in this sharing.

MCAD members freely share information and communicate with each other daily about criminal defense matters and indigent defense issues.

20. What system do you use to monitor the volume of cases assigned to each attorney or law firm? How do you insure that attorneys are not handling too many cases?

The system is both formal and informal. Periodically, MCAD audits the amount of work based on attorney fee billings to determine the historic workload of its members. If concerns are generated by this audit the Executive Director acts to make sure that the attorney is not overloaded. In addition, informally, either because of observation of members, staff, or the Court and then communication with the Executive Director this issue is addressed.

MCAD members bill their completed cases every other week. These billings are reviewed internally by MCAD staff for accounting and systemic indigent defense issues. The Executive Director reviews above average "high" billings for the same issues. This review in addition to the above described review brings overwork issues to the attention of the Executive Director who addresses them individually with the MCAD member.

21. How do you insure that attorneys are providing quality representation? Are there regular evaluations of attorneys? If so, how and by whom are they performed? Are there other mechanisms in place to insure that consortium attorneys are providing quality representation?

MCAD has a Quality Assurance Committee that is responsible specifically for the quality of representation. The process is described in the Attorney Manual attached.

In addition the also described mentoring system ensures quality representation.

There is also an informal system of quality assurance by the Executive Director based on concerns either of the Executive Director or communications by others (members, other attorneys, the Court, staff) with the Executive Director. The Executive Director evaluates these concerns and communicates appropriately with the member and others to address whatever concerns are expressed.

In addition, MCAD members bill their completed cases every other week. These billings are reviewed internally by MCAD staff for accounting and systemic indigent defense issues. The Executive Director reviews above average "high" billings and other billings that are brought to his attention by staff for the same issues. The standard for review is whether the substantive work performed was reasonable and necessary in the context of the defendant's case and attorney's representation. This review is another informal quality review. Quality issues often become apparent in this review and this review is conducted every other week and then addressed by the staff and Executive Director. For example, billings clearly indicate a standardized mechanistic practice that must be explained based on quality of representation.

One of the issues when one attempts to discuss quality representation is the definition of quality representation and how to deal with it. As the current Executive Director of the Office of Defense Services has expressed many times, what quality representation actually is, is a moving target that is almost impossible to define. To actually define quality representation; enact a set procedure to ensure it in every case and circumstance;

and give due process to the subject of any quality inquiry; would take all and more of anyone's time in the indigent defense system.

MCAD's goal is to give the best representation available under the circumstances and recourses available. MCAD has developed a flexible system both formal and informal, to ensure that this is accomplished.

22. How do you address problems of underperformance by attorneys?

If the definition of underperformance is an attorney who consistently does not give his or her clients quality representation, MCAD has various methods to address these problems. One method is the quality assurance process described above. One method is the formal and informal mentoring system in MCAD. Informal mentoring has been recommended and mandated for under performing members. In the past this has included members helping other members in specific cases through trial to make sure that the member "gets it" in how a case should be handled through trial. Counseling and training by the Executive Director or others is also offered.

Finally if quality is not improved and there appears to be little chance of improvement, MCAD has removed membership from these under performing attorneys after due process to the attorney to make sure the issue is quality issue and not some other political issue.

23. Do you provide training or access to training for consortium lawyers? Please describe. Do you require a minimum number of criminal, juvenile or civil commitment law- or trial practice-related CLE credits per year?

MCAD encourages each member to take as much formal training as they deem necessary. This includes but is not limited to CLE's put on by the various providers in the State of Oregon. In particular MCAD encourages membership and attendance in any and all OCDLA programs. MCAD also provides CLE's periodically throughout the year on issues of importance to a criminal defense attorney. We do not require any minimum number or CLE credits outside of that required by the Oregon State Bar but encourage members to get as many criminal law related credits as they feel necessary to perform their representation of the indigent accused.

See also answer to No. 22.

24. Are attorneys required to report disciplinary actions by the bar? How many consortium attorneys have been disciplined by the bar? What were the circumstances?

Yes MCAD members must report disciplinary actions by the bar to MCAD. MCAD does not keep a formal record of these reports.

25. What is the consortium's process for handling complaints from judges? From clients? From others? Is there a designated contact person for complaints? Is that person's identity generally known in the criminal and juvenile justice community?

Please see the quality assurance process described in the Attorney Manual. There is a formal and informal process described. The contact person for complaints is the Executive Director. Any complaints received in the MCAD office are referred to the Executive Director. Each judge in Marion County understands that they can refer complaints to the Executive Director. Most members of the Court community in Marion County know that MCAD is the exclusive indigent defense contractor except for civil commitments and juvenile matters in Marion County and the person who has a complaint either knows someone who refers them to MCAD or they themselves refer them to MCAD. Just recently, a Marion County Commissioner was referred to MCAD by the Trial Court Administrator's office in Marion County with a constituent's complaint about their court appointed attorney. The Executive Director handled this complaint.

26. What steps have you taken to address issues related to cultural competence such as the need for interpreters, training regarding cultural biases, culturally appropriate staffing, awareness of immigration consequences?

Most of these issues are handled by the diversity CLE requirement of the Oregon State Bar which each MCAD member must take or they would not be a member of MCAD. MCAD has conducted immigration CLE's and has available on a formal and informal basis immigration advice by specialists either through the NRE process or by volunteer attorneys in the community.

27. Do you have a system in place which allows clients to evaluate the quality of services received from consortium attorneys?

No, except for the quality assurance process.

28. Are consortium attorneys and the administrator active participants in policy-making bodies of your criminal and juvenile justice systems?

Yes.

29. What are some of the things your consortium does especially well? Please describe.

MCAD provides the indigent criminal accused and others that qualify for appointed attorneys in Marion County quality legal services.

MCAD provides the judicial system in Marion County an entity to rely on to provide the management, planning and service that the Court system relies upon to do its every day work and functions.

MCAD provides the statewide indigent defense system a wealth of systemized experience in a hourly based system and a wealth of organized providers in a variety of indigent appointed case types to step into situations that are needed in the statewide indigent defense system.

It does all of the above well and to the betterment of Marion County and the State of Oregon as a whole.

MCAD was created to both protect the then current indigent defense providers in Marion County from arbitrary and capricious actions that had in the past been taken against them. In addition and more importantly MCAD was also created to provide a quality, efficient, and accountable system of indigent defense in Marion County. As a side bar to this creation, MCAD has been influential in providing statewide indigent defense a proving ground for systems that have helped statewide indigent defense further its goal of providing quality, efficient and accountable services to the State of Oregon and the defendants in criminal actions.

For Statewide indigent defense this has created an Extraordinary Expense Authorization (now the Non Routine Expense) system that was copied from the MCAD system to a statewide system. This has given the statewide system accountability and credibility when attacked by outside forces and provided to statewide indigent defense the ability to account to the Oregon State Legislature for the proper use of state resources.

The statewide system has also been able to clone the MCAD system in Yamhill County and possibly elsewhere, to ensure another method of providing quality, efficient and accountable indigent defense services.

In Marion County this has led to indigent criminal defense to have a place at the table at various groups that effect the criminal justice system in Marion County. If the criminal justice system is a three legged stool, the judiciary, the prosecution, and the defense; criminal defense in Marion County now has input because of MCAD's creation and the systems that have been established.

MCAD does well in providing not only this over all service to the criminal justice system as being a true player in the process but also gives quality and efficient service to its individual clients.

MCAD has systems in place that give consistency in application to the criminal justice system, the attorney members and the defendants. This system is not rigid and has enough flexibility to be extremely effective in every situation that occurs. In the criminal justice system this consistency and flexibility is tested in emergency situations almost daily.

MCAD also provides to Marion County defendants and statewide indigent defense a hourly rate system based on payment for actual work done on a case. This is done in an accountable and efficient manner. This provides statewide indigent defense an

alternative method of service delivery that also provides statewide indigent defense statistical information that is invaluable for current and future indigent defense planning.

MCAD also provides Marion County Petitioners and statewide indigent defense and petitioners a wealth of experience in Post Conviction and Habeas corpus matters that would not exist if MCAD did not exist.

MCAD also provides to its members the protection, pride of membership, and power of the group to allow them to do their job without outside political or other interference.

MCAD also provides to its members and the criminal justice system billing and financial accountability and quality monitoring in both real and near real time.

By any standard, MCAD provides quality, efficient criminal defense services to the indigent accused in Marion County. MCAD's service delivery system matches the quality, efficiency and accountability of any service delivery system in the State of Oregon given the resources that are provided to it.

the average and exceptional representation provided by MCAD members to criminal defendants against any county system in the State of Oregon. I certainly believe that indigent defense could not provide the same quality service in Marion County with the same resources that are actually provided under any other system that could be developed and implemented in Marion County. That is not to say that MCAD members cannot improve. One can always incrementally and individually strive to improve oneself and the work that our members do.

To say this in another way, I believe that if one chose to compare MCAD's representation of the indigent accused against any other current actual system with the same resources available, based on any set standard, that MCAD's representation would equal or exceed that other group or system.

30. Are there any areas in which you think improvement is needed? Please describe.

See answer to 29.

At this time it is best to leave areas of improvement for others to suggest. That is not to say that MCAD and its members cannot improve. One can always incrementally and individually strive to improve oneself and the work that we do. Given the resources provided improvement might need to be left to this type of individual improvement. Given more resources, especially in the hourly rate and the lessening of caseloads (read more time to work on less cases) could not help but improve the system.

More resources to expand training or fund a full time trainer would also at least theoretically improve quality.

Submitted by Steven H. Gorham, Executive Director, MCAD on July 14, 2005.

ARTICLES OF INCORPORATION

Marion County Association of Defenders, Ltd. (MCAD)

The undersigned natural persons of the age of eighteen years or more acting as incorporators under the Oregon Nonprofit Corporations Act, adopt the following Article of Incorporation:

ARTICLE I

The name of this corporation is Marion County Association of Defenders, Limited, and its duration shall be perpetual.

ARTICLE II

This corporation is a mutual benefit corporation.

ARTICLE III

The address of the corporation's initial registered office and the initial registered agent at the same location are:

Steven H. Gorham
341 State Street, 97301

ARTICLE IV

The alternate corporate mailing address shall be that of the principal office; notice may be mailed to that address until the principal office has been designated in its annual report.

ARTICLE V

The names and addressed of the incorporators are:

Steven H. Gorham, 341 State Street, Salem, Oregon 97301
Steven L. Krasik, 341 State Street, Salem, Oregon 97301
Lee H. Peterson, 494 State Street, Suite 210, Salem, Oregon 97301

ARTICLE VI

This corporation shall have members.

ARTICLE VII

Upon dissolution of the corporation, after payment of all liabilities, remaining assets, if any, shall be disposed of exclusively to organizations organized and operated exclusively for charitable, educational, religious or scientific purposes which are qualified as exempt organizations under the Internal Revenue Code, Section 501(c) (3) or the corresponding provision of any future code as the Board of Directors shall determine.

Any such assets not so disposed of shall be disposed of by the Circuit Court of the State of Oregon for the County of Marion, to such organizations as said Court shall determine which are organized and operated exclusively for the purposes described in the next preceeding paragraph of this Article VII.

ARTICLE VIII

There will be nine (9) initial Directors who will be elected at the incorporation meeting.

ARTICLE IX

The purpose for which this corporation is organized is to provide legal counsel and representation to persons certified by the State of Oregon to be indigent and to qualify for Court-appointed legal representation under the laws of this State and/or the Constitution of the United States. Additionally, this corporation is organized to engage any other lawful activities; provided, however, a substantial portion of this corporation's activites shall not be for profit nor for political purposes.

This corporation is organized exclusively for charitable or educational purposes within the meaning of Section 501(c)(3) of the internal revenue code or the corresponding provision of any future such code.

ARTICLE X

This corporation shall be governed by the Board of Directors in accordance with the Bylaws and the Oregon Nonprofit Corporation Act, as the same exists or may hereafter be amended.

ARTICLE XI

The Corporation's Board of Directors shall consist of nine (9) directors. All Directors shall be active members of the Oregon State Bar in good standing except that the Executive Director who shall be appointed by the existing Directors may (but need not be) a person whis is not a member of the Oregon State Bar. Each Director shall serve a term of three years and for a period thereafter until such time as that Director's

successor has been appointed; provided, however, the initial Directors shall derve terms as set forth in the following schedule:

Director	Term
1	1 year
2	1 year
3	1 year
4	2 years
5	2 years
6	2 years
7	3 years
8	3 years
9	3 years

Directors shall be elected by members at large, with each memberhaving one vote per vacancy. Votes may not be pooled nor is cumulative voting permitted.

Initial directors shall be elected by a plurality of votes cast by members for that specific vacancy; vote pooling and cumulative voting shall not be used.

Succeeding directors shall be elected by a two-thirds majority of votes cast for that specific vacancy. Provided, however, where more than two candidates are offered for a sincle vacancy, a plurality of votes may be used to eliminate all candidates until there are two candidates remaining after which a two-thirds majority shall be required to elect the successful candidate. Vote pooling and cumulative voting shall not be used.

The executive Director may be removed for cause by vote of two-thirds of the membership.

ARTICLE XII

No part of the net earnings of the corporation shall inure the the benefit of, or be distributed to its directors, trustiees, officers, of other persons, except that the corporation shall be authorized ond empowered to provide reasonable compensation for the services rendered and to make payments and distributions in furtherance of the purposes set forth in Article IX.

No substantial part of the activites of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation. The corporation shall not participate in or intervene in (including the propagation or distribution of statements) any politacal campaign on behalf of or in opposition to any candidate for public office.

Notwithstanding any other provision of these Articles, the corporation shall not carry on any activities not permitted to be carried on

(a) by a corporation exempt from federal income tax under the provisions of Section 501(c)(3) of the Internal Revenue Code or the corresponding provision of any future United States internal revenue law, or

(b) By a corporation, contributions to which are deductible under Section 170 (c)(2) of the Internal Revenue Code or the corresponding provision of any future United States internal revenue law.

ARTICLE XIII

The corporation shall indemnify each of its directors and uncompensated officers to the fullest extent permissible under the Oregon Nonprofit Corporation Act, as the same exists or may hereafter be amended, against expense, liability, and loss (including, without limitation, attorney fees) incurred or suffered by such person by reason of or arising from the fact that such person is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director, officer, partner, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, and such indemnification shall continue as to a person who has ceased to be a director, officer, partner, trustee, employee, or agent and shall inure to the benefit or the person's heirs, executors, and administrators. The corporation may, by act of the Board of Directors, provide indemnification to employees and agents of the corporation who are not directors or uncompensated officers with the same scope and effect as the indemnification provided in this Article XIII to such uncompensated officers. The indemnification provided in this Article shall not be exclusive of any other rights to which any such person may be entitled under any statue, bylaw, agreement, resolution, or otherwise.

ARTICLE XIV

To the fullest extent permitted under the Oregon Nonprofit Organization Act, as it now exists or may hereafter be amended, a director, or uncompensated officer of the corporation shall not be liable to the corporation for monetary damages for conduct as a director or uncompensated officer. The repeal of or amendment to this article XIV shall not adversely affect any rights or protection of a director or uncompensated officer of the corporation existing at the time of such repeal or amendment.

ARTICLE XV

These Articles of Incorporation shall be amended only by an affirmative vote of two-thirds of the active membership.

The undersigned incorporators declare under penalty of perjury that they have examined the foregoing and to the best of their knowledge and belief, it is true, correct, and complete.

Original Incorporator

CORPORATE BYLAWS

Of

MARION COUNTY ASSOCIATION OF DEFENDERS, LTD.

ARTICLE I. OFFICES

The principal office of the corporation in the State of Oregon shall be located in the City of Salem, County of Marion.

The registered office of the corporation required by Oregon Nonprofit Corporation Act to be maintained in the State of Oregon may be, but need not be, identical with the principal office of the corporation, and the address of the registered office may be changed from time to time by the Board of Directors.

ARTICLE II. BOARD OF DIRECTORS

Section 1. General Powers. The business and affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications. The number of directors of the corporation shall be nine. Each director shall hold office for the term stated in the Articles of Incorporation or until the director's death, resignation, or removal from office in the manner hereinafter provided.

Section 3. Regular Meetings. A regular annual meeting of the Board of Directors shall be held without other notice than this bylaw on the third Tuesday in October at 9:00 a.m. at the principal office of the corporation, unless said meeting is reset by the Board.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the Executive Director, the Chairperson, or any three directors. The person or persons authorized to call special meetings of the Board of Directors may fix any place for holding any special meeting of the Board of Directors called by them.

Section 5. Notice; Waiver. Notice of any special meeting shall be given at least 48 hours prior thereto by written notice delivered personally or mailed to each director at the director's business address. If mailed, such notice shall be deemed to be delivered 48 hours after it is deposited in the United States mail so addressed, with postage prepaid. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board of Directors need be specified in the notice or waiver of notice of such meeting. The attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director objects at the beginning of the meeting or promptly upon arrival to holding the meeting or transacting business at the meeting because the meeting is not lawfully called or convened and does not thereafter vote for or assent to any action taken at the meeting. A written waiver of notice of a meeting signed by the director or directors entitled to such notice, whether before or after the time stated therein, which specifies the meeting for which notice is waived and which is filed with the minutes or corporate records, shall be equivalent to the giving of such notices.

Section 6. Quorum. A majority of the number of directors fixed by Section 2 of this Article II shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, but, if less than such majority is present at a meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. Except to the extent a greater number is required by law, the articles of incorporation, or elsewhere in these bylaws, the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 8. Vacancies. Any vacancy created by reason of term expiration shall be filled in accordance with the articles of incorporation. Any vacancy occurring by reason of death, resignation, or removal shall be filled by the Board of Directors. Such director shall be appointed for the unexpired term of the predecessor in office. Any directorship to be filled by reason of any increase in the number or directors shall be filled by the affirmative vote of a majority of the directors present at any meeting, even though less than a quorum of the Board is present at such meeting. The Board of Directors, by the vote of a majority of the directors then in office, may declare vacant the office of a director who fails to attend two out of four consecutive meetings of the Board and who, prior to such meetings, shall have failed to notify the Executive Director or the Secretary of the director's inability to attend and the reasons thereof.

Section 9. Removal of Directors. A director may be removed at a meeting expressly called for that purpose by a two-thirds vote of the membership.

Section 10. Action by Directors without Meeting. Any action required to be taken at a meeting of the directors, or any other action which may be taken at a meeting of the directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all the directors, and such consents are included in the minutes or filed with the corporate records reflecting the action taken.

Section 11. Telephonic Meetings. Meetings of the Board of Directors, or of any committee designated by the Board of Directors, may be held by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and such participation shall constitute presence in person at the meeting.

ARTICLE III. OFFICERS

Section 1. Number. There shall be four officers: The Chairperson of the Board of Directors, the Executive Director, the Secretary and the Treasurer.

Section 2. Appointments, Elections, and Terms of Office.

(a) The Chairperson of the corporation shall be elected from among and by the Board of Directors for a term of one year.

(b) The Treasurer of the corporation shall be elected from among and by the Board of Directors for a term of one year.

(c) The Secretary of the corporation shall be elected from among and by the Board of Directors for a term of one year.

(d) The Executive Director of the corporation shall be appointed by the Board of Directors for a term which shall last as long as the Executive Director's employment as executive director.

Section 3. Removal. Any officer or Executive Director elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interest of the corporation would be served thereby.

Section 4. Vacancies. A vacancy in any office because of death, resignation, removal, disqualification, or otherwise may be filled by the Board of Directors for the unexpired portion of the term.

Section 5. Chairperson of the Board. The Chairperson of the Board shall preside over meetings of the Board of Directors.

Section 6. Executive Director.

(a) The Executive Director shall be the principal executive officer of the corporation and, subject to the control of the Board of Directors, shall in general supervise and control all the business and affairs of the corporation. The executive director may sign, with the secretary or any other proper officer of the corporation thereunto authorized by the Board of Directors, any contracts or other instruments which the Board of Directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these bylaws to some other officer or agent of the corporation or shall be required by law to be otherwise signed or executed; and in general the Executive Director shall perform all duties incident to the office of Executive Director and such other duties as may be prescribed by the Board of Directors from time to time.

(b) The Board of Directors shall establish a written position description for the position of Executive Director. The Board of Directors shall also establish a written list of criteria for evaluating the performance of the Executive Director. The Board of Directors shall evaluate the performance of the Executive Director on a yearly basis in writing. The position description, criteria and evaluations shall be available upon request for inspection by any member.

Section 7. Secretary. The Secretary shall:

(a) keep the minutes of the Board of Directors meetings in one or more books provided for that purpose;

(b) see that all notices are duly given in accordance with the provisions of these bylaws or as required by law;

(c) be custodian of the corporate records; and

(d) in general, perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to him or her by the Board of Directors.

Section 8. Treasurer. The Treasurer shall:

(a) have charge and custody of and be responsible for all funds of the corporation, receive and give receipts for monies due and payable to the corporation from any source whatsoever, and deposit all such monies in the name of the corporation in such banks, trust companies, or other depositories as shall be selected in accordance with the provisions of Article V of the bylaws; and

(b) in general, perform all duties incident to the office of Treasurer and such other duties as from time to time may be assigned by the Board of Directors.

Section 9. Salaries. Neither the Chairperson of the Board nor the other directors shall receive any salary for the work they do on the Board, but nothing in these bylaws shall preclude any director from serving the corporation in another capacity and receiving compensation for these services.

ARTICLE IV. MEMBERS

Section 1. Voting. Each member shall have one vote.

Section 2. Members. Initial membership shall be limited to those persons listed on a membership roster dated November 2, 1993, subscribed by Steven H. Gorham as amended at the initial corporate meeting of November 2, 1993.

Section 3. Admission to Membership.

(1) Persons other than those identified in Article IV, Section 2 wishing to become members must:

(a) be eligible to serve as appointed counsel in an Oregon District Court under the provisions of ORS 151.430(3) as implemented by rules promulgated by the Indigent Defense Services Division of the Oregon Judicial Department;

(b) serve a probationary period of one year;

(c) after receiving input from the active membership, receive a majority vote of the Board of Directors voting in the election for new members.

(2) Membership will be open periodically upon a majority vote of the Board of Directors.

(3) General meetings of members shall be held the third Tuesday of each month at the Marion County courthouse.

(4) Special meetings of the membership may be called by the Chairperson, the Executive Director or by petition of thirty members.

(5) Annual meetings of the membership shall be held each year in October or November to vote on any vacant Board of Director position(s) and on any other appropriate matters.

(6) A simple majority of members of the active membership shall

constitute a quorum for the transaction of business at any general, annual, or special meeting of the members.

In addition to the above definition an active member of MCAD is further defined as a member who has taken an appointment through MCAD in the past six months.

ARTICLE V. CONTRACTS, LOANS, CHECKS, AND DEPOSITS

Section 1. Contracts. The Board of Directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation, and such authority may be general or confined to specific instances.

Section 2. Loans. No loans shall be contracted on behalf of the corporation and no evidence of indebtedness shall be issued in its name unless authorized by a resolution of the Board of Directors. Such authority may be general or confined to specific instances.

Section 3. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of the corporation shall be signed by such officer or officers, agent or agents, of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors.

Section 4. Deposits. All funds of the corporation not otherwise employed shall be deposited from time to time to the credit of the corporation in such banks, trust companies, or other depositories as the Board of Directors may select.

ARTICLE VI. AMENDMENTS

These bylaws or any portion hereof may be amended by the membership by a two-thirds vote of those members present conducted at a meeting where the notice to all members of the meeting contains the proposed bylaw amendment.

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Att-3

Marion County Association of Defenders, Ltd.

(MCAD)

ATTORNEY MANUAL

POLICIES AND PROCEDURES

Modified July 13, 2005.

This manual is designed to mirror the policies and procedures set forth by the Oregon Judicial Department's Indigent Defense Payment Policies and Procedures as they apply to work done by MCAD attorneys. Unless expressly addressed in this manual, these policies and procedures are subject to the authority of the Judicial Department's Policy Statement.

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1.0 MARION COUNTY ASSOCIATION OF DEFENDERS, LTD. (MCAD)

A. AUTHORITY

Marion County Association of Defenders, Ltd. (MCAD) is a non-profit organization incorporated on November 12, 1993 and organized for the purpose of providing legal representation of persons deemed by the State of Oregon to be indigent and eligible for court appointed counsel within the boundaries of Marion County. MCAD contracts with the State Court Administrator (SCA), Indigent Defense Services Division (IDS), and operates under the authority of the Oregon Judicial Department (OJD).

B. ORGANIZATION

MCAD has a Board of Directors with nine members elected by and from the current membership. The Board has regular monthly meetings and schedules additional meetings as needed. Board Meetings are generally held on the first Thursday of every month at 5:15 PM at the MCAD corporate office. Board Meetings are open to the membership to attend confirmation of the actual location and times are available through the MCAD office. The initial Board of Directors had terms from one to three years. As these terms expired, new board members were elected for three-year terms. Elections for any vacant board position(s) occur at the annual mandatory members meeting held in October or November of each year. The Board of Directors elects the officers of the corporation for one-year terms, immediately following the annual members meeting. The officers consist of a Chairperson, a Treasurer, and a Secretary.

MCAD's corporate office is located at 130 High Street SE, Salem, Oregon 97301. MCAD currently has 6 employees, consisting of an Executive Director, a Computer Consultant, an Office Manager, two Office Assistants and a part-time Law Clerk. The Executive Director and Computer Consultant are currently active attorney members of the Association and are also part-time managerial employees of the corporation.

The organization has numerous committees consisting of Board members and active members who volunteer to complete committee tasks and assignments. The committees report to the Board of Directors. Members are encouraged to be active and participate on these committees. Current operational committees include the Quality Assurance Committee, the Fee Review/Appeal Committee, the Policies and Procedures Committee and the Education Committee. Ad hoc or other permanent committees are formed at the direction of the Board of Directors, when needed, such as the Contract Negotiation Committee.

C. MEMBER QUALIFICATION STANDARDS

All MCAD attorneys must meet the qualification standards for court appointed counsel to represent indigent persons as set forth by the current Oregon Judicial Department's Policy Statement. MCAD attorneys shall exercise their independent professional judgment in providing effective assistance of counsel for each appointed defendant, as outlined in the MCAD attorney contract and the policies and procedures described herein. **(See "Appointment of Counsel for Indigent Persons", Section #3.0 A)**

D. MEMBERSHIP

MCAD is a consortium of attorneys that requires membership to provide legal representation for indigent clients. All members operate under signed contract agreements with MCAD. Members are participating in MCAD at various full-time equivalents (FTE's) ranging from full-time to part-time or are temporarily inactive by their own choice. New members must be be

voted in by a majority of the Board of DirectorsAll new members are required to develop and complete a personal mentoring program.

E. LEAVE OF ABSENCE

MCAD members may elect to take a six-month leave of absence at any time and for any reason. A leave of absence is renewable one time for an additional six months. The request for leave must be in writing giving an effective date and received by the MCAD office not less than 30 days prior to the effective date. Members may return from a leave of absence at any time, with written notice received by the MCAD office prior to their return. Members are responsible to ensure that all cases they are appointed to at the time the leave is requested are properly handled. Members may either fulfill all their current appointment obligations, or take necessary steps to ensure that their current appointments are taken over by other members, either by substitution of counsel or formally withdrawing from all cases. Members are required to immediately submit their billing statements on all their cases, as they are disposed or as the member withdraws. The MCAD office must receive written notification if a member going on a leave of absence is unable to close and bill on all their cases within 60 days.

F. MEMBERSHIP MEETINGS

MCAD has regular monthly membership meetings preset for the third Tuesday of each month at noon at the courthouse Jury Assembly Room. Members receive information and updates on the Board of Directors Meetings, Committee Meetings, Court and Jail Meetings, Contract Issues, Billing Issues, Member Announcements, Guest Speaker presentations and free Continuing Legal Education (CLE) programs. Members are encouraged to be active and present at these monthly meeting.

The Attorney-of-the-Day calendars for the signing up of court dates are circulated at these meetings. Members not present for choosing court dates are contacted by telephone after the meeting to sign-up in rotational order to fill in the calendars. It is not mandatory to sign-up for court dates; members may choose to skip rotations at any time, although replacement dates are not guaranteed. Contact the MCAD office with your requests to change or cancel your court dates. The MCAD office will ask that you attempt to trade your date first, but then follow a process for filling in open dates. MCAD requests as much notice as possible to find replacements. Members unable to provide the complete coverage that the attorney-of-the-day function requires should consider taking another date. For example, if you are unable to be present for the 8:30 AM start or if you have a previous appointment scheduled downtown mid-morning, you should not sign-up for that date.

MCAD has one **mandatory annual meeting** held in October or November each year. The entire membership is gathered to take care of corporate and other business such as voting on issues, election of Board of Directors, and any other business that requires the membership to be present.

G. MEMBERSHIP TERMINATION

1.) Members may voluntarily terminate their membership and void their contract with MCAD at any time for any reason. The voluntary termination shall become effective upon receipt of written notice by the MCAD office or as requested within the written notification. Members are responsible to ensure that all cases they are appointed to at the time of termination are properly handled. Members must either fulfill their current obligations, or take steps to ensure that their current appointments are taken over by other members, either by substitution of counsel or formally withdrawing from all cases. Members are required to immediately submit their billing statements on all their disposed or withdrawn cases. The MCAD office must receive written notification if a member terminating their membership is unable to close and bill on all their cases within 60 days.

2.) MCAD may terminate and/or suspend a member immediately or concurrently, if the member is terminated and/or suspended by an action of the Oregon State Bar. Members terminated and/or suspended by the Oregon State Bar, or members precluded by order of a court, must cease to represent appointed clients immediately or within the restriction of the termination/suspension dates.

2.) For good cause shown, the MCAD Executive Director, after consulting with the Chair of the Board of Directors may suspend a member temporarily. A suspension may be full (suspension of all current and future cases) or partial at the discretion of the Executive Director. Notice of the suspension shall be provided to the member as soon as practicable. Said notice may be oral or in writing but if oral it must be followed by written notice as soon as practicable to the Attorney's office.

A suspension may be appealed to the Board of Directors. Notice of an appeal must be in writing by the member and must be taken within 30 days of being notified. The Board of Directors shall hear the appeal as soon as practicable but in no case later than 14 days after the Notice of Appeal unless agreed to by the member and the Board.

3) In addition to the above process for suspending or terminating a member, tThe MCAD Board of Directors, with the recommendation of the Quality Assurance Committee, and having, and having provided the member prior notice and an opportunity to be heard, may take any of the following actions:

a.) Give member notice to comply within a reasonable time.

b.) Mandate member's participation in a Quality Assurance Mentor Program.

c.) Suspend member from receiving case appointments until further notice.

d.) Terminate member's contract with MCAD immediately.

e.) Implement any other appropriate corrective course of action.

4.) The MCAD member's duty of performance imposed by their contract with MCAD terminates upon the member's death or substantial disability.

H. COMPLAINTS OR CLAIMS AGAINST MEMBERS

Members must immediately notify MCAD in writing of the existence, substance, and if applicable the results of any non-frivolous complaints and/or malpractice claims made or filed against them. Members do not have to notify MCAD of any frivolous complaints. A frivolous complaint is defined as a complaint that either does not require a written response or if a bar complaint; one that has not gone beyond bar counsel's initial review, unless this has occurred as a result of an appeal of bar counsel's determination that this was a frivolous complaint.

I. QUALITY ASSURANCE COMPLAINTS AND PROCEDURES

MCAD feels that quality assurance is an important part of the consortium's function and has established a Quality Assurance Committee (hereafter in this section, Committee) to ensure that members provide quality, effective, adequate, and efficient representation to Marion County indigents.

The following process shall be used when quality assurance concerns are expressed about a member. It is the intent of this process to mirror the due process procedures (in a less formal and time consuming manner) contained in the Oregon State Bar's disciplinary process and to provide a due process forum for the member and the person filing the complaint (hereafter in this section, complainant). This process is not a disciplinary process. Disciplinary complaints

shall be addressed to and by the Oregon State Bar. MCAD has decided not to enact a disciplinary process. This process is intended to help our members provide the best quality of service possible under the circumstances. The goal of this process is to help each member provide quality, effective, adequate, and efficient representation to Marion County indigents.

Any response to a complaint shall be directed towards corrective action to help the subject member provide better service to our clients. All investigation and investigative reports are confidential except for those persons or bodies contained therein.

1.) INFORMAL COMPLAINT:

An oral complaint may be made directly to the MCAD Executive Director. The Executive Director shall investigate the complaint and discuss the issues with the individuals involved. In all cases, the complaint will be discussed with the Complainant and the Member. After investigation of the informal complaint, the Executive Director shall inform the Member and Complainant of the findings and proposed resolution and the Complainant's option to make a formal complaint, if the resolution is unacceptable to the Complainant.

2.) FORMAL COMPLAINT PROCEDURE:

A formal complaint must be in writing, signed by the Complainant and must be submitted to the MCAD Office. A complaint must contain a statement of the facts and circumstances leading to the complaint.

The MCAD Office must forward the written formal complaint to the Committee for review within five working days of receipt and shall forward a copy to the MCAD Executive Director. The Committee shall evaluate the information contained in the complaint within fifteen days of receipt by the Committee.

Any formal complaint may be referred to the Executive Director for disposition as an informal complaint at the discretion of the Committee. If the Committee determines that the facts alleged in the written complaint do not raise a quality assurance matter, the Committee shall notify the Complainant and the complaint shall be dismissed. This action cannot be appealed.

If the Committee determines that the facts alleged in the complaint raise a quality assurance matter, the Committee shall appoint an MCAD member attorney or other qualified person to investigate the complaint (hereinafter in this section, Investigator) and shall notify the Member and Complainant in writing immediately. This notice shall include a copy of:

a.) The complaint.
b.) A copy of the Quality Assurance Complaint Procedure.
c.) The name of the Investigator.

Upon receipt of the complaint, the Member shall submit a written response to the Investigator within 14 days. One extension of time to respond of up to 14 days may be granted as a matter of right. Further Member requests for extensions of time to respond must be in writing and addressed to the Investigator. Member requests for an extension of time to file a response may be granted at the discretion of the Investigator and may be granted by the Investigator only with the written consent of the Complainant or consent of the Committee.

3.) INVESTIGATOR:

a.) Appointment: The Committee will appoint an MCAD member or other qualified person who does not have a conflict of interest either with the Complainant, the Member, or the issue of the complaint, as the Investigator. The Complainant or the Member

may inform the Quality Assurance Committee in writing within seven days of notification of any objection to the proposed Investigator. The Committee shall decide if it should appoint a new Investigator and shall notify the Complainant and Member immediately. The Committee's decision concerning the appointment of a new Investigator shall not be appealable.

b.) Duties: The Investigator shall make an independent investigation of the complaint using the information provided by the Complainant and the Member and any other information that he or she deems relevant. This independent investigation may include consultation with the parties, consultation with others who know about the facts of the complaint, or any other sources of information.

The Investigator's report shall be submitted to the Committee not less than 60 days after the appointment of the Investigator and shall include findings of fact. Any extension for filing the Investigator's report may be granted by the Committee only with the written consent of the Member and the Complainant.

The Committee shall review the Investigator's report and by majority vote resolve the complaint and notify the Complainant and the Member of its decision and recommended resolution. Any response to a complaint shall be directed toward corrective action to help the Member provide better service to his or her clients.

4.) RESOLUTION APPEAL PROCEDURES:

If either the Complainant or the Member are not satisfied with the Committee's resolution, the unsatisfied party may appeal to the MCAD Board of Directors by mailing a written request for appeal to the Board Chair within 14 days of receipt of the Committee's decision. The MCAD Board Chair shall immediately inform the Member, the Complainant and the Investigator of the appeal. Within 14 days of receipt of the MCAD Board Chair's notice of request for appeal the Member and Complainant may submit in writing any additional comments that are relevant to the appeal. The MCAD Board of Directors will address this appeal at it's next regularly scheduled meeting or as soon as possible. The decision of the Board shall be final as to the Quality Assurance Complaint and resolution. The MCAD Board Chair shall notify the parties of this decision.

5.) MEMBER COMPLIANCE:

In the event any Member fails to cooperate with the investigation of a Formal Complaint, one or more representatives of the Committee shall meet with the MCAD Board of Directors at the next regularly scheduled Board meeting to inform the Board. After consideration of the facts and circumstances of the Member's refusal, the MCAD Board may, by majority vote, implement any such corrective action the Board deems appropriate so long as that corrective action is consistent with the policies and procedures for Member discipline adopted by the MCAD Board of Directors.

The MCAD Board Chair shall inform the Member attorney of the Board's decision within five days of the Board meeting. The Member attorney has five days to request a hearing. Such request must be delivered to the Board Chair and the hearing shall be held at the next regularly scheduled Board meeting. The proposed action by the MCAD Board shall be suspended during the pendency of the appeal hearing. The decision of the MCAD Board after such hearing shall not be appealable.

6.) CONFIDENTIALITY:

The MCAD Board of Directors shall be informed of the receipt of any Formal Complaint, **the nature of the**

complaint, the appointment of an Investigator, and the procedural status of the complaint. **The Board may be provided a copy of the written complaint upon request of the Board Chair. If the Board is provided a copy of the written complaint this document shall be kept confidential by the Board**. Except as stated herein, Quality Assurance Committee files are confidential and may not be furnished to any party without the express written consent of the Member. Appeal as outlined above of any Quality Assurance Committee decision, noncompliance with the Quality Assurance Procedures set out herein and/or filing suit based upon any Committee or Board action as outlined above shall act as consent to release such Member's file to the MCAD Board of Directors.

J. ARBITRATION

Any disagreements between MCAD and the member attorney shall be decided either informally or by binding arbitration, if an informal agreement cannot be made.

1.) Arbitration is mandatory.

2.) Arbitration will proceed under UTCR 13.100 then existing or its equivalent.

3.) Parties will agree on a single arbitrator from a list provided by both parties. Should the parties be unable to agree on a single arbitrator, each party will choose one representative and these two representatives shall choose the arbitrator.

4.) The decision of the arbitrator shall be subject to the State Contract.

5.) The costs of said arbitration shall be borne by equally by the parties. Each party shall be responsible for its own attorney fees if any. No attorney fees shall be awarded by the arbitrator and if awarded they shall not be enforceable. No prevailing party fees or costs shall be awarded by the arbitrator and if awarded they shall not be enforceable

K. MEMBER DUES, FEES, AND ASSESSMENTS

Subject to a Board of Directors vote, implementation of reasonable dues, fees, or assessments may be levied against the members of MCAD.

L. MEMBER LEVIES AND GARNISHMENTS

The MCAD office is obligated to respond to any notices of levies and garnishments of its members. If the office receives such notices, the affected member will be notified and provided with copies of such notices. Members are required to respond to the agency serving the notice and are expected to fulfill their obligations in this respect. The MCAD office will handle such matters in a confidential and timely manner.

2.0 CONTRACT CASELOAD COVERAGE

A. INCLUDED IN THE CONTRACT

MCAD provides 100 percent coverage of the indigent defense appointments in Marion County for the following case types:

1.) Misdemeanor and Felony criminal cases.

2.) Misdemeanor and Felony Probation Violation proceedings.

3.) Post Conviction Relief and Habeas Corpus cases.

4.) Contempt proceedings.

5.) Extradition proceedings.

6.) Death Penalty, which includes:
   a.) Original trial level cases,
   b.) Re-sentencing and re-trials,
   c.) Post Conviction Relief from sentence of death, and
   d.) Habeas Corpus proceedings arising from a sentence of death.

7.) Juvenile Murder and Aggravated Murder either filed or adjudicated in Adult Court or remanded to Circuit Court.

B. EXCLUDED FROM THE CONTRACT

1.) Civil Commitments.

2.) Juvenile Cases (except as expressly included above).

3.) Appeals on Criminal Cases, Post Convictions, and Habeas Corpus.

C. CONTRACT FEE SCHEDULE

1.) Criminal cases will be paid at $50.00 per hour.

2.) Habeas Corpus and Post Conviction cases will be paid at $60.00 per hour.

3.) Ballot Measure 11 Criminal cases will be paid at $650.00 per hour. Cases that begin as BM11 cases and are indicted, as non-BM11 cases, will be paid at $50.00 per hour unless the attorney worked on the case to obtain the result. A written statement justifying the $60.00 per hour rate might be required if it is not clear from the billing that the increased hourly rate applies.

4.) Juvenile Aggravated Murder and Murder cases will be paid at $60.00 per hour.

5.) Aggravated Murder original trial level cases including Post Conviction and Habeas Corpus cases where the petitioner was sentenced to death or true life $75.00 an hour for both lead counsel and co-counsel. Co-counsel at this increased rate requires pre approval from MCAD.

6.) contempt cases involving non-payment of support resulting from a domestic relations case (SED), $55.00 an hour.

If you have any doubt about the hourly rate of pay for any particular case that you have been appointed to, you should contact the MCAD office at the beginning of the case to discuss the applicable hourly rate.

3.0 APPOINTMENT OF COUNSEL FOR INDIGENT PERSONS

Appointment of counsel is subject to ORS 135.050, 135.055, 151.430 to 151.480, the Attorney MCAD Contract, and to the MCAD Indigent Defense Contract. The courts appoint counsel from the MCAD member attorneys qualified to handle the particular case(s) under the qualification standards SCA and MCAD have adopted.

A. QUALIFICATION STANDARDS FOR APPOINTED COUNSEL

Pursuant to ORS 151.430(3), SCA and MCAD have adopted the current qualification standards for counsel appointed to represent indigent persons at state expense. Volume 1, Chapter 13, Section 1, OJD Policy Statement is a 37-page document that outlines the qualifications. This policy statement is available for review at the MCAD office.

MCAD attorneys must submit a new "Certificate of Attorney Qualification" to the MCAD office each time a "Request For Proposal" is submitted to SCA, when requested by the MCAD office and/or when their qualifications change for any reason. MCAD attorneys must file new certificates annually with SCA and with the particular courts for case types outside the MCAD Contract, or for counties other than Marion when they wish to be appointed to cases in those counties. **(See Section 16, Exhibit # 1)**

B. APPOINTMENT AGREEMENT

By accepting an appointment to represent an indigent person, counsel agrees to abide by the payment policies and procedures in this policy statement. The Executive Director has the discretion to allow specific exceptions to the attorney fee schedule. (For example $55.00 per hour for Aggravated Murder Cases.) Members requesting an exception to the attorney fees schedule, must request it in writing and justify the request.

C. APPOINTMENT OF COUNSEL

Appointments made under an indigent defense services contract are subject to that contract, pursuant to ORS 151.460. These appointments are called "contract appointments" or "contract cases". The individual member attorneys are held responsible for the case(s) to which they are assigned and are compensated for their services through MCAD. Contract attorneys appointed to case(s) outside the contract are called "assigned appointments" and the attorneys are compensated by billing the appropriate Court, County or through SCA.

D. APPOINTMENT OF CO-COUNSEL

The courts have the sole discretion to appoint co-counsel when the court finds that the appointment is reasonable and necessary considering both the circumstances of the case and lead counsel's circumstances and needs. Lead counsel must move the court to appoint co-counsel and must file a supporting affidavit that explains why the appointment is reasonable and necessary, including any overall anticipated cost savings.

As a general policy, co-counsel is discouraged except in:

1.) Capital cases, or

2.) Complex or lengthy murder or serious felony cases when:

a.) Qualified lead counsel would not be able to take the case unless co-counsel were appointed, or

b.) No lead counsel is available within the area, and appointment of co-counsel would help local counsel obtain experience to qualify as lead counsel for future appointments of this type.

MCAD requires a copy of the appointing order when the courts have approved co-counsel. Counsel and co-counsel must familiarize themselves with the MCAD policies and procedures for processing payments in such cases. In general, there can be no duplicative time billed by the attorneys and the attorneys billing statements must cover the same period of time and be submitted to MCAD for processing within the same billing batch.

3.5 APPOINTMENT ROTATIONS

MCAD attorneys will only accept those indigent defense court appointments that they are qualified and certified to accept. Appointments are received on a rotational basis as defined below:

A. FELONY AND MISDEMEANOR TRIAL COURT CASES

For all Trial Court cases including Felonies, Misdemeanors, DUII/DWSS, Probation Violations, Contempt's, Extradition's, and VRO's, the Attorney-of-the-Day rotation is utilized. MCAD attorneys are given the opportunity to sign-up for Felony and Misdemeanor Court dates to receive the indigent defense court appointments for that date. Monthly calendars with the name(s) of the attorney-of-the-day are provided to the court annex staff and they are notified of any changes that occur.

Members sign-up for their court dates and therefore should be available. It is understandable that at times scheduling changes or problems occur. MCAD requests that when it is necessary to change your dates you attempt to trade dates with another qualified MCAD attorney and notify the MCAD office. MCAD will notify the courts of the changes in attorney-of-the-day. If you are unable to trade dates with another attorney, then notify the MCAD office with as much advance time as possible. The MCAD office has a procedure for replacement or fill-in attorney dates.

B. SPANISH SPEAKING MISDEMEANOR TRIAL COURT CASES

A Spanish-speaking Misdemeanor Court attorney is present in the courtroom each day in addition to the Misdemeanor and Felony Court attorneys-of-the-day. They only receive appointments to Misdemeanor Court cases where the defendant's primary language is Spanish. The Spanish speaking Misdemeanor Court attorneys sign-up for court dates on a separate rotation and they ineligible to sign-up for regular Misdemeanor Court days. However, in the event of extenuating circumstances, the MCAD office may request that a Spanish speaking attorney fill-in when no other members are available.

C. SUPPORT ENFORCEMENT (SED) CASES

A group of member attorneys provide the coverage for receiving appointments in support enforcement cases. These members sign-up on a rotational basis for specific Mondays throughout the year to receive appointments to the Support Enforcement cases.

D. POST CONVICTION RELIEF AND HABEAS CORPUS CASES

Appointments to Post Conviction Relief and Habeas Corpus cases are handled by assigning the next member attorney's name from the MCAD list. The process is that the court's clerk or judicial assistant calls the MCAD office when an attorney is needed for an appointment. The courts notify both the member attorney and the MCAD office with a copy of the appointing order for each appointment and/or substitution. The judge assigned to the case must first approve any changes or substitutions of counsel.

*APPEAL OF POST CONVICTION RELIEF AND HABEAS CORPUS CASES

MCAD attorneys are encouraged to handle their clients' appeals of Post Convictions and Habeas Corpus cases by having themselves appointed and completing the necessary paperwork. If a member is not willing to handle their clients' appeal, then they should call the MCAD office for the name of the next appellate attorney willing to be appointed. **It is the**

responsibility of the MCAD trial attorney to file the Notice of Appeal in Post Conviction and Habeas Corpus cases along with a motion and order to prepare transcripts and waive the fees, without prior agreement of another responsible person. Please note that appellate level cases are **not included** in the MCAD contract. Appellate level billing statements are submitted to the Court of Appeals for payment following the Court of Appeals payment policies and procedures. MCAD only manages the list of attorney names willing to do appeals.

E. MURDER CASES

The courts or other responsible parties normally notify the MCAD office when an arraignment on a murder charge is forthcoming. MCAD contacts the next member from the current murder rotation to see if they are willing and able to take the case. If, for some reason, the attorney is unwilling or unable to take the case, the next member on the rotation is contacted. This process is repeated until there is an attorney available to be present in court for the arraignment. MCAD then notifies the court of the attorney's name and the attorney is appointed at the arraignment proceeding. The Court appoints the MCAD attorney in these cases. The court may request the next name in the murder rotation.

Counsel contacted by MCAD may visit their prospective client any time they feel it is appropriate and should visit as soon as possible. By agreement with the Marion County Courts, the Marion County Jail shall not refuse visitation by counsel anytime later than noon the day before the arraignment, even if the formal appointment has not yet been made.

Counsel contacted to represent a murder client may pass one time on an appointment to a particular case and still remain active in the particular rotation. This is a minor pass.

Counsel may also pass on an appointment to a particular case and request to be active in the next round for an appointment in the particular rotation. This is a major pass.

F. AGGRAVATED MURDER CASES

The courts or other responsible parties normally notify the MCAD office when an arraignment on an aggravated murder charge is forthcoming. However, the assigned Judge in the Aggravated Murder case appoints a member attorney from the MCAD Aggravated Murder rotation. The MCAD office will provide the current aggravated murder list for courts to choose an attorney for the case and will assist the court in contacting the members' office.

Counsel contacted by MCAD or the courts may visit their prospective client any time they feel it is appropriate and should visit as soon as possible. By agreement with the Marion County Courts, the Marion County Jail shall not refuse visitation by counsel anytime later than noon the day before the arraignment, even if the formal appointment has not yet been made.

4.0 TRIAL COURT BILLING

MCAD is responsible for processing the billing statements on the case types listed in Section 2.0 (A) under "Contract Caseload Coverage". ORS 135.055(4) requires counsel, upon completion of all case related services to submit their billing statement of all reasonable fees and expenses, supported with the necessary pre-approvals, invoices and receipts. Contained within the "MCAD Attorney Contract" is an agreement between the Attorney, MCAD and the State of Oregon that all billings submitted either in writing or by electronic means are automatically certified to be true and accurate. The MCAD office reviews, verifies, and processes the billing statements for payment to the member attorneys and their Sub-Providers.

BILLING STATEMENTS SUBMITTED TO MCAD **MUST INCLUDE** THE FOLLOWING:

A. MCAD BILL HARDCOPY: To meet statutory requirements, MCAD developed the Bill Hardcopy, which replaces the State Court Administrator's Fee Statement/Certification Form. **(See Section 16, Exhibit #2)** All Attorney billing statements requesting payment of attorney fees, out-of-pocket expenses, and non routine expenses (NRE) must be submitted to the MCAD office using this form, or if billing electronically, using a compatible format to the Bill Hardcopy. Electronic Billing is mandatory unless otherwise approved by the Executive Director It is necessary to have all applicable boxes and lines filled in with the complete and correct case information. Make sure to use the MCAD published codes for the Appointment Types, ORS #'s with extensions, Charge Names, Withdrawal Reasons and Dispositions. **(See Section 16, Exhibit #5)** Incomplete billing forms or missing case information may cause the billing statement to be held-up or returned to the attorney for correction and/or completion before processing by MCAD.

*CERTIFICATION: The new "MCAD Attorney Contract" has been revised to include an agreement between the Attorney, MCAD and the State of Oregon. It contains an agreement that all billings submitted by electronic means are automatically certified to be true, accurate, and that the attorney will not accept or receive other direct or indirect compensation for these services. If applicable, the attorney is also certifying that the sub-provider billing statement is true, accurate, and correct when submitted along with the attorney billing.

B. ATTORNEY TIME AND EXPENSE DETAIL: Attorneys must submit supporting information for the total hours submitted on the billing statements. The attorney time and expense detail is a chronological listing of the dates of services, a description of services, and time expended on each service listed in tenths of an hour. In addition, this detail must clearly differentiate between the time spent "In-Court" and the time spent "Out-of-Court". **(See Section 16, Exhibit # 3)**

*SUPPORTING DOCUMENTATION: The MCAD attorney must have and keep supporting information to back-up the attorney time and expense detail where appropriate. Example #1: If the MCAD attorney keeps contemporaneous time-slips such as a separate document or as writing in the file, this must be retained for audit verification purposes. Example #2: If the MCAD attorney time detail indicates that a Motion to Suppress with memorandum was produced, this must be kept for audit verification.

BILLING STATEMENTS MAY ALSO INCLUDE THE FOLLOWING:

C. OUT-OF-POCKET (O-O-P) CASE EXPENSES: Case expenses such as photocopies, postage, telephone, facsimile, travel, subpoena service, records, some transcripts, clerks, associates and other miscellaneous expenses are reimbursable to member attorneys. If the total cost of any one expense is $25.00 or more, the expense requires submission of a receipt. If the total cost of any one expense is over $25.00, the expense requires a pre-authorization utilizing the Extraordinary Expense Authorization process. (NRE)

D. MCAD Non Routine Expense AUTHORIZATION (NRE): Attorneys requiring the services of any sub-provider (i.e. Interpreter, Investigator, Evaluator, Expert or Out-of-Pocket Expenses over $75.00) must obtain **PRE-APPROVAL** from the MCAD office **BEFORE** engaging the services of the sub-provider or the expenditure of any funds. NRE requests may be faxed, mailed or delivered to the MCAD office. The "Non Routine Expense Authorization" must be properly completed with the appropriate client and case details and any explanations or descriptions of work to be performed. All case details and information provided to MCAD for expense approval shall be kept confidential. **(See Section 16, Exhibit #4)**

The completed NRE, with the approval information filled in at the bottom, needs to be on file at both the attorney's office and at MCAD's office. **A copy of the approved NRE must be given to the sub-provider as their work order or authority to perform the services requested. Please note that Sub-providers will only be paid for the total amount of hours pre-approved by the EEA on file at the MCAD office, except in extraordinary circumstances and under the procedure set forth in the paragraph below.**

The routine NRE requests like Interpreter, Investigator and Clerk for ten hours or less are quickly approved. Unusual requests may require more time to approve, or may require a written or verbal explanation. MCAD occasionally needs to talk with IDS regarding some requests and there are instances when the attorney and the Executive Director must discuss the request in order to receive an approval. Every effort is made to approve your requests by the quickest means possible.

Increases to NRE's need to be indicated and tracked on the original NRE. To request additional hours or funds on a particular case, simply date and write an explanation to justify the additional request. All additional increase requests are reviewed and approved by the Executive Director, so a detailed explanation should be submitted. It may also be necessary to discuss these additional requests with the Executive Director.

In extraordinary cases, an NRE may be approved and paid after the expense is incurred. When the submitted NRE did not cover the actual amount of the expense or when the NRE process was not used before the expense was made it may still be paid. If the request complies with the indigent defense policies and procedures and the total amount is still reasonable and necessary. However, this post-authorization will only be accepted with written explanation by the attorney, detailing the exigent or extraordinary circumstances that existed requiring the expense to be incurred before receiving authorization. This written explanation is necessary to justify the after-the-fact approval or increases and provide a reasonable audit trail.

Billing statements that are submitted for payment that are "not pre-approved" or are for "amounts above" the pre-approvals will require this written explanation from the member before they can be processed. The lack of planning and following the pre-approval process will delay payment at least one billing cycle due to the extra paperwork that must be done by the MCAD office.

The completed NRE and the sub-provider billing must be included with the attorney's billing statement when the case is completed and submitted for payment. If an NRE was completed and approved but not needed, it must still be included with the attorney billing statement in order to be removed from MCAD's accounts payable files.

E. SUB-PROVIDER BILLING STATEMENTS: Pre-authorized sub-providers must submit their billing statements to the hiring attorney when their work is completed, when their billing is requested, or when the case is completed. Sub-providers may not submit their billing statements directly to the MCAD office. The sub-provider billing statement must provide the name of the client, the name of the hiring attorney, detail indicating the date(s) of service(s), time expended performing service(s) in tenths of an hour, the hourly rate, and the total amount requested for the billing statement.

Sub-providers billing for hours over what has been pre-authorized on the NRE will only be paid for the hours that are pre-authorized except in extraordinary circumstances as outlined in Section 4.0 (D). Sub-providers must always be aware of their approval amount/time. It is the responsibility of the hiring attorney to provide the sub-providers with a copy of the approved NRE.

In limited situations, and with pre-approval, the sub-provider may have their billing statement processed prior to the case being completed **(See "Interim Billing", Section #13.0)**

F. RECEIPTS FOR CASE EXPENSES: Any individual out-of-pocket expense that totals $25.00 or more must be accompanied with a receipt to be reimbursed. This applies to both Attorney and Sub-Provider expenditures. Expenses expected to be more than $25.00 requires a pre-authorization using the Non Routine Expense Authorization (NRE) process.

In the absence of a receipt, the attorney or sub-provider must state on a separate piece of paper:

1.) What the expense was for.

2.) What the rate and total amount of the expense was.

3.) Why there is not a receipt.

The attorney or sub-provider must sign and date this separate piece of paper and submit it with the billing statement to MCAD. The attorney or sub-provider must keep reasonable underlying records in case MCAD, the court, or SCA requires further documentation.

4.5 ELECTRONIC BILLING SYSTEM (ELECTROBOOJUM)

A computerized billing system is available to members to prepare the MCAD billing statements at no cost to the members. Please call the MCAD office to request and inquire about the "ElectroBoojum". Members are encouraged to utilize the billing system; it has been designed to make billing much less time consuming than preparing the MCAD Bill Hardcopy manually. There are built-in tables and integrity checks that help with choosing the correct MCAD codes and charge details. There is a calendar feature that provides members with knowledge of all hours billed or unbilled on any single calendar date, along with many other helpful features.

ElectroBoojum also enables members to electronically prepare the billing statements. **Those members using ElectroBoojum are required to submit their bills electronically.** The MCAD office encourages electronic billing because it saves an enormous amount of key-entry time. It is still helpful to receive hardcopies of the billing statements billed electronically.

ELECTROBOOJUM Helpful Hints:

1.) Do not use punctuation (dashes, slashes, and periods etc.) when entering unique ID numbers, ORS numbers and docket numbers.

2.) Double-check the Unique ID for the correct year of the appointment. You cannot always accept the default Unique ID number given by the computer.

3.) Double-check the ORS numbers/extensions that pop up as you start to enter the number. You cannot always accept the first choice offered by the computer. The ORS numbers are in "table order" and the correct number and extension needs to be selected. This applies to charge names as well. Ensure that you are selecting the appropriate charge name and level.

4.) Always enter the first time-slip choosing the official "Appointed Date" because this date defaults to date appointed box on the Bill Hardcopy page. For Habeas Corpus and Post Conviction cases, this first time-slip should be entered as 0.0 time and backdated to correspond to the date the judge signed the order appointing counsel.

5.) Use a separate diskette for each calendar date that you do billing. Diskettes cannot be uploaded when there are billings transferred on multiple days. Use multiple diskettes for multiple billing dates, the diskettes are reformatted and returned to you with your paychecks.

6.) Be aware that sub-provider expenses and some out-of-pocket expenses will need to be entered on the "Bill Hardcopy" view of the computerized bills prior to printing/transferring them. If necessary the F-9 Key will recalculate the billing to include these additions on the Bill Hardcopy.

7.) If you discover an error after printing/transferring a bill, do not correct it by hand. Use the "Un-bill" feature of the billing system; fix the error and print/transfer the bill again. **MCAD strongly recommends that all corrections and changes that occur (particularly with respect to adjusted hours and dollars adjustments) be made on your billing system. This is advisable for audit verification purposes.**

5.0 TIMELINES FOR BILLING STATEMENTS

A. BILLING CYCLES, CUT-OFF, AND PAYMENT TIMELINES

MCAD processes approximately two billing cycles a month, with an average of over 300 bills per billing cycle. Every other week the attorneys have a cut-off date for submitting billing statements. Billing statements received after 5 PM on cut-off dates are held over for processing in the next batch. The MCAD office produces one electronic billing from the individual billing statements received prior to the 5 PM cut-off. This electronic billing is submitted to Indigent Defense, who in turn submits a payment request to the Accounts Payable of the State of Oregon, Judicial Department. Every other Wednesday (opposite Wednesday cut-off deadlines) will be the day that checks get distributed for the prior cut-off submission day. This means that Attorney and Sub-Provider payments for a particular cut-off date will be disbursed three weeks after that cut-off date. Thus, every Wednesday will either be a cut-off day or a payday. In extraordinary circumstances, this schedule may not be able to be followed. MCAD will do everything possible to inform members if there will be a problem meeting this schedule.

Also, a couple of times a year, this schedule may not be met due to special projects that must be completed. MCAD shall inform the membership of any schedule changes as soon as possible, but no later than one month prior to the planned change in the schedule.

The MCAD office produces the individual checks to the members and the sub-providers after it receives a telephone call from the Accounts Payable of the Department of Justice that the payment is available. If for some reason the State is unable to process the MCAD electronic billing, the payment timelines under the above schedule may be delayed and the MCAD office will inform the members as soon as possible.

The MCAD office provides a reference calendar for each year indicating the cut-off dates to the membership. Members are notified in advance of any changes to these cut-off dates.

B. TIMELY SUBMISSION OF BILLING STATEMENTS

MCAD attorneys are encouraged to submit their billings statements in a timely manner to the MCAD office. However they should not be submitted prior to the dispositions being reported and a judgment being received. Billing statements must be submitted to the MCAD office for processing within sixty (60) days after the last court appearance on the case. With the exception of Habeas Corpus and Post Conviction cases, which may be submitted once the Attorney is confident of the pending disposition.

Cases should not be billed too soon, nor too late. If the case is billed too soon and requires any further Attorney involvement, there will not be any supplemental billings approved. For example: A defendant pleads and is sentenced on a cut off date and the attorney submits the bill on the same cut off date. The next day, an amended judgment is submitted because of a mistake in the original judgment. No supplemental billing will be allowed for the time that the attorney spent in reviewing or helping acquire the amended judgment. It is important for the attorney to use judgment in deciding the appropriate time to submit a bill.

Billing statements that are received later than sixty days after the last court appearance will not be processed for payment, without a letter of explanation regarding why the billing was not presented within 60 days. Upon review of this explanation, the Executive Director will decide whether or not to process the billing statement.

The maximum number of billings that can be processed for an individual attorney in a bill batch is 26. The attorney must submit all of the attorney time and case expenses relating to

each client's case(s) at one time at the end of the case(s). The attorney is responsible for gathering and submitting the billing statements of any sub-providers with whom they contracted with at the time of billing.

C. DELAYS IN PROCESSING BILLING STATEMENTS

Occasionally billings may not be processed within the billing cycle for which they were submitted. There are several reasons this may happen. These include:

1.) Billings held up for Fee Review **(See "Fee Review Process", Section #15.0)**.

2.) Billings without pre-approved NRE's or above the pre-approved amounts.

3.) Billings that the MCAD payment process cannot verify details.

4.) Billings that are illegible, incorrect, or incomplete.

5.) Billings received later than 5 PM on cut-off dates.

5.5 COMMON ERRORS ON BILLINGS STATEMENTS

The MCAD office makes every effort to accurately process all the attorney-billing statements received from members. The attorneys' offices can help correct some of the "common errors, omissions and problems" by:

a.) Ensuring that the Unique ID Number has not been used previously.

b.) Matching the year of the ID Number to the year of the appointment.

c.) Obtaining and using client's full legal names (first, middle, last).

d.) Verifying and using client's correct date of birth.

e.) Accurately indicating the true appointment date in the first time-slip.

f.) Using **only** the published codes from the "MCAD Codes Lists".

g.) Listing all charges and counts appointed to on separate lines. With the exception of infractions and violations.

h.) Ensuring that all ORS numbers have the proper MCAD sub-section extension and level codes.

i.) Reporting the appropriate and correct dispositions for all charges.

j.) Accurately separating and totaling in and out of court functions.

k.) Attaching/creating receipts for individual out-of-pocket expenses totaling $25.00 or more.

l.) Including all Extraordinary Expense Authorizations (NRE's) and all Sub-Provider invoices.

The MCAD office verifies and processes the attorney billing statements making adjustments, additions, and corrections as needed. A photocopy of each billing statement with major changes, additions, and adjusted totals are provided for you along with your paychecks. These copies should be kept with your files as your record of how they were reported to Indigent Defense for audit verification purposes and they are an excellent way for you and/or your staff to learn from reoccurring errors. Remember that by signing the MCAD Attorney Contract, MCAD attorneys have certified that the information submitted for billing purposes is true, accurate, and correct. **MCAD strongly recommends that all corrections and changes that occur (particularly with respect to hours and dollars adjustments) be made on your billing system. This is advisable for audit verification purposes.**

6.0 BILLING PREPARATION AND TRAINING

A. BILLING TO PREPARE AND REVIEW STATEMENTS

For cases appointed to on or after January 1, 1998, Attorneys may include a reasonable amount of attorney time to prepare and review the billing statements. Please consult the MCAD office to review the appropriate guidelines to accomplish this.

B. BILLING PREPARATION TRAINING

The MCAD office encourages attorneys and billing personnel to feel free to contact us, to ask questions, and to gain helpful hints on completing the MCAD Billing statements. The MCAD office will gladly set an appointment to offer you and your billing staff personalized training. Due to the constant billing cycles, the office may not be able to immediately schedule with you, but every other week there is a small window of opportunity for a training appointment.

7.0 MCAD CASE EXPENSE GUIDELINES

Reimbursable expenses must be both reasonable and necessary to the preparation, investigation, or presentation of the indigent person's case subject to review by the Executive Director and/or the Fee Review Committee.

MCAD will only pay for legal services related to a specific appointment. MCAD will not compensate any attorney or sub provider time spent for representing indigents in cases that they are not appointed to or managing their offices and careers except with respect to any negotiated contractual inclusions. For example, an MCAD attorney is appointed to represent an individual in a Robbery in the First Degree charge. During this representation, the client is served with divorce papers. While there is nothing to prevent the attorney from giving advice to the client or representing the client in the divorce matter, any advice or representation must be done either pro bono or any compensation for this representation must come from other sources; not from State/MCAD indigent defense funds.

At the present time, MCAD does provides compensation for specific category, non-case specific related expenses through Stipends reimbursements which have been negotiated and are included in the State Contract.

A. MCAD GUIDELINE AMOUNTS

All guideline amounts are maximum amounts. Note that the guideline amounts are not equivalent to a pre-approved cost and are not a substitute for pre-authorization.

Appointed counsel must obtain needed services by the least expensive means available and within the MCAD guideline amount, unless the MCAD Executive Director approves a more expensive means as reasonable and necessary. Attorneys must discontinue those services no later than when the case is completed.

MCAD Attorneys must provide the pre-approved NRE and any relevant portions of the guidelines, including total dollar amounts approved and procedures for billing; to the prospective sub-providers before incurring any costs for services to be paid from indigent defense funds through the MCAD Office. When additional funds are needed above the original approved amount, the original NRE must be used to request an increase. The NRE and the Sub-provider billing statement must indicate the appropriate audit trails.

Example: An NRE is requested and approved. The Sub-provider is contacted and hired. The Sub-provider must be given a copy of the approved NRE as their "work order". The Sub-provider performs the work necessary, accurately tracking the dates and their time in tenths of an hour. If the Sub-provider finds that they are close to their approved cap of hours or dollars, they contact the attorney to request **additional pre-authorization**. The attorney **must use the original NRE** to describe the additional work to be performed and request an additional cap of hours or dollars. After MCAD approves the additional request, the Sub-provider must be given a copy of the increased approved NRE. When the work is completed the Sub-provider submits a billing statement to the attorney. The Sub-provider's NRE and billing statement are entered on the MCAD Attorney Bill Hardcopy and are submitted for processing and payment along with the attorney billing statements.

If an approved Sub-provider has not performed any work, the NRE must still be submitted along with the Attorney billing statement so that it will be removed from the MCAD's accounts payable files.

B. RECEIPTS FOR CASE EXPENSES

Receipts are required for individual out-of-pocket expenses over $25.00. If a receipt is not available, attach a signed and dated explanation stating:

1.) What the expense was for.
2.) The rate and total amount of the expense.
3.) To whom the expense was paid.
4.) And why there is no receipt available.

Both the Attorney and the Sub-Providers must provide receipts for expenses over $25.00 and must maintain reasonable underlying records in case further documentation is requested by MCAD or by SCA.

7.5 TYPES OF EXPENSES

General expense categories include overhead expenses, out-of-pocket expenses, and extraordinary expenses.

A. OVERHEAD EXPENSES

Overhead, including services performed by an employee or an independent contractor, is not reimbursable, except in very limited circumstances with MCAD's pre-approval.

NON-REIMBURSABLE OVERHEAD includes, but is not limited to:

1.) Travel, including parking, to and from court for appearances within the county where counsel's office is located or within 60 miles of counsel's office, whichever is less.

2.) Secretarial services.

3.) Word-processing.

4.) Rent and utilities.

5.) Office equipment and supplies.

6.) Library materials.

7.) Law Clerk, Associate and paraprofessional services unless pre-authorized.

B. OUT-OF-POCKET **(O-O-P)** EXPENSES

MCAD attorneys may be reimbursed for actual out-of-pocket costs for the following items within the limits described below. Receipts and pre-approval are required for any single expense category totaling more than $25.00.

1.) **(POST)** Postage:

Reimbursed at actual (not estimated) costs of first class mail. Express mail or messenger service can be reimbursed only if the attorney could not have avoided the extra expense through better planning or if the attorney could show that it was reasonable, necessary, or less expensive than regular first class mail.

2.) **(TELE)** Telephone Charges:

Reimbursed at actual (not estimated) costs of long distance telephone charges and local collect call charges from indigent clients in jail, prison, hospital, or other similar institutions.

3.) **(COPY)** Photocopy:

In-office, actual costs not to exceed $ .05 per page; by outside vendor other than state court, actual costs not to exceed $ .10 per page; by state court, actual costs not to exceed $ .25 per page, plus necessary certification cost. (Photocopying of large projects expected to be more than $25.00 must be pre-authorized utilizing an NRE.)

4.) **(TRAV)** Travel/Mileage:

Reimbursed at $ .21 per mile for necessary travel other than travel within the county to court appearances (See Overhead, Section) and for sub-providers such as Investigators outside the normal course of business travel for the office location or provider's type of work.

Travel that must be accomplished by air needs to be pre-approved through MCAD and arranged through the SCA, as the SCA can obtain discounted rates on air travel. If you need to travel by air or need to have a witness travel to Salem by air, you must utilize the NRE process and contact the MCAD office to help arrange/detail this expense.

5.) **(CLERK)** Law Clerk:

Reimbursed at up to $15.00 per hour for hours pre-authorized utilizing the NRE process to perform specific duties and tasks related to an individual case. Clerk time must be included within the attorney time and expense detail, by date and in tenths of an hour, similar to the attorney time detail.

ElectroBoojum users enter the date the work was performed, enter Clerk and a short description of work performed such as research etc. and the time spent such as 1.3 and then enter the total expense of the time multiplied by the hourly rate for each task.

For those not using ElectroBoojum, please provide a separate accounting of the clerk time and expenses similar to the attorney time detail. Record clerk's time by date, in tenths of an hour, along with a description of work performed and the total reimbursements requested. Members must retain supporting documentation for hours worked by clerks in the applicable files at the attorney's office that must be made available for audit verification purposes, if requested by MCAD or SCA

6.) **(FAX)** Facsimile:

Reimbursed at actual costs of facsimile charges not to exceed $0.50 per page. Individual receipts are necessary for each facsimile reimbursement. Multiple page documents should be handled by the least expensive means possible. If another delivery method, such as mail or express mail would be less expensive it should be considered first.

7.) **(TRANS)** Transcripts:

In some cases, it is necessary to have a full or partial transcript prepared. The Executive Director can approve this expense if reasonable and necessary **except in Post Conviction** cases. **The absolute maximum amount that can be approved and reimbursed for transcript preparation is $2.50 per page.** No appearance or other fee may be paid for the transcript preparation. The maximum amount that can be reimbursed for a photocopy of a transcribed proceeding is $0.25 per page. Please note that transcripts needed for Post Conviction cases are still handled through the pre-MCAD procedure requiring a Motion, Order, and Affidavit to the Post Conviction Court. MCAD does not have the authority to approve these transcript expenses.

8.) **(RECORDS)** Records & Reports:

In some cases, it is necessary to obtain copies of records and reports such as medical, hospitalization, police, probation, counseling or court files. Pre-authorization is necessary utilizing the NRE process for any cost of records or reports expected to be more than $25.00. When you are not sure what the total expense will be, you should obtain a pre-approval before requesting the documents.

9.) **(DISC)** Discovery:

Reimbursed at actual cost of copying discovery by the least expensive means possible not to exceed $ .05 per page in-house and not to exceed $ .10 by outside vendor. Photocopying of large amounts of discovery and any copying expected to be over $25.00 must be pre-authorized utilizing the NRE process. Premiums charged by vendors for expedited copies will not be paid if counsel could have reasonably avoided these costs.

10.) **(CLR)** Computerized Legal Research:

Reimbursed for actual on-line usage and only to the extent counsel shows in supporting documents that the cost, including attorney fees, is less than the cost of the same research done manually. Pre-authorization is necessary utilizing the NRE process for any cost of computerized Legal Research expected to be more than $25.00.

11.) **(SERV)** Service of Process:

In criminal proceedings, counsel must use the least expensive means possible. Flat fee process servers should be utilized as much as possible. If it is necessary to use your investigator for this service, it should be handled by utilizing the least expensive means possible. ORS 21.410 (1) (a) provides that no fee shall be charged to the state by any process server for civil cases in which the party requesting service has counsel appointed at state expense. Pre-authorization is necessary utilizing the NRE process for any cost of Service of Process expected to be more than $25.00.

12.) **(ASSOC)** Associate Work:

Associate work may be reimbursed at $40.00 per hour for hours pre-authorized utilizing the NRE process to perform specific allowable functions or tasks related to an individual case. Associate time must be included within the attorney time and expense detail, by date and in tenths of an hour, similar to the attorney time detail. Members must retain supporting documentation for hours worked by Associates in the applicable files at the attorney's office that must be made available for audit verification purposes, if requested by MCAD or SCA.

13.) **(MISC)** Other Out-of-Pocket Expenses:

MCAD will pay other out-of-pocket expenses similar to the above or in excess of the limits stated above utilizing the NRE process, if the expenses are reasonable and necessary. If counsel is uncertain as to whether the expense will be reimbursed, contact the MCAD office to check on it before incurring the expense and to determine if pre-authorization is required. Generally, an inquiry should be made for any individual expense rising above $25.00.

C. Non Routine EXPENSES

MCAD will only reimburse member attorneys and their sub-providers for extraordinary indigent defense expenses if:

1.) MCAD has pre-authorized the expense utilizing the NRE process.

2.) The expense is within the guidelines and the approved amount.

3.) MCAD has properly approved a deviation from the guidelines.

4.) In extraordinary cases, an NRE may be approved after the expense is incurred. In cases when the submitted NRE did not cover the actual amount of the expense or when the NRE process was not used before the expense was made, if the request complies with the indigent defense policies and procedures and the total amount is still reasonable and necessary. However, this post-authorization will only be accepted with written explanation by the attorney detailing the exigent or extraordinary circumstances that existed requiring the expense to be incurred before requesting authorization. This written explanation is necessary to justify the after-the-fact approval or increases and provide a reasonable audit trail.

    Billing statements that are submitted for payment that are "not pre-approved" or are for "amounts above" the pre-approvals will require this written explanation from the member before they can be processed. The lack of planning and following the pre-approval process will delay payment at least one billing cycle due to the extra paperwork that must be done by the MCAD office.

5.) Non Routine Expense authorization decisions made by the Executive Director may be appealed using the same policies and procedures as a Fee Review Appeal. **(See Section 1.0 D)**

Extraordinary Expenses include, but are not limited to:

1.) **(INTERP)** Interpreter Services.

2.) **(INVEST)** Investigator Services.

3.) **(EVAL)** Psychiatric/Medical Evaluations.

4.) **(EXPERT)** Expert Fees and **(WIT FEE)** Witness Expenses.

5.) **(TRANS)** Transcripts/**(COPY)** Photocopies/**(MISC)** Audio or Video Tapes.

6.) **(RECORDS)** Records/Reports from Outside Sources.

7.) **(TRAV)** Extended Travel/Lodging Expenses.

8.) Extraordinary Expenses may also include any **(O-O-P)** Out-of-Pocket Expenses such as **(CLERK)** clerk or **(ASSOC)** associate time that has been pre-authorized as an expense, can be incurred outside of overhead costs.

8.0 SPECIFIC GUIDELINES FOR Non Routine EXPENSES

All the services listed below require pre-approval by utilizing the MCAD Extraordinary Expense Authorization (NRE) process. All payments for these services must be processed through the MCAD Office. At no time, are Sub-providers to be paid by MCAD attorneys. These payments must be properly accounted for and tracked for 1099 Contractor tax purposes and reporting to SCA. **(See Section 16, Exhibit # 4) You must try to find a Sub-provider at or below the rates listed in these guidelines. If the attorney is unable to do so, the attorney may request a deviation from these rates but must indicate that they have tried to find a Sub-provider at these rates and/or why a Sub-provider who charges greater than these rates is necessary.**

A. **(INTERP)** INTERPRETER SERVICES

Language Interpretation Services are not to exceed $25.00 per hour ($32.50 per hour for Court Certified Interpreters). MCAD attorneys are responsible for arranging for interpretation services within the guideline rate for their out-of-court meetings such as office appointments and jail visits. If counsel requires an interpreter to be present at any in-court proceeding for the defense purposes only, then the attorney must make the arrangements. The courts arrange for interpreters and specialty interpretation services for in-court needs. For example: During a jury trial the Court shall arrange for the interpreter for Court functions and the defense attorney shall arrange for the interpreter to be with the Defendant. For specialty interpretation services, such as American Sign Language or other uncommon language interpretation, MCAD has the authority to approve a guideline rate variance.

B. **(INVEST)** INVESTIGATOR SERVICES

Investigation Services are not to exceed $25.00 per hour. Investigators are required to be licensed by the Oregon Board of Investigators (OBI). MCAD Attorneys are responsible for deciding which of their cases require the services of an investigator and which OBI Investigator to hire. The investigator must receive a copy of the NRE authorizing the investigative hours along with clear and concise investigative goals and direction. If the investigation is going to take more hours than what has been pre-authorized, the attorney must request additional authorization of time by providing more information on the tasks to be completed. These pre-authorizations are very important and MCAD will only pay the total hours pre-approved on the NRE that is filed in the MCAD office.

C. **(EVAL)** MEDICAL EVALUATORS

When the attorney is requesting authorization for funds to hire medical experts a reason should be stated or a desired result explained on the extraordinary expense authorization form.

1.) PSYCHIATRISTS, PSYCHOLOGISTS, PHYSICIANS EVALUATIONS are limited to:

a.) Examination: not to exceed $300.00
b.) Report: not to exceed $75.00
c.) Consultation with Attorney: not to exceed $75.00 for one hour
d.) Testimony: not to exceed $60.00 per hour.

2.) MEDICAL EXPERTS STANDBY FEES:

MCAD will pay standby fees for medical experts only when the court or opposing counsel is responsible for incurring the standby expense. For example, the trial court refuses to take testimony out of order or grants opposing counsels belated

request for a continuance over appointed counsel's objection after the expert is on standby.

3.) MISSED MEDICAL OR PSYCHOLOGICAL APPOINTMENTS:

The party, counsels, or court responsible for the missed appointment is responsible to pay for it. MCAD will pay for a missed appointment only:

a.) When an indigent person with appointed counsel is responsible for missing an appointment because of illness, injury, lack of capacity, or other good reason which prevented the timely cancellation of the appointment, and is not attributable to another party, to counsel, or to the court.

b.) When the indigent person requesting the appointment was personally responsible for the missed appointment and cannot show good cause; however, MCAD will not pay for a second or a later appointment for the same purpose.

The person seeking payment from indigent defense funds has the burden to establish that the indigent person was responsible for the missed appointment.

D. **(EXPERT)** FORENSIC SERVICES

Counsel should consult first with the state crime lab and the state medical examiner to determine whether counsel requires extensive independent forensic services. The State Court Administrator's Office has a contract with Intermountain Forensics and Intermountain Forensic billings are sent directly to SCA. The attorney is still required to obtain pre-authorization for expert forensic investigation; the MCAD office must have the case details on file.

MCAD will pay up to $75.00 per hour for forensic services, including but not limited to:

1.) Out-of-court testing and examination (of blood, bullets, hair, etc.);
2.) Testimony in-court.

The hourly fee includes all overhead expenses, including secretarial services and routine travel within 60 miles of the provider's office.

E. **(EXPERT)** HANDWRITING ANALYSIS

MCAD will pay up to $150.00 per hour for handwriting analysis.

F. **(POLY)** POLYGRAPH TESTING

Polygraph examination and report not to exceed $400.00. MCAD will authorize polygraph services sparingly and only when the service is necessary to an adequate trial defense or negotiated disposition. MCAD will not pay polygraph expenses for testing the truthfulness of communications between an indigent client and his or her appointed counsel.

G. **(CLERK)** LAW CLERK, LEGAL ASSISTANT, PARALEGAL

MCAD will reimburse counsel for law clerk, legal assistants, or paralegal services when pre-authorization is obtained as an out-of-pocket expense, not to exceed $15.00 per hour. Paraprofessionals include law clerks, legal assistants, and trial assistants. Counsel may

request reimbursement only as an out-of-pocket case expense. The attorney must provide the paraprofessionals time records by dates, time reported in tenths of an hour, and description of work performed in order to be reimbursed.

9.0 INTERIM BILLING

A. IN GENERAL

Interim billing involves many extra steps throughout the billing process. The attorneys, sub-providers, and the MCAD office all must handle these billings differently and it is generally discouraged except in certain circumstances where it is appropriate.

MCAD may approve an Interim Billing for:

1.) Sub-providers who have completed their work on a case and the case is ongoing (+3 months);

2.) The attorney and all sub-providers, if the case is complicated, and ongoing (+ 6 months);

3.) The attorney and all sub-providers, for ongoing SED contempt cases (+6 months/+$200.00);

4.) The attorney and all sub-providers, for murder and aggravated murder cases (quarterly); or

5.) Partial payments when the billing statement is being held/reviewed by the Executive Director.

B. PRE-APPROVAL TO INTERIM BILL REQUIRED

Pre-approval from the MCAD office is required in order to submit an Interim Billing. Approvals to Interim Bill must be pre-planned, requested, and approved in advance. Approval will not be given on cut-off days and billing statements received without pre-approval will not be processed within the current batch. The MCAD office completes an "Interim Billing Authorization Form" which requires information about the case much like an Extraordinary Expense Authorization. Then there are some specific questions about the case(s), such as, when were you appointed to the case(s), what is the next major event in the case(s), and how many hours have been worked on the case(s)? Depending upon the answers to these types of questions, approval to interim bill is received or denied.

However, even with pre-approvals of Interim Billings, there is no guarantee that they will be processed within the bill batch for which they were received. Every effort will be made to attempt to process these bills but it will depend upon the MCAD office workload, timelines and volume of regular billing statements received. Regular bills have a priority over interim bills.

C. INCLUDED ON THE INTERIM BILLING

The attorney must bill for all the case time and expenses incurred within a specific time frame on the interim billing. This means that any sub-providers or out-of-pocket case expenses from the date of appointment up to a specific date must be included. The attorney and any sub-providers decide on a cut-off date, such as the end of a 6-month period or the end of a quarter and bill all the time and expenses up to and including that specific date.

D. RECEIPTS ON ALL OUT-OF-POCKET CASE EXPENSES

When interim billing on a case the likelihood of going over the $25.00 expense amounts that require receipts is common. It is therefore necessary to provide receipts for all out-of-pocket case expenses that are incurred by the attorneys and their sub-providers on each interim billing of the case.

E. INTERIM BILLING BILL HARDCOPY FORMAT

For interim bills, there are a couple of differences when completing the Bill Hardcopy:

a). Each Interim Bill must have the same Unique ID number.

b.) Each Interim Bill must reflect the original appointment date.

c.) There should not be a date in the Final Date field until the final billing.

d.) The disposition on all charges should be "INTR" until the final billing.

e.) Charges are listed with CSS numbers only until the final billing then the CHS is entered if appropriate.

10.0 SUPPLEMENTAL BILLING

A. IN GENERAL

There are certain instances when it is necessary and appropriate to request a supplemental billing. This usually occurs when there is a major oversight or error in the billing process or at the request of the courts when further work on a case is necessary. Attorneys are encouraged to avoid unnecessary supplemental billings due to the extra steps that are involved to process this type of billing.

MCAD may approve a supplemental billing when:

a.) A major omission or error such as neglecting to pay a sub-provider occurs.

b.) With pre-approval, substantial time and expense has been logged after billing the case.

c.) The courts request additional work on the case(s).

B. PRE-APPROVAL TO SUPPLEMENTAL BILL REQUIRED

Pre-approval from the MCAD office is required in order to submit a Supplemental Billing. Approval to Supplemental Bill must be pre-planned, requested, and approved in advance. Approval to Supplemental bill will not be given on cut-off days and billing statements received without pre-approval will not be processed within the current batch. The MCAD office completes a "Supplemental Billing Authorization Form" which requires information about the case much like an Extraordinary Expense Authorization. Then there are some specific questions about the case(s), such as, what is the reason for the supplemental billing request, when did you previously bill the case(s), and how many hours have been worked on the case(s)? Depending upon the answers to these types of questions, approval to Supplemental bill is received or denied.

However, even with pre-approvals of Supplemental Billings, there is no guarantee that they will be processed within the bill batch for which they were received. Every effort will be made to attempt to process these bills but it will depend upon the MCAD office workloads, timelines and volume of regular billing statements received. Regular bills have a priority over supplemental bills.

C. INCLUDED ON THE SUPPLEMENTAL BILLING

Attorneys complete the billing statement using the same Unique ID number and case details as previously submitted/corrected. The attorney needs to ensure that there are no overlapping times or expenses on any supplemental billings. The billing statement must contain only the time and expenses not previously submitted or paid.

D. RECEIPTS ON ALL OUT-OF-POCKET CASE EXPENSES

When supplemental billing on a case, the likelihood of having gone over the $25.00 amounts that require receipts are common. It is therefore necessary to provide receipts for all out-of-pocket case expenses that are incurred by the attorneys and their sub-providers on each supplemental billing of the case.

E. SUPPLEMENTAL BILLING BILL HARDCOPY FORMAT

For supplemental bills, there are a couple of differences when completing the Bill Hardcopy:

a.) Each Supplemental bill must have the same Unique ID number as the original bill

b.) Each Supplemental bill must reflect the original appointment date.

c.) The disposition on all charges is "SUPP".

11.0 REVIEW OF ATTORNEY BILLING STATEMENTS

A. IN GENERAL

One of the functions of the MCAD office is to provide an initial review of the attorney billing statements for reasonableness. The process begins on cut-off dates, with a verification of the time and expense calculations to compare the total fees requested with the standard weighted average deviation for the different case types. Billing statements received with total fee requests above the standard average deviations are isolated within two or three working days and given to the Executive Director for further review.

B. EXECUTIVE DIRECTOR FEE REVIEW

The Executive Director reviews any billing statements that exceed the standard averages for that particular case type by $50.00 or more. Upon this initial review, the Executive Director may approve the fees as reasonable and necessary and the billing statement is processed within the same batch.

If an attorney believes that a particular billing statement is likely to be in excess of the standard average deviation, they are encouraged to submit a letter or memo along with the billing statement. The attorney should provide an explanation as to why the time expended or the expenses incurred were reasonable and necessary. If the information submitted is sufficient explanation, the Executive Director may approve the fees as reasonable and necessary and the billing statement is processed within the same batch.

If the Executive Director has any questions or concerns about the billing statement revealed by this review or not explained in an attached letter or memo, then the billing statement is withheld from the current batch. A Fee Review Letter is sent to the attorney requesting that the Executive Director and the attorney discuss the particular case and the billing statement details.

Upon receipt of a Fee Review letter, the attorney has two options:

1.) Contact the Executive Director in person or by phone to discuss the case. While members may contact the Exective Director in person or by phone the best process is to submit a letter or memo to MCAD as set forth in 2, below.

2.) Submit to MCAD a letter or memo outlining any pertinent details. This letter must include information so that the Executive Director can decide whether the time and expenses spent on the case are reasonable and necessary. This must include facts concerning the case, the attorney's time and expenses and how they relate to each other. It may include case strategy and theory. An attempt to develop a defense may or may not be reasonable and necessary given the type of case, the law, and the facts.

Please note that all case details and information provided to MCAD for expense approval or fee review shall be kept confidential.

C. SAMPLE FEE REVIEW MEMOS

The following are examples of fee review memos that provide the necessary and appropriate information:

Example 1: Criminal Case

"This was an unusual case because of the factual issues and the mental capacity of John. John is mentally retarded. He resides in a group home situation that is run by Mrs. Doe. I represented John in 1993 on an indecency charge in the Municipal Court on a limited fee basis. That charge was successfully defended.

In 1994, John was accused of exposing himself to two young girls near Hood Street. I was court appointed and sought to resolve the case by some sort of plea without too much consequence to John who has very limited understanding. He does work at Goodwill and he gets around. I forgot to mention that John is 63 years old. While we were negotiating, John was accused of sexually touching a peer who worked at Goodwill with him. Our investigation showed that this was either a mutual expression of affection by two consenting mentally handicapped adults or John was enticed by the "victim" to make advances. At any rate, Judge A because of her sensitivity to the retarded, kept this case when she became a Circuit Court judge and with her help I got the DA to not challenge a psychological report by Dr. C who is not on the DA list. We got a favorable result that included the treatment that Dr. C recommended and that John was already doing and eliminated any chance of jail, which the DA tried to do.

The short answer then is that this was a complicated misdemeanor with two separate incidents of alleged sexual crimes which included a psychological report and that ended up in victory and took the time and the effort that is listed on my billing."

Example 2: Criminal Case

"Jack was accused of attacking two aids in the Oregon State Hospital. Jack was there on a prior Psychiatric Security Review Board (PSRB) case from Portland. His PSRB jurisdiction ended and then he became a civil commitment. While on this commitment he was on the telephone and was ordered off by a female aid. This upset Jack. He knew it upset him so he went to ask the aid and nurse who were hiding in the nurse's station for some medication to calm him down. They blew him off so this got him madder and he jumped on top of the nurse. Jack is a big man. This broke one of her vertebrae although she did not know this until she went to the hospital on her own power. The aid came to her aid and Jack hit her. During this out of control time he said something that made them believe he was trying to kill them.

Jack unfortunately is still severely mentally ill. He was and is unable to aid and assist. I had Dr. S do an evaluation that I attended and tape-recorded. I believe that because I was there, Dr. S agreed that Jack could not aid and assist. He kept calling Dr. S by a different name even though Dr. S kept telling him his right name.

All of the above took the time that this case did and this is why it is over the cut off amount."

Example 3: Criminal Case

Mr. Z was charged with sexual abuse in the first degree, and charged under Ballot Measure 11. He was facing 75 months in prison under a ballot measure 11 sentence. Mr. Z agreed that he was guilty of something, but not to the degree to warrant a 75-

month sentence without the possibility of good time or parole. Based on that, Mr. Z wanted to take the case to trial.

Since the case was scheduled for trial, all necessary trial preparation and investigation was conducted. On the day before trial (a Friday), the district attorney offered a deal wherein defendant would plead to attempted sexual abuse in the first degree, a non-ballot measure 11 crime, agree to a sentence of 46-50 months, and he would be eligible for good time and credit for time served. I spent considerable time over that weekend discussing matters with the defendant, and he agreed to accept the deal. A change of plea and sentencing occurred on Monday; the date set for trial.

Example 4: Criminal Case

This letter is to explain my fee statement in the above-referenced matter. I was appointed to represent Sam on a charge of Robbery in the Second Degree and miscellaneous misdemeanors. Sam went into a convenience store, put his hand into his pocket, and gave the teller a note saying, "Give me all the money out of the till." The clerk replied, "Is this a joke?' To which Sam replied, "No, man, I need the money." The clerk gave Mr. Sam $81.00. Sam had been in that store many, many times before. The clerk knew his name. Mr. Sam was not wearing a disguise. Upon his arrest, Sam gave the SPD Detective a full and complete confession corroborating the clerk's story. In sum, we had nothing for trial. So we sought sentencing under ORS 137.712 (SB 1049).

Sentencing was originally set for July 12, 1999, but after arguments, Judge G asked both parties to submit written memorandum of law. We returned on July 19, 1999, but the court had not reviewed the memorandum thoroughly so we were set-over to August 4, 1999. Today we appeared for sentencing, and the Judge sentenced Sam under Ballot Measure 11 to 70 months DOC. However, the good news is that the Judge may have committed reversible error requiring re-sentencing by denying Sam his right of allocution.

Example 5: Criminal Case

Mr. Y pleaded no contest on the day of trial. He changed his mind several times in the course of his case, including backing down on a plea offer on the eve of trial with another attorney, for whom I substituted. He did have a couple of issues worth researching (proof of the value of goods; state of mind), but the case was still a lock for the State. Considerable time was spent in negotiating a very good deal (work center, continue-the p/v on an Assault IV conviction, no contest, and statutory plea), as well as just dealing with my client. Since he still had not made up his mind by the day of trial, I went through all the preparation I normally would do. All the time was necessary and reasonable to obtain a favorable outcome.

Example 6: Habeas Corpus case

"This was an unusual Habeas Corpus case because of the legal issues involved. The major issues were the interplay of Corrections and the Parole Board. Mr. B attempted to discharge his sentence but was released two days before his good time date even though he refused parole. Corrections does this so that the person is on parole and they can keep them on the string. If the client is ever revoked then all of their previously granted good time is eliminated and they are put back in the institution until they have served their sentence again two-days before their new good time date. The cycle continues. Full employment of corrections and parole officers combined with the feeling the society is better off interfering with the individual's lives after they have done 99 % of their time. This is one of Paralegal Y's pet ideas. The problem is that these

inmates are always released after the habeas is filed and then it gets dismissed for mootness. This was the same but in this case before we got to the actual dismissal I filed a memo on the issue and a reply as to why the case was not moot.

Thus it took more time than normal because of the research and writing and contact with Paralegal Y".

Example 7: Post Conviction case

"X was charged with Kidnapping, UUMV, Reckless Driving and Attempting to Elude in Lane County. He was and is mentally ill. He currently is in partial remission and under the jurisdiction of the PSRB. He has not been released from the Oregon State Hospital (OSH) and the hospital currently has no plans to release him because he is unsuccessful in getting sex offender treatment because he does not view himself as being a sex offender. In all likelihood he is not a sex offender.

On the streets of Eugene he saw a woman and thought that she was in danger even though she was just talking with her friends. He went over to her, grabbed her arm and forced her towards the car that he had just stolen. When she screamed, he let go and ran away. The police did a chase and eventually did catch him. During the interviews with the Police he was talked into admitting that he did this for some sexual purpose. He was found guilty but insane of Kidnapping in the First Degree after a stipulated facts trial. The remaining charges were dismissed. He was sent to OSH. Because of his interview with the police, he has been labeled a sex offender at OSH and thus has to go through more programs, even though he had not been charged with or had a history of sexual offenses.

This was his major complaint although we could not do much about this except the normal Post Conviction. The PC took some extra time because we needed to get the transcript and Mr. X kept calling all the time and being unclear in his letters and telephone contact because of his mental illness. Judge Y did his threats about what the result would be if he granted the PC but Mr. X was fixated to get out of OSH. He did not. The case is currently on appeal. The main reason that it took the extra time is the client's mental illness and dealing with him and OSH.

Example 8: Post Conviction case

Jane was accused of Custodial Interference in Clatsop County. I was originally appointed to represent her in Clatsop County because she was out of custody. This appointment came with the understanding that the case would be transferred to Marion County. I had to get the agreement of Josh Marquis (Clatsop DA) and the State which was not hard to do but took time. Jane was and is living in Bremerton, Washington and the communication was difficult. Several times I had to locate her and this took extra time.

The rest of any extra time on this case was mainly spent on understanding the underlying charge and getting ready for trial on the Post Conviction.

Jane and her husband were in controversy concerning their split up. She had taken the children and had moved to Washington to establish residency to start a divorce. At this time her husband got a restraining order against her with an accompanying custody order by lying to the Clatsop County Court. CSD then got involved and they both tricked her into giving the husband visitation in Astoria and when she showed up they arrested her for violating the custody order. She then started the divorce in Washington after she was released and got a custody order in Washington giving her

custody. The actual timing of these events was open to controversy during her criminal trial and did not really get any clearer in the Post Conviction. She could not understand how she could be guilty of a crime when her husband had lied to the Court to get custody. She figured that she should not be convicted and blamed her attorney for the conviction. This case went to a Court trial in front of a pro tem Judge C who felt that she was technically guilty because of the timing of the orders and she had to follow the order even though it might have been a fraudulently created order. When it came to sentencing the DA wanted jail and to his credit Judge C saw through that and only gave her probation. She still does not believe that she is guilty and wanted this off of her record and she was adamant throughout the case that she was right (and she might be).

D. SCHEDULED FEE REVIEW TIMES

The Executive Director is available to conduct fee reviews anytime that his schedule allows and that he is in his office. Members may contact the Executive Director directly to arrange a personal meeting or telephone appointment, or they may call the MCAD office to schedule a convenient time to contact the Executive Director. Fee reviews are not conducted on Friday afternoons.

During the fee review, the member and the Executive Director discuss the particular case(s) and the time spent on the case(s). The Executive Director produces a brief memo regarding this discussion of the case(s) and the billing statement is processed with any changes agreed to during this discussion. The Executive Director's memo is filed with a copy of the Fee Review letter and the billing statement. The billing statement is then processed within the current billing batch if at all possible.

If the supporting information is deemed insufficient, and/or the Executive Director does not agree that the time or expenses were reasonable and necessary, the Executive Director may propose an immediate resolution to the fee dispute. If agreed to by the member, the resolution will go into effect and the fee review will be resolved with no right of appeal.

If the member does not agree with the resolution, they may appeal to the fee review as outlined below. The Executive Director may adjust the fee and/or the expense to the amount he feels is reasonable and necessary and the adjusted billing statement is processed.

E. APPEAL OF A FEE REVIEW

If the member disagrees with the decision of the Executive Director, they may appeal the decision within ten business days of being informed of the Executive Director's decision. The member must submit a written request to the MCAD office indicating that they wish to appeal the Executive Director's decision to the Fee Review Committee.

The Fee Review Committee consists of two members of the Board of Directors and 2 member attorneys who will meet to review the particular billing statement. The Executive Director and the member may appear before the Fee Review committee either in writing or in person and submit any information relevant to the decisions to be made by the Committee.

The Fee Review Committee will review all materials made available to decide whether or not the proposed fees and/or expenses are reasonable and necessary and comply with MCAD's and Indigent Defense's payment rules. The Fee Review Committee will make its decision as soon as possible and will inform the member and MCAD of its decision either verbally or in writing if necessary.

If the attorney disagrees with the decisions of both the Executive Director and the Fee Review Committee, they may appeal to the judge assigned to the case or if no judge has been assigned, to the Presiding Judge. An appeal to the Court may be done by filing a Motion, Affidavit, and Proposed Order for Payment of Fees and/or Expenses with the Court or by another method as directed by the Court. The member is obligated to immediately notify MCAD and/or the Executive Director of this appeal either verbally or in writing. The member is also obligated to immediately provide MCAD with copies of any paperwork submitted to the Courts in support of this appeal. The Executive Director may take appropriate steps to inform the Court of MCAD's position and shall notify the attorney of any action to be or that has been taken. Unless not authorized by law, rule, or MCAD's State Contract, MCAD shall pay any disputed fees and/or expenses that the Court or the Fee Review Committee orders as a result of the appeal. Once the Court's decision is made and the Order provided to MCAD, the bill, or approved remainder thereof, will be processed within the current billing cycle.

12.0 EXHIBITS ATTACHED TO MANUAL:

Exhibit **#1**	CERTIFICATION OF ATTORNEY QUALIFICATIONS
Exhibit **#2**	MCAD BILL HARDCOPY
Exhibit **#3**	SAMPLE TIME AND EXPENSE DETAIL
Exhibit **#4**	MCAD EXTRAORDINARY EXPENSE AUTHORIZATION (NRE)
Exhibit **#5**	MCAD SPECIFIC BILLING CODES
Exhibit **#6**	MCAD ALPHABETIC SORT - ORS NUMBERS AND CODES
Exhibit **#7**	MCAD NUMERIC SORT - ORS NUMBERS AND CODES

Att-4

Marion County Association of Defenders, Ltd.

Position Description

POSITION TITLE: **EXECUTIVE DIRECTOR**

HOURS:	Part time - 30 Hours Per Week
LOCATION:	130 High Street S.E., Salem, Oregon 97301
EMPLOYEE:	Steven H. Gorham
REPORTS TO:	MCAD Board of Directors

The Marion County Association of Defenders, Ltd., (MCAD) is an Oregon Non Profit Corporation, established to provide indigent defense services to the criminally accused and indigent incarcerated in Marion County. MCAD is a consortium of attorneys joined together for this purpose.

SUMMARY: The Executive Director of MCAD is responsible for all aspects of the development and management of the corporation as well as overseeing the daily operations of the business office. The Executive Director is the Chief Executive Officer (CEO) of the corporation.

MAIN DUTIES AND RESPONSIBILITIES:

Historically, the Executive Director's duties involved the research, development and negotiation of a contractor's preliminary agreement with Indigent Defense Services Division (IDS) of the State Court Administrators Office (SCA). The initial planning of MCAD encompassed the development of the Corporate Bylaws, the Articles of Incorporation, and application for Tax Exempt Non-Profit status with the Internal Revenue Service for the purpose of effectively creating and maintaining the corporate entity. In addition, the systems for the payment, review, and operation of MCAD were either personally established by the Executive Director or under the direction of the Executive Director with the help of MCAD members and staff.

The duties and responsibilities have been and will continue to be adjusted and augmented from time to time, as MCAD's purpose, scope, issues, and obligations change.

The Executive Director acts as a liaison between the State Court system, Marion County Trial Courts, the Marion County Judges, the Office of Public Defense Services, the Public Defense Services Commission, MCAD

members and any other individuals and/or organizations interested in Marion County Indigent Defense services. The position requires the Director's attendance at different meetings, for the purpose of liaison, negotiating and handling different situations. The Executive Director must help solve problems, make changes, improve processes, policies and procedures dealing with indigent defense in Marion County and the State of Oregon.

The Executive Director is responsible for the corporations' business operations, as well as performing a wide variety of both organizational and operational tasks. Duties involve securing office space, hiring employees, providing training, overseeing employees, overseeing the development of the computer based and other operational systems, the holding of monthly Board of Directors meetings, monthly and annual membership meetings and to ensure that all corporation business requirements are fulfilled.

The Executive Director is responsible for the continuing contract between the State of Oregon and MCAD. These duties include continual consultation about contract issues with the Board of Directors and the State of Oregon. They also include either beginning negotiation and/or facilitating the negotiations of new contracts with the State of Oregon. This responsibility includes providing those interested with factual information, including statistical information to arrive at a fair contract between the State and MCAD.

The Executive Director is ultimately responsible for the effective functioning of MCAD's committees including the Quality Assurance Committee and the Education Committee. The Executive Director has certain direct responsibilities under the Quality Assurance Process to deal with informal and formal complaints against MCAD's members.

The Executive Director acts as a sounding board for member, court, staff and others who need a vehicle to air their concerns and the Executive Director attempts to resolve these concerns when appropriate.

The Executive Director is ultimately responsible to ensure that there are sufficient number of members to do the contract work.

Weekly duties include ultimate responsibility for the proper payment of the corporation's members, subproviders and creditors. This involves working within the timelines for processing billings to peruse and review billings that exceed established parameters for processing and payment.

The task involves careful scrutiny of the attorney timeslips, analyzing and comparing new billings of the same type from other attorneys, and reviewing attorney explanations to determine if the time expended is reasonable and necessary and therefore payable with the State of Oregon's Indigent Defense funds. The Executive Director determines which bills are processed or are deferred awaiting further explanation. The Executive Director personally communicates with member attorneys whose billings require further explanation or clarification, prepares memos regarding the unusual case particulars and determines any fee reductions, if necessary.

The Executive Director analyzes and approves all Non Routine (formerly Extraordinary Expense Authorizations) that exceed the in-office parameter for costs. It is often necessary for the Executive Director to contact the attorney making the request to discuss the need and benefit of the expense. These functions sometimes include helping the MCAD attorney find and fund the appropriate resources to properly defend their client.

The Executive Director works closely with the computer consultant and staff obtaining regular reports and statistics on membership billings to facilitate the fee review process and to monitor the contract expenditures and budgets. The Executive Director delegates tasks and duties to the computer consultant as required or requested. The Executive Director personally enters billing information onto spreadsheets to monitor the individual case type averages and other contract expenditures.

Monthly duties include preparing agendas, arranging and attending monthly Board of Directors and membership meetings, producing membership mailers to share information and keep the members current with changes and announcements.

QUALIFICATIONS: The Executive Director must be admitted to the Oregon Bar, have several years of legal experience in the area of criminal defense, and have knowledge of how Oregon's Indigent Defense system operates.

Revised 6/2005

MCAD NEW MEMBER INFORMATION SHEET

MCAD, the Marion County Association of Defenders, Ltd, is a non profit Oregon corporation which is the major indigent defense contractor for Marion County. MCAD is a consortium of independent member attorneys with offices in Marion County or the City of Salem. Membership is individual to a specific attorney, but members may be in any type of office arrangement as long as the member has an office in Marion County or the City of Salem. (Sole practitioners, partners or associates in large or small firms, or other office sharing arrangements are welcome, but just because a partner is a member does not mean that all of the partners or the firm are members) Members may take private clients in any areas of law that they so chose, including criminal matters in Marion County or elsewhere.

MCAD provides the Courts in Marion County with attorneys who do all types of appointed indigent defense work including all District and Circuit Court criminal cases, all Marion County Post Conviction cases, all Marion County Habeas Corpus cases, and all SED (support enforcement division) defendant cases. All Marion County criminal appointments from misdemeanors to Aggravated Murder cases must come to our membership, except in extraordinary circumstances. At this time, our contract does not extend to mental commitment or juvenile court criminal appointments although it does include juveniles who are charged in adult court.

We also provide various local and appellate courts with the names of our members who are willing to take appointments in many types of court appointed appellate work.

Attorneys are compensated at the statutory Court appointed rate of $50.00. As an incentive to do certain types of work, our contract allows an appointed rate of $60.00 in certain types of cases. Aggravated Murder cases are paid at $75.00 per hour. Billings for closed cases are submitted every two weeks and usually paid within two weeks of submission. Out of pocket and non routine expenses (for example investigators, copying charges, law clerks) are paid in a similar manner by the state upon pre approval of the MCAD office.

At this time we allow our attorneys to volunteer to take appointments in the various listed areas. Because of workload and contract obligations, we at times force members to take appointments in areas that we do not have enough volunteers. In the past this has been done in the Post Conviction and Habeas Corpus cases. All attorneys must be qualified under the State Indigent Defense Qualification Rules to take the type of appointment that they accept.

We also provide to the Marion County Misdemeanor Court bilingual Spanish speaking attorneys for appointments to indigent defendants who primarily speak Spanish.

Normal criminal appointments are made on an attorney of the day basis in the Felony and Misdemeanor Courts. The attorney of the day receives all of the new appointments on their particular days. Each attorney can sign up for approximately a Felony and Misdemeanor court day every month. Appointments per attorney day run from a low of two to a high of 25 depending on the day.

We also have a Spanish speaking attorney of the day rotation in the Misdemeanor Court. This rotation should average one appointment day every week. Other appointments are made from rotating lists.

MCAD's contracts to do these services started in November of 1993 and run until December 31, 2005. It is likely that this contract or a modification of it will continue for another two year period, at least up until December 31, of 2007, although this is not guaranteed.

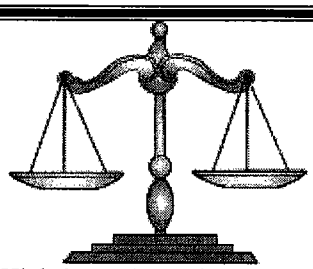
New members are on probation for one year. All new members are required to enroll in MCAD's mentoring program. This program provides members with a mentor of their choice upon the approval of the mentoring program to help integrate the member into the Marion County legal system. This program is individualized based on the experience and needs of the new member.

Att 5

MCAD

MARION COUNTY ASSOCIATION OF DEFENDERS, LTD

www.mcadlaw.com



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OCDLA Email Summary
June 30, 2005 – July 13, 2005

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NOTICES:

MEMBER MEETING

The next Member's Meeting will be on July 19, 2005

RESEARCH BANK MATERIALS

Visit the MCAD web page at www.mcadlaw.com to get motions, pleadings, articles, cases and more! Several new features have been added to facilitate your research. Take advantage of the "POWERSEARCH" search engine to facilitate your search of the website.

BRIEFS AND MEMOS

Please submit your recent briefs and memos to the Research Bank. Contact the MCAD clerk, Viva Foley. Email: mcad@mcadlaw.com

MCAD WEBPAGE SUGGESTIONS

Please give the MCAD Law Clerk, Viva Foley, any suggestions on what you would like to have available on the MCAD Webpage. Feel free to email at mcad@mcadlaw.com

SUBSCRIPTION SERVICES

To subscribe to the MCAD Pond: mcadpond-subscribe@yahoogroups.com, and you will quickly be added to the list serve. To unsubscribe. mcadpond-unsubscribe@yahoogroups.com. To subscribe to Willamette Law Online Service: http://www.willamette.edu/wucl/wlo/subsc.htm

US SUPREME COURT

Note: The United States Supreme Court has ended its 2004 session. It will begin the 2005 session in October.

Rice v. Collins
Certiorari Granted: 06/28/05
No. 04-52
Court below: 348 F.3d 1082 (9th Cir. 2004)
Full text: http://caselaw.lp.findlaw.com/data2/circs/9th/0156958p.pdf

CRIMINAL PROCEDURE (Whether A Trial Court Judge's Findings are Sufficient When Assessing Attorney's Reasons For Striking a Minority Juror During Voir Dire)

The issue in this case is whether a trial court judge's ruling should be given deference when determining the truthfulness of an attorney's reasons for striking a juror.

Collins was convicted of possession of 0.1 grams of rock cocaine. Being his third felony conviction, he was sentenced to 25 years to life under California's "three strikes" law. At trial, the prosecutor made a peremptory challenge of one African American prospective juror. The trial court listened to the prosecutor's race-neutral reasons for using a peremptory strike against an African American prospective juror. After weighing the evidence and arguments for and against the peremptory challenge, the trial court judge concluded that prosecutor's reasons for making the strike were race-neutral. Collins filed a writ of habeas corpus with the California state appellate court. That court denied his writ of habeas corpus. Collins then filed for a writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit (Court of Appeals) arguing that the trial court erred in granting the prosecutor's peremptory challenge. In reversing the lower court's decision, the Court of Appeals explained that the lower opinion completely disregarded evidence contradicting the trial judge's decision that the prosecutor was being truthful in her arguments for striking the juror in question. The Court of Appeals cites evidence that the prosecutor said the jurors in question were both young. The record reveals, however, that the juror was a grandmother. Furthermore, the prosecutor stated that she was also challenging the juror due to her gender, a ground which the trial judge immediately rejected as unconstitutional. Most importantly, however, the prosecutor stated that the juror displayed disrespect by rolling her eyes at a question which she was presented. The trial judge stated that he did not see the juror roll her eyes. Based upon these facts, the Court of Appeals held that state appellate court's characterization of prosecutor's proffered reason for striking African-American prospective were unreasonable determinations of the facts. [Summarized by Tobin Ernst.]

House v. Bell
Certiorari granted: 06/28/05
No. 04-8990
Court below: 386 F.3d 668 (6th Cir. 2004)
Full text: http://caselaw.lp.findlaw.com/data2/circs/6th/006136p.pdf

CRIMINAL PROCEDURE (Whether a State's Doctrine of Waiver May Bar Future Claims and Whether Establishment of Innocence May Revive Barred Claims)

The issue in this case is whether a state court's application of an objective waiver standard constitutes an adequate and independent procedural bar to another claim and whether petitioner's establishment of actual innocence is sufficient to revive barred claims.

Convicted of murder and sentenced to death, Paul House (House) unsuccessfully appealed his conviction and sentence. Claims of ineffective assistance of counsel were submitted, but not argued. House appealed to the Tennessee Court of Criminal Appeals alleging jury instruction errors. The Tennessee Supreme Court denied leave to appeal and the United States Supreme Court (the Court) denied certiorari. A second petition for post-conviction relief was filed and denied by the trial court. The Court of Criminal Appeals affirmed. The Tennessee Supreme Court remanded for reconsideration in light of a recent but later withdrawn opinion. The Court of Criminal Appeals remanded to the trial court for further consideration of a waiver issue, but the remand was stopped when the Tennessee Supreme Court re-instated the trial court's initial denial of House's second post-conviction relief. The

Tennessee Supreme Court then re-instated the trial court's original denial of House's relief. House filed a habeas corpus petition and the United States District Court for the Eastern District of Tennessee (District Court) granted the State's summary judgment motion for a majority of the claims. The district court denied habeas relief on House's remaining claim that the procedural default of his ineffective counsel claims was excused because he was able to establish his actual innocence. House then appealed to the United States Court of Appeals for the Sixth Circuit in regard to two issues. First, whether the state waiver rule was applied in a such a way as to provide an adequate and independent state ground that procedurally defaulted his ineffective assistance to counsel claims and second, whether House showing of actual innocence was sufficient to revive House's claims. The United States Court of Appeals determined that the state's determination of procedural default was proper and that House failed to establish actual innocence. [Summarized by Valerie Hedrick.]

9TH CIRCUIT

Fields v. Legacy Health System
No. 03-35386 (06/22/05)
Before Circuit Court Judges Graber, Gould, and Berzon
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/5F428C53F518C12A882570270081FC1E/$file/0335386.pdf?openelement

CONSTITUTIONAL LAW / EQUAL PROTECTION AND DUE PROCESS / WRONGFUL DEATH STATUTE OF LIMITATIONS

Opinion (Gould): In 1994, Laura Fields had a Pap smear at Legacy Hospital in Portland (Legacy), Oregon. She was told the results were normal. In 1995, Laura Fields and her husband, George, moved to Washington along with their son. In 1996, she had another Pap smear and was informed that she had cervical cancer. Laura died in 2000, while still residing in Washington. As a personal representative of her estate, George Fields brought a diversity action in district court in Washington for wrongful death against Legacy for failing to diagnose Laura's cancer. He then filed an identical action in Oregon district court. Legacy moved to dismiss the Oregon action and the court granted the motion on the ground that it was barred by Oregon's statute of limitations and Oregon's statute of repose. The Washington court also applied Oregon law and dismissed the action. Fields appealed both dismissals and they were consolidated for the Ninth Circuit to review. The Ninth Circuit held that both the Washington and Oregon courts were correct in applying Oregon law because Oregon had the most significant contacts—the conduct causing the injury occurred in Oregon, Legacy is an Oregon corporation, and Laura Fields lived in Oregon at the time of the injury. The Ninth Circuit also reviewed Fields' argument that Oregon's wrongful death statutes of limitations and repose violate the equal protection and due process clause of the U.S. Constitution. Fields claimed these statutes discriminated against claimants whose decedents happen to live more than three years after discovering the injury and five years sustaining the injury causing death. The Ninth Circuit held that these statutes did not violate the U.S. Constitution because they had a rational basis. They helped to avoid stale claims and limit the costs of litigation and medical care. AFFIRMED. Concurrence by Gould. [Summarized by Mary Tollefson]

U.S. v. Camacho
No. 04-10078 (06/24/05)
Before Circuit Judges Thomas, Paez, and Burns, District Judge for the Southern District of California
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/152B63F1F22C43D98825702900806B74/$file/0410078.pdf?openelement

CONSTITUTIONAL LAW / FIFTH AMENDMENT / DOUBLE JEOPARDY

Opinion (Paez): Victor Camacho purchased a home theater system at the Travis Air Force Base Exchange; however, Camacho "left the Exchange with two." Camacho's squadron commander sanctioned Camacho, including suspension of privileges to use the Base Exchange, official reprimand, reduced performance scores, and required counseling. Subsequently, the Judge Advocate proceeded with criminal prosecution for the theft. Camacho pled not guilty and filed a motion to dismiss based on double jeopardy grounds. A magistrate judge denied the motion and the district court affirmed. Camacho appealed. The Ninth Circuit held that the double jeopardy clause does not apply when the initial punishment was based solely on the government's capacity as an employer, and not as a

sovereign. Camacho's supervisor reprimanded Camacho in manner that was no different from the type of punishment available to a private employer. The Ninth Circuit noted that Camacho presented a question of first impression, but the Ninth Circuit followed the policy established by several sister circuits. Therefore, the lower court correctly denied Camacho's motion to dismiss. AFFIRMED. [Summarized by Matt DeVore]

U.S. v. Nakai
No. 03-10485 (06/22/05)
Before Circuit Judges Reinhardt, Noonan, and Fernandez
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/BF1120C00CAF44358825702D00555858/$file/0310485.pdf?openelement

CRIMINAL LAW / APPEAL / TRANSFER, HEARSAY, JURY INSTRUCTION, MURDER

Opinion (Noonan): On August 17, 2001, Gregory Nakai and his two brothers, members of the Navajo tribe decided to "jack up" two men they had been selling beer to. The men were carjacked, robbed, kidnapped, severely beaten, ultimately shot to death, and their bodies were burned to cover the crime. One of the brothers informed the FBI of the murders in November. Nakai, who shot the driver five times, was convicted and sentenced to life imprisonment. On appeal, Nakai argued that the transfer of the trial from one district court to another deprived him of a fair representation of the community. The Ninth Circuit found that 14.1 percent of the venire were Native Americans and most were excluded because they didn't have phones on the reservation and so could not be reached. Second, Nakai's defense at trial had been voluntary intoxication, and Nakai argued that his brother's statements to the FBI agent about the amount of alcohol Nakai had consumed were improperly excluded at trial. The Ninth Circuit found the statements were inadmissible hearsay. Third, Nakai argued that the conspiracy instruction to the jury was improper, as Nakai was not charged with conspiracy. The Ninth Circuit found that the jury was instructed that it could find an agreement to commit carjacking, robbery, kidnapping, murder, and use of a firearm during a crime of violence and that the evidence established each of the crimes of which Nakai was convicted. Finally, Nakai argued that there was no proof that the driver was alive when he shot him. The Ninth circuit found that the jury could rationally conclude that Nakai "would not have wasted his bullets on a corpse." AFFIRMED. [Summarized by Amber Ames]

Bradley v. Henry
No. 04-15919 (06/22/05)
Before Circuit Judges Ferguson, Noonan, and Rymer
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DB712C04C85EE8EA8825702700824056/$file/0415919.pdf?openelement

CRIMINAL LAW / HABEAS CORPUS / RIGHT TO CHOOSE COUNSEL / "CRITICAL STAGE"

Opinion (Noonan): In 1996, prosecutor's indicted Nicole Bradley for first degree murder, carjacking, possession of a short-barreled shotgun, and attempted robbery. Over the next two years, three different sets of attorneys represented Bradley. In 1998, without Bradley present, Cynthia Dunlevy, who was Bradley's attorney, and Chris Andrian attended an in-camera hearing where Dunlevy asked to withdraw because of conflicts with Bradley. The judge granted Dunlevy's request and appointed Andrian to represent Bradley. After the hearing, Bradley moved to remove Andrian as her attorney. The court refused that request, and a later request by Bradley to replace Andrian. At trial, a jury convicted Bradley of the first three counts of the indictment. Bradley appealed the conviction arguing her exclusion from the in-camera hearing and the denial of her motion to replace Andrian deprived her of the right to choose counsel. The state appellate court denied her appeal, and the California Supreme Court denied review. Bradley then filed a petition for a writ of habeas corpus alleging denial of her right to due process, a fair trial, and counsel of her choice. The district court denied the petition and Bradley appealed. The Ninth Circuit held the in-camera hearing was a "critical stage" in the trial, and Bradley had a fundamental right to be present for the hearing. Because of the seriousness of the charges, Bradley's exclusion from the in-camera hearing deprived her of her right to choose her own counsel. REVERSED AND REMANDED. Concurrence by Judge Ferguson. Dissent by Judge Rymer. [Summarized by David Wilson]

U.S. v. Barken
No. 03-50441 (06/27/05)
Before Circuit Judges D. Nelson, Graber, and Gibson, Senior Circuit Judge for the Eighth Circuit
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/5EBB87757C223FA88825702D00560276/$file/0350441.pdf?openelement

CRIMINAL PROCEDURE / FIFTH AMENDMENT DUE PROCESS / DELAY OF PROSECUTION

Opinion (Gibson): In 1997, Gary Donald Barken, president of Barken's Hard Chrome, dumped corrosive hazardous waste. Riverside County charged Barken with six felony counts for transporting and disposing of hazardous waste. Hard Chrome's corporate entity, Barken's Enterprises, pled guilty per a settlement agreement, in 1998, to a single count and was sentenced to probation and charged $80,000. The federal government then indicted Barken on multiple counts relating to his prior acts, in 2002, approximately five days before the federal statute of limitations expired. A jury returned a guilty verdict on six of the counts. As a result, Barken received six concurrent 24-month sentences. Barken appealed to the Ninth Circuit and argued that the court should have dismissed the indictment against him due to the delay. The Ninth circuit noted that courts rarely dismiss indictments on the basis that the prosecution's delay constituted a Fifth Amendment due process violation. The Ninth Circuit determined that Barken failed to show that he suffered actual, non-speculative prejudice from the delay. Furthermore, the Ninth Circuit held that the statute of limitations typically provides adequate protection for a defendant's rights. Moreover, the Ninth Circuit refused to use the date of Barken's initial arrest, on state charges, as the measuring date for purposes of showing an unnecessary delay under the Federal Rules of Civil Procedure. Barken also argued that the district court incorrectly imposed the mandatory sentencing guidelines. In the midst of Barken's appeal, the Supreme Court clarified the sentencing regime. The Ninth Circuit found that the record did not indicate whether the district court would have imposed a different sentence if it had known the guidelines were merely advisory. CONVICTIONS AFFIRMED; SENTENCE REMANDED. [Summarized by Julia Smith]

U.S. v. Vo
No. 03-10699 (06/27/05)
Before Circuit Judges Beezer, Graber, and Bybee
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/E7AE5DF9FEADC9CC8825702D005575FE/$file/0310699.pdf?openelement

CRIMINAL PROCECURE / SPEEDY TRIAL ACT, MARITAL COMMUNICATIONS PRIVILEGE, AND PRIOR CONVICTIONS

Opinion (Bybee): Rick Vo appealed his conviction on one count of aiding and abetting possession with intent to distribute methamphetamine by raising three claims. First, Vo claimed that the district court erred by denying his Speedy Trial Act motion to dismiss. Vo claimed that the dates between October 10 to October 21, which Vo sat in jail while a continuance of his detention hearing was being carried out, were not excludable. Second, Vo claimed that the district court violated his marital communications privilege by allowing his wife to testify about marital communications. Third, Vo claimed the district court improperly allowed evidence from a thirteen-year-old drug conviction to be admitted. The Ninth Circuit affirmed the district court's decision on all three claims on the following grounds: (1) Vo's Speedy Act Motion was properly denied, as the twelve days in question were excludable under the act (2) marital communications that concern joint criminal activity are not shielded. Furthermore, there is an exception when one spouse has not yet become a participant, but since Vo did not assert the privilege at trial, he waived it. (3) The district court also properly allowed evidence from a prior conviction, since evidence from a prior possession of sale of narcotics is relevant to issues of intent in prosecutions of current charges for similar crimes. AFFIRMED. [Summarized by Bill Niese]

U.S. v. Gonzalez
No. 04-10041 (06/22/05)
Before Circuit Judges D. Nelson, Kleinfeld, and Gould
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/EC21EC0341AFD64C8825702700822286/$file/0410041.pdf?openelement

CRIMINAL PROCEDURE / SUPRESSION OF EVIDENCE / APPLICATION FOR WIRETAP

Opinion (D. Nelson): During an investigation by the U.S. Government (Government) into illegal alien smuggling conducted by Gonzalez and his company Golden State Transportation (GST), the Government applied for a wiretap application for GST's headquarters. Based on an affidavit by U.S. Border Patrol, the district court granted the application. Defendants moved to require a hearing under Franks v. Delaware to suppress any conversations obtained as a result of the wiretap. The district court held that defendants had adequately alleged that the wiretap application had material misrepresentations and omissions, necessary for a Franks hearing, and also that the Government failed to prove necessity of the wiretap at GST's headquarters. The Ninth Circuit affirmed the district court holding that the defendants made a substantial showing of intent by the Government to omit or misrepresent in support of their motion for a Franks hearing. Additionally, the Ninth Circuit held that the government failed to meet the necessity requirement for the wire tap application because they did not show that normal investigative procedures were adequately utilized, that other procedures would not have succeeded, or that other procedures were too dangerous. Finally, the Ninth Circuit held that Gonzalez had standing to request the Franks hearing. AFFIRMED. [Summarized by Michael Elliott]

Hearns v. Terhune
No. 02-56302 (06/30/05)
Before Circuit Judges Hug Jr., Pregerson, and Berzon
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/C081FD240551936A8825702F007EC895/$file/0256302.pdf?openelement

CONSTITUTIONAL LAW / 8TH AMENDMENT / CRUEL & UNUSUAL PUNISHMENT / CONDITIONS OF CONFINEMENT

Opinion (Pregerson): The State prison, as a result of prior violence, did not allow unsupervised Muslim prisoners in chapels. Hearns, a Muslim, was attacked by a group of Muslims in a prison chapel without supervision. Hearns was moved, for safety reasons, to the disciplinary segregation unit. The safety conditions in the segregation unit caused him to fear "serious health concerns," due to the lack of drinkable water in the yard and other unsanitary conditions. Hearns exhausted his administrative remedies and brought a 42 U.S.C. sec. 1983 claim on the grounds that his 8th Amendment rights were violated by the inhumane conditions in the segregation unit and a failure to protect in the chapel. The District Court dismissed with leave to amend for failure to state a claim, and then upon re-filing, the court again dismissed the 8th Amendment claim because the inhumane conditions were not sufficiently serious to meet the objective component and the failure to protect claim did not allege deliberate indifference by prison officials. The Ninth Circuit held that the failure to protect claim was sufficiently alleged because of the inference that the prison officials acted with deliberate indifference and disregarded the risk by failing to take reasonable measures to abate risk when prison officials knew of the prior violence that lead to the supervised prison chapel policy. The Ninth Circuit held that the conditions of confinement claims were sufficiently serious because, among other things, prisons must provide for basic human necessities and allegations of one hundred plus degree weather without drinkable water was adequate to state a claim. REVERSED; AND REMANDED. [Summarized by Jim Webster]

U.S. v. Romo
No. 04-30131 (07/05/05)
Before Circuit Judges B. Fletcher, McKeown, and Gould
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/6D6D513F4C164FA4882570350051D1EB/$file/0430131.pdf?openelement

CRIMINAL LAW / MOTION TO SUPPRESS / PSYCHOTHERAPIST-PATIENT PRIVILEGE

Opinion (McKeown): Romo, a prisoner at a correction facility, was convicted for threatening the President of the United States after he had confessed to the facility counselor and subsequently to a secret service agent. The facility counselor and the agent testified that Romo had written and sent a threatening letter to the President. The district court had earlier denied Romo's motion to suppress because the meeting between the counselor and Romo was "not a counseling, treatment, or therapy session." Romo appealed claiming that his confession was protected under the psychotherapist – patient privilege. The Ninth Circuit applied the Jaffee rule. Under Jaffee, to invoke the privilege, the defendant bears the burden of showing that 1) the counselor is a licensed psychotherapist, 2) his communications

to the counselor were confidential, and 3) the communications were made during the course of diagnosis or treatment. The Ninth Circuit concluded that the privilege applies only when a "therapist practices his craft, not whenever a therapist and a patient communicate." Thus, the Ninth Circuit affirmed the district court's ruling stating, "the meeting...did not occur during the course of diagnosis or treatment." The Ninth Circuit also held that Romo's communication with the secret service agent was "harmless" and that the prosecution had sufficient evidence. AFFIRMED. [Summarized by Rob Kavanaugh]

OREGON COURT OF APPEALS

State v. Brown
Case No.: A121813 http://www.publications.ojd.state.or.us/A121813.htm

AREA OF LAW: CRIMINAL LAW

HOLDING: (Opinion by Brewer, C. J.) A claim of error asserted for the first time on appeal is disregarded if the ends of justice will not be disserved by requiring petitioner to abide by terms of probation.

James Brown (Brown) was sentenced to three years enhanced bench probation with special conditions after being convicted for driving under the influence of intoxicants (DUII). Brown appealed, claiming that in order to impose the special conditions of his probation the trial court was required to find facts that, under Blakely v. Washington and Apprendi v. New Jersey, should have been proved to a jury beyond a reasonable doubt. Brown's assignment of error was not preserved at trial, nonetheless, Brown asked the Court of Appeals to address the error as plain error. The court declined to use exercise its discretion to correct the unpreserved error because the gravity of the asserted error was slight, the ends of justice did not require reversal, and Brown did not face potentially unlawful incarceration. Affirmed. [Summarized by Kimberly Boswell.]

State v. Dinsmore
Case No.: A122052 http://www.publications.ojd.state.or.us/A122052.htm

AREA OF LAW: CRIMINAL LAW

HOLDING: (Opinion by Edmonds, P. J.) A court's reinstatement of dismissed charges is improper without grand jury authorization.

In a plea bargain, Karen Dinsmore (Dinsmore) pleaded "no contest" to criminally negligent homicide (a lesser-included charge for second degree manslaughter), and the trial court dismissed charges of assault, DUII, and reckless driving. The Court of Appeals reversed the conviction on Miranda grounds. On remand, Dinsmore withdrew her plea; the trial court vacated its order dismissing the other charges, and the state reinstated its second degree manslaughter charge. Dinsmore was found guilty on all charges. Dinsmore appealed her conviction claiming that the trial court lacked authority to reinstate charges that had been dismissed and erred by admitting the results of a Breathalyzer test. The Court of Appeals held that revival of the dismissed charges was impermissible without grand jury authorization and because she was not afforded counsel before deciding to submit to a Breathalyzer test the results were inadmissible as to the manslaughter prosecution. Convictions for assault in the third degree, assault in the fourth degree, driving while under the influence of intoxicants, and reckless driving reversed; conviction for manslaughter in the second degree reversed and remanded for new trial. [Summarized by Kimberly Boswell.]

ARTICLE OF THE WEEK

Court issues stay of execution

Monday, July 11, 2005

JARRATT, Virginia (AP) -- The U.S. Supreme Court granted a last-minute stay of execution Monday for a man convicted of fatally stabbing the manager of a pool hall with a pair of scissors.

Robin Lovitt, 41, had been scheduled for execution at 9 p.m. Monday.

The stay will remain in place until the full court resumes in October. The court will then either hear Lovitt's appeal or allow Virginia to execute him.

Lovitt's attorneys and opponents of capital punishment have argued that the conviction should be reviewed because of questions surrounding the evidence.

Initial DNA tests of the bloody scissors could not conclusively link Lovitt to the 1998 slaying of Clayton Dicks, 44, during a pool hall robbery in Arlington.

A court clerk later destroyed most of the evidence, including the scissors, making additional DNA testing impossible.

The Virginia attorney general's office has maintained that DNA evidence was not critical to the conviction because of "very compelling, strong evidence," including eyewitness testimony.

"He was found guilty by 12 jurors, two trial judges, seven state justices, one federal district judge and three federal appellate judges," said Emily Lucier, spokeswoman for the state attorney general's office.

Lovitt's attorneys had sought a last-minute appeal from the high court and requested clemency from Gov. Mark R. Warner. Among those fighting the execution are former independent counsel Kenneth Starr.

Lovitt has steadfastly maintained his innocence and had remained hopeful about his ability to win a last-minute reprieve, his lawyers said.

The Supreme Court of Virginia in 2000 found no error by the trial court and affirmed Lovitt's conviction and death sentence. The following year, the U.S. Supreme Court refused to consider Lovitt's appeal.

The scissors were among items discarded in 2001 to free up space in the Arlington County Circuit Court's evidence room. In 2003, the Virginia Supreme Court rejected Lovitt's claim that his due process rights were violated. The justices ruled a court employee did not act in bad faith when he ordered the evidence destroyed.

In May, more concerns were raised after an independent audit found the state crime lab erred in critical testing in the case of another death row inmate, who was pardoned.

The audit prompted the governor to call for a scientific review of more than 160 cases handled by the lab. The review team last month concluded the lab properly handled the DNA evidence in Lovitt's case.

Lovitt would have been the first inmate executed in Virginia in 2005.

FROM THE POND

7/8/2005
[mcadpond] [Fwd: one plea petition per case]
I have had defense attorneys use one plea petition for multiple files. Please advise them to just use one per case.

7/8/2005
[mcadpond] [Fwd: Fw: Change in DUII Diversion Fees - Form Correction]
I received notice from the OSCA that the filing fee of $267 listed on their form for DUII Diversion was incorrect. The fee is actually $261. A new version of our form is posted on the database (link here: (Document link: Database 'MAR Documents', View 'By Category', Document 'DUII Diversion Petition; Statement of Eligibility; Plea Petition and Order; Motion forExtension of DUII Period and Order')). The new language reads:

a. Pay the court a filing fee of $261. You will also be required to pay a Unitary Assessment fee of $97. If you cannot afford to pay these fees, tell the judge. Some or all of these fees may be waived, depending on your financial situation. The court may allow you to make payments over time.

b. The court will give you the name and address of a diagnostic agency. You agree to contact this agency and undergo an evaluation to determine the extent of any alcohol or drug abuse problem you may have. You will be referred to a treatment program if the agency finds treatment to be necessary. The cost of the evaluation is $150. You must pay this amount directly to the agency that performs the diagnostic assessment.

7/15/2005
[mcadpond] [Fwd: July 15, 2005]
Courtroom B will be closed all day on Friday July 15, 2005. Everything that is currently scheduled for Courtroom B will be moved into Courtroom A

6/30/2005
[Ocdlapond] Habeas Question
Assume the following facts: Youth under the age of 15 is accused of aggravated murder and conspiracy to commit the same in 1998.

Youth is remanded pursuant to ORS 419C.352 to adult court where youth is then indicted for same crimes. Remand is appealed and affirmed in 2000.

Youth then enters plea to aggravated murder and conspiracy to commit aggravated murder in 2000. Adult court sentences youth to life with 30-year minimum, but eligible for second look after 15 years at which hearing the government will remain silent on the aggravated murder charge and 120 months (straight guideline sentence w/o departure either way) on the conspiracy charge. The 120 months runs concurrently to the murder sentence.

No appeal is taken. No PCR is filed. Prisoner now files a Petition for HB, alleging an illegal sentence. Leaving aside the substantive issues of whether the sentence is, in fact, illegal for the moment, is this procedurally possible? I think that prisoner is toast for not having exercised and exhausted rights of appeal and PCR. Can the Petition be heard anyway?

> **Response:**
> It depends on why the sentence is illegal, doesn't it? If it's illegal because the DOC or whoever is misinterpreting the judgment, then client doesn't lose for the reason you specify.
>
> If it's illegal for a reason that would be cognizable on direct appeal, D loses unless his failure to appeal is the result of inadequate assistance or some such for which he can now PCR, which would require that he have a basis equitably to toll the limitations period. As I dimly recall, the statute on tolling is oddly worded, and, if the two-year period was tolled at all, then there is no limitations period under the statute. I might remember that wrong, and even if I'm right there might be latches-type problems.

If the sentence is illegal for a reason that would be cognizable in PCR, then D loses unless he can PCR now, which depends on the facts, especially why he didn't PCR within the SOL.

You don't say if you're talking about state or federal habeas. I dimly recall that, in federal habeas, relief from the one-year SOL is available if the client is actually innocent, which I think includes innocence as it relates to a specific term in the judgment or sentence. In that case, client might be "actually innocent" of any offense justifying his sentence, if the sentence is in fact illegal and the state could never have made it legal, i.e., it's illegal according to the true underlying facts in addition to the terms of the plea bargain.

Response:
Habeas is not a substitute remedy for those who failed to seek post-conviction relief. *See, e.g., McClure v. Maass.*

Response:
This is quite the way I see it. The sentence appears to be illegal because, at least as I read the statute, a person cannot be convicted of both conspiracy and the completed offense (ORS 161.485). Even if there is a way past that limitation, conspiracy is a non-waivable offense and D should have been remanded back to the juvenile court for disposition on that offense. Neither of those being the result of DOC interpretation, they should have been handled on direct appeal or through PCR. There may be facts that would toll the SOL for PCR filing but I think that the test must be in that process, not in habeas. It is a state habeas proceeding, btw.

7/1/2005
[Ocdlapond] New law affecting jury lists
On 6/29/05, the Gov signed HB 2281 (A-engrossed) which changes how presiding judges control local jury systems. Local presiding judges no longer have authority to "prescribe a selection system or device" and all authority is now pretty much vested in the State Court Administrator. (Section 4 of HB 2281).

The presiding judge CAN now authorize the use of juror ID numbers instead of names, "when to do so would promote the efficiency of the selection process..."

Also, the SCA can now use lists obtained from any person or public body, to make up the master jury lists. I assume this means that private/corporate list compilers (since corporations are technically speaking "persons") or whoever can give the SCA lists to use after they've been "cleansed."

Perhaps the most interesting part of this new law is that the SCA now has authority to "make adjustments to the master jury list" including (but not limited to) "removing the names of persons who are deceased, permanently ineligible for jury service or permanently excused from jury service...."

I will be auditing the adjustments, and objecting to the masking of prospective juror IDs on the grounds of "efficiencies." I encourage others to do so as well.

The Bill was catagorized as an "emergency" so it will go into effect asap, I think.

7/11/2005
[Ocdlapond] Blakely-fix legislation
You may have heard that the so-called "Blakely-fix" bill, Senate Bill 528, has passed both the Senate and the House. The Governor signed it last Thursday, July 7. Jennelle and I will be discussing this bill at some length at next month's NACDL-OCDLA CLE. But there is some information about it that I want to get out now.

Because the bill has an emergency clause, *it is now the law* and has been the law for four days. You can see the bill at: http://www.leg.state.or.us/bills_laws/home.htm. That page will give you a choice between HTML and PDF versions. If you're planning on cutting and pasting from the bill, you can do that only from the HTML version. Otherwise I recommend opening the PDF version, because it's easier to read (although to do that, you must have Adobe Reader on your PC).

With SB 528 now on the books, there now is statutory authority for jury trials, using the reasonable-doubt standard, on at least some types of aggravated departure factors. Greg Silver and I have consolidated cases in the OSC addressing the question of whether the pre-SB 528 scheme authorized jury trials on aggravating factors. State v. Sawatzky; State v. Upton. The cases now are scheduled for arguments on Sept. 9. It is possible that the state now may move to remand either or both cases to the respective trial courts for determinations on whether and the extent to which SB 528 affects the cases.

Beyond authorizing jury trials using the reasonable-doubt standard for certain types of aggravating factors, SB 528 does a couple of interesting things. Its apparently novel feature is that it distinguishes between offense-specific and offender-specific aggravating factors. The former are based on facts pertaining to the crime. The latter are based on facts pertaining to the criminal. Under the bill, offense-specific factors presumably are tried during the guilt phase. Offender-specific factors are tried during the penalty phase (assuming there is one, i.e., assuming the defendant is found guilty of the underlying crimes). The bill also requires application of the evidence code during the state's case on aggravating factors. It allows a defendant to waive jury on aggravating factors, but only on an "all or none" basis. That is, he can't pick and choose which factors to try to the jury, and which factors to try to the bench.

In addition to its emergency clause, the bill has a sunset clause. The bill expires on Jan. 2, 2008. That is the day after the 2007 Legislature's enactments usually will take effect. This will give the 2007 Legislature the chance to examine the present system. I find the sunset clause more than a little ominous. When asked what he thought about SB 528, Steve Doell of Crime Victims United said it was the best they could get "for now."

As I've mentioned in earlier emails, the bill also has retroactivity clauses. Both clauses apply the bill to crimes committed before the bill's July 7 effective date. The first clause pertains to cases that have never been sentenced. The second clause pertains to cases that the appellate courts reversed and remanded for resentencing.

In defense of ex post facto challenges to these retroactivity clauses, the state will argue that even assuming that the law in effect when defendants committed their crimes mandated bench trials on aggravating factors using less than the reasonable-doubt standard, by its terms the pre-SB 528 law otherwise authorized aggravated departures. Because of that, the state will argue, the law in effect at the times of defendants' crimes gave them "fair warning" of aggravated departures, so applying SB 528's procedure to them retroactively is not ex post facto. See, e.g., Dobbert v. Florida, 432 US 282 (1977); State v. Perez, 119 Or App 436, rev den 317 Or 272 (1993).

But for most defendants there are two ways to try to defeat this "fair warning" defense to ex post facto claims. First, if a defendant committed his crime after certain points in the "Apprendi time line," he can argue that the "fair warning" dissipated, because the Apprendi-type case law obliterated the "fair warning." The points along the time line are:

1. March 24, 1999, when the USSC decided Apprendi's predecessor, Jones v. US.
2. June 26, 2000, when the USSC decided Apprendi v. NJ.
3. June 24, 2002, when the USSC decided Ring v. Ariz.
4. June 24, 2004, when the USSC decided Blakely v. Wash.
5. September 8, 2004, when the Ore. COA decided State v. Sawatzky.
6. October 13, 2004, when the Ore. COA decided State v. Warren.
7. December 16, 2004, when the OSC decided State v. Dilts II.

The more of these time points after which a defendant committed his crime, the stronger his argument that *the case law* told him that he could not get an aggravated departure despite what the statutes said before SB 528. Therefore, a defendant would argue that *because of the case law*, he had no "fair warning" about the possibility of an aggravated departure. Notwithstanding cases such as Dobberts and Perez, applying SB 528 to him would be ex post facto.

The second way to try to defeat the state's defense to an ex post facto challenge is one that can be used regardless of the date of the defendant's crime. As originally written, the guidelines mandated bench trials on all departure factors—mitigating and aggravating. See, e.g. State v. Mack, 108 Or App 643 (1991), rev den 313 Or 300 (1992).

SB 528 only modifies the departure scheme to allow jury trials on *aggravating* factors. Insofar as *mitigating* factors are concerned, SB 528 leaves intact cases such as Mack.

This means that under the post-SB 528 system, the state can present special verdict instructions on aggravating factors, but the defendant cannot present such instructions on mitigating factors. Unless the courts are willing to rewrite the post-SB 528 departure scheme to allow jury trials on *mitigating* factors, the defense can argue that retroactive application of the new one-sided scheme is ex post facto. See State v. Fugate, 332 Or 195 (2001) (where legislation repealed statutory exclusionary rule that only benefited defendants, retroactive application of repeal was ex post facto). See also Carmell v. Texas, 529 US 513 (2000).

There's much more to be said about post-SB 528 attacks on aggravated departures. But as Dave Groom might say, all of that will be divulged "in the fullness of time."

Response:
Based on the language of Blakely referring to unanimous jury decisions, in order to be a true "Blakely fix", shouldn't the jury decision on the aggravating factors be by unanimous verdict (as opposed to the 10-2 requirement for conviction)? And if that true, wouldn't it follow that after conviction--if the jury is polled and less than 12 vote to convict--the subsequent aggravating issues question/portion is moot? In other words Blakely specifically uses "unanimous verdict" language; this bill is the Blakely fix so a unanimous jury verdict must be required for the aggravating factors; if less than the full 12 votes to convict, there can be no unanimous verdict on the aggravating factors, so no ability to go forward with the "fix"? Or have I overlooked the obvious?

APPENDIX B

Questionnaire for Consortia Administrators and Boards

1. Does your consortium have formal by-laws and a set of written operating policies and procedures? If so, please provide.

2. Does the consortium have a board of directors? If so describe the role that your board plays. Who are the members? How often does it meet? What kinds of issues are directed to the board? Are there limits on how long a board member can serve or how long one member can chair the board? Are there seats designated for "lay" or "community" board members?

3. How is the administrator of your consortium selected? Compensated? Evaluated? Are there formal qualifications to be the administrator? Does the consortium or its board of directors have a "plan for succession" to insure an orderly transition from one administrator to the next?

4. What percentage of the administrator's overall workload is related to consortium matters? Is there a formal limit to the percentage?

5. How are administrative problems and demands met when the administrator is in trial or otherwise unavailable? Is there a formal or informal back-up administrator?

6. What are the requirements for membership in the consortium?

7. What is the process for applying for membership?

8. How long has each of the attorneys been a part of the consortium?

9. To what extent do consortium attorneys specialize in criminal and juvenile defense? In public defense? Is there a limit on the percentage of an attorney's practice that can be consortium related?

10. How do you insure that new attorneys can become part of the consortium?

11. What materials and orientation are provided to new consortium members?

12. Is there a procedure for insuring that less experienced attorneys have access to more experienced attorneys when they need advice? Do you have a formal mentoring system? Please describe your system.

13. How are cases distributed among attorneys? Do you have a process for assigning cases based on the seriousness and complexity of the case? If so, how do attorneys progress from handling less serious and complex cases to handling more serious and complex cases?

14. How soon are attorneys notified of appointment to a case? Do attorneys routinely meet with clients within the timeframes set forth in the contract with PDSC?

15. Does your system provide continuity of representation when possible? If a client has been represented by a consortium member in the past are future cases involving that client generally assigned to the same attorney?

16. Does your organization have a standardized procedure for identifying conflicts or does each attorney or law firm have its own procedure? When are conflict checks conducted? How soon is a case reassigned after a conflict is identified?

17. Do consortium members meet regularly as a group? If so, how frequently?

18. Is there a mechanism for regular communication among consortium members such as a newsletter, e-mail list, website, regular mailing?

19. Is there a mechanism for sharing research or forms?

20. What system do you use to monitor the volume of cases assigned to each attorney or law firm? How do you insure that attorneys are not handling too many cases?

21. How do you insure that attorneys are providing quality representation? Are there regular evaluations of attorneys? If so, how and by whom are they performed? Are there other mechanisms in place to insure that consortium attorneys are providing quality representation?

22. How do you address problems of underperformance by attorneys?

23. Do you provide training or access to training for consortium lawyers? Please describe. Do you require a minimum number of criminal, juvenile or civil commitment law- or trial practice-related CLE credits per year?

24. Are attorneys required to report disciplinary actions by the bar? How many consortium attorneys have been disciplined by the bar? What were the circumstances?

25. What is the consortium's process for handling complaints from judges? From clients? From others? Is there a designated contact person for complaints? Is that person's identity generally known in the criminal and juvenile justice community?

26. What steps have you taken to address issues related to cultural competence such as the need for interpreters, training regarding cultural biases, culturally appropriate staffing, awareness of immigration consequences?

27. Do you have a system in place which allows clients to evaluate the quality of services received from consortium attorneys?

28. Are consortium attorneys and the administrator active participants in policy-making bodies of your criminal and juvenile justice systems?

29. What are some of the things your consortium does especially well? Please describe.

30. Are there any areas in which you think improvement is needed? Please describe.

RECEIVED JUN 20 2005

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June 20, 2005

Shelley Dillon
Public Defense Services Commission
1320 Capitol Street NE, Suite 190
Salem, Oregon 97303

Dear Shelley:

Please find enclosed responses to the questions you earlier transmitted to us for your review prior to our meeting on Wednesday. I hope these are helpful to you in preparing for the meeting.

I have also enclosed resumes for each of the JAC members.

Sincerely,

Richard W. Condon

RWC:paj
Enc.
cc: JAC Members

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June 20, 2005

Responses to Questions

Question 1

Currently, we do not have formal by-laws or written operating procedures. For the past several months, our consortium members have discussed this issue and we have reviewed different options. We have a subcommittee that is assigned to propose the type of entity, proposed by-laws and individual contractor agreements. This committee has consulted with a business attorney and accountant to assist us in addressing these issues. We have drafted a set of operating by-laws and they are being reviewed by our consortium members. We anticipate the by-laws being in place by July 30, 2005.

Question 2

Presently, we do not have a board of directors, however, we have a good idea of the individuals who will constitute the board. We cannot formally establish the actual board membership until we have addressed the issues discussed in question 1. That does not mean we have operated without a decision making process in the past. We have used an informal structure to address consortium issues and this informal structure consists of the senior members of the consortium reaching decisions by consensus. To date, our consortium has made decisions by consensus, however, we acknowledge that consensus may not always be possible in the future. As our consortium expands, we realize that we need a more formal structure to conduct consortium business.

All consortium members meet once a week to discuss issues relating to the consortium and the juvenile justice system.. Frequently, the entire group or subcommittees meet more often to discuss issues that require additional time and attention. We anticipate having at least two non-consortium members on the board. We have tentatively discussed and identified one of those directors. Again we anticipate this being in place by July 30, 2005.

After we have established the board, we expect the board will meet weekly or biweekly. These meetings will be in addition to the consortium's regular weekly meetings. Issues expected to be handled by the board include all major business issues for the consortium, including but not limited to: hiring, mentoring, performance review, conflict issues, division of workload, committee assignments, and other needs as they arise. Board membership terms have not been

decided at this point.

Question 3

Presently, we do not have an executive director. For several years Richard Condon has served in this capacity - particularly with respect to contract issues. Once we have established the board, we anticipate Dick will continue in this role and perhaps as executive director. He is not compensated otherwise and we do not anticipate this changing in the near future.

To date, various members of the consortium have been involved in the management of issues that periodically arise. We view the management issues as being a shared responsibility. At given times, different members have been assigned to serve on juvenile court improvement projects, internal committees for recruitment, mentoring, performance issues, contract negotiations, and training issues. Additionally, most of our members have been involved in leadership roles within the bar and community. Due to this shared management philosophy and level of experience, we feel we could select one of our members to succeed Dick in the future. (Of course we also work to ensure that Dick gets plenty of exercise and eats a balanced diet).

Clearly, the advent of the board of directors will change the consortium's management style, but we hope to maintain our philosophy of shared management responsibility.

We have a part-time administrative assistant. She is responsible for tracking case counts and sending initial case counting forms to members. At the end of each month, each member is required to report case counts to her and she sends total case count figures to the Office of Public Defender Services (OPDS). She is an independent contractor and not otherwise employed by any other JAC member.

Question 4

It is a relatively small percentage and there is no formal limit. As the consortium grows, and the board is implemented, more of this work and responsibility will shift to the board.

Question 5

To date we have responded to all administrative issues in a timely fashion. We plan to have the board handle significant administrative functions and do not anticipate that individual attorney's trial schedules will impair the board's ability to address those functions.

Question 6

We have no formal criteria for membership, but we have a committee that developed a set of qualities that we believe are important to become successful in doing juvenile court work in Marion County. We try to recruit individuals who are well respected in the legal community, have a commitment to juvenile issues and are community service minded. We look for

individuals who relish the opportunity to become involved in consortium and juvenile justice issues.

We added two new members at the beginning of this year. Our current plan is to add three more attorneys in the next 30-60 days. Our intention is to add members that are younger attorneys, but individuals with life experience, as well as experience with children and children's issues. We hope to also add members that would bring cultural diversity to our group - including bilingual capabilities.

The judiciary in our county consistently tells us that our group is well respected. Above all else, we strive to recruit new members that will continue to enhance that reputation and feel we have been successful in doing so in the past.

Question 7

To date we have had no "application process". Our group has discussed staffing level needs, composed a recruitment committee, and approached individual members of the bar to determine their interest level and ability to do consortium work. We have consulted with members of the judiciary, including the juvenile court and presiding judge for suggestions. In particular, we have sought input from the bench about younger members in the local bar who would be appropriate for our consortium. It is unlikely that we would recruit a potential member without receiving positive feedback from the bench regarding an individual's experience and competence. We place a strong emphasis on individuals' ability to deal with a sometimes difficult clientele.

Question 8

Our most experienced members represent the remaining group of attorneys selected by Judge Norblad to perform juvenile work when he presided at the juvenile court. Over the years, we consistently added new members to handle an increased caseload. The Juvenile Advocacy Consortium (JAC) was founded in response to Indigent Defense Services' change to the "contact" process in the early 1990s.

We have a wide range of experience in members - from 30+ years to a few months. Please see the attached materials which include resumes for each member.

Question 9

We all specialize in juvenile defense. However, our consortium also consists of members who have expertise in additional areas of law. In particular, we find that experience in criminal defense and family law is of great benefit to our clients. Our members all have an interest in childhood development and we are constantly attempting to increase our knowledge in this area. Several of our members are Marion County Association of Defenders (MCAD) members. The MCAD/JAC members handle the 15 year-old Ballot Measure 11 cases because those kids are

held at the juvenile detention center. The ability to handle both criminal and juvenile cases has proved important in negotiating these cases and convincing the state to resolve many of these cases by transferring the case to juvenile court on a non-Ballot Measure 11 juvenile petition.

We also have members that either have done or currently do indigent work for the tribes. Those members' expertise on ICWA issues is an important resource for our consortium. Additionally, we have members with appellate expertise - particularly on juvenile cases. Lastly, several consortium members have expertise in doing adoption and guardianship work..

The majority of every members' practice is juvenile defense, but all members do private retained work as well. There is no formal limit on consortium work v. outside work.

Question 10

To date, the ever-expanding caseload has created the need to add attorneys. We do not expect that to change. The number of juvenile cases in Marion County dramatically increased in the last few years. The abuse of methamphetamine in Marion County and a conscious effort by law enforcement and the district attorney's office to more aggressively prosecute cases and file juvenile petitions has mostly contributed to the increased caseload. We have added attorneys but still need to do so to handle the caseload expansion.

We continue to value and seek demonstrated experience and competence, and feel that this is the best way to keep personnel management issues at manageable levels.

Question 11

New members are provided with a copy of the consortium contract, materials recently generated dealing with the Adoption and Safe Families Act, Juvenile Department procedures related to INS holds, sex offender registration law changes, the Indian Child Welfare Act, and other materials discussed by the group's members from time to time.

Each new member is assigned a mentor to meet with regularly during their first 6-12 months in the group. Practice tip issues are discussed at weekly meetings of the group.

Members in the group share forms and office procedures, and access domestic relations forms from the Marion County Court website. Additionally, there are many forms routinely used that are available at the juvenile court. New members are expected to review these forms and become familiar with the circumstances in which the various forms are used.

Question 12

Please see answer above. Members are required to attend weekly meetings, which are an opportunity to bring questions or concerns to the group, as well as to "staff" cases or legal issues. New members are enrolled in the National Association of Counsel for Children, and encouraged

to attend OSB and OCDLA CLEs regarding juvenile law.

Question 13

In general, we all receive an equal number of cases as assigned by court staff. However, new members are assigned fewer and not given an increased caseload until they can demonstrate proficiency with the existing caseload. Recently, we have brought in a new member to do only delinquency cases, and anticipate doing the same with new and less experienced members in the future. We will increase the new members' caseload as they adjust to the work load. We would also like to see these new members at some point in the future begin doing dependency cases, and, ultimately, termination of parental rights cases.

Question 14

Currently, we are notified of our appointment in three ways. First, the court puts an appointment order in our mailbox at juvenile court. Second, we get a fax within 24-48 hours by our administrative assistant. Third, the court directs clients to contact us immediately to schedule an appointment.

Beginning July 1, 2005, the appointment process will change on dependency cases. We had a subcommittee that studied the shelter care process and visited Multnomah County to view their procedures and interview different parties in the juvenile court process. Our subcommittee then made a proposal to our court where we would be present at initial shelter care hearings and represent parties at the first court appearance. Under this system we should actually be notified of our appointment before the individual goes to court.

Question 15

Yes. As a group we discourage the practice of attorneys withdrawing from cases unless an actual conflict demands it. We work hard to resolve disputes with clients - which often is difficult due to personality issues common in this caseload. We believe the caliber of attorneys in our groups allows us to minimize the instances where a withdrawal occurs due to a disgruntled client.

Question 16

Each attorney is responsible for their own conflict checks. Conflict checks are done immediately upon notice of an assignment, Generally, cases are re-assigned within 48 hours.

Question 17

Yes - we meet for lunch every Monday and often meet more frequently if issues arise that demand more attention. We also schedule a yearly weekend retreat just for consortium members to do planning and discuss management and other issues.

Question 18

We all have email and communicate in that manner. We have also set up a computer system and fax system at our juvenile court attorney room. Additionally, we have a mail box system at juvenile court which is used to distribute important memos, new legal cases, notice of CLEs and other information pertinent to consortium members. We all keep laminated wallet sized cards with all consortium members' office and personal cell phone numbers.

Question 19

Yes. We distribute forms and memos at weekly meetings and electronically.

Question 20

We get monthly and quarterly reports that detail our case counts. If an individual attorney's case counts are less than the average amount, then that attorney will sign up for additional assignment days with the court. If an attorney is overly burdened we make the same adjustments by signing up for fewer days with the court.

Question 21

Periodically, we check with judges to determine if there are any concerns from the bench. We contact district attorneys, DHS officials and probation officers regarding performance issues - particularly, with new members. We have almost daily contact among the group and know and discuss performance concerns.

Question 22

This issue rarely occurs. However, we have addressed the issue in the past by discussing the issues with the individual and have the individual work with a mentor. Then we regularly review the performance issues with the attorney, mentor, judges, caseworkers and district attorneys. If the performance issues continue then we make it clear that the attorney will not be included in the bidding for the next contract period.

Question 23

We don't have any specific requirements other than those required by the OSB. However, we encourage attorneys to attend CLES by OCDLA (criminal and juvenile seminars), OSB (criminal and juvenile law annual seminars) and the National Association of Counsel for Children annual conference. For the last several years at least one of our members (and usually several) have attended each of these seminars. We then discuss any new issues at our weekly meeting.

Question 24

To our knowledge no attorney has been disciplined by the Oregon State Bar. If such a process was initiated by the OSB, we as a group would undoubtedly be aware of the proceeding.

Question 25

We have only had one complaint from a judge and it was handled pursuant to the process set out in Question 22. The attorney is no longer a member of the consortium. There is no one designated person to receive complaints and this is an area which we will address in establishing a more formal structure.

Question 26

All members have attended various CLE sessions on these topics and we have had discussions about the topic among the group. We have no formalized process other than the requirements set forth by the OSB.

Question 27

No formalized process currently exists. This is a difficult goal to achieve and we are open to suggestions.

Question 28

Yes. Our court is very active in implementing procedures and programs to improve the juvenile court system. We have regular meetings with the court and other participants in the juvenile justice system Juvenile Court Operations Committee). We have several members attend these meetings. Periodically, the court will create ad-hoc committees and our members will participate on those committees. For instance, the court created a committee to establish a family drug court and two of our members volunteered for that committee. The family drug court is not yet functioning, but those attorneys attended a series of meetings, as well as attending training programs in Toledo and Baltimore with the local court team.

The Marion County Juvenile court is a busy court. We have experienced many process and structural changes under the guidance of Judge Pamela Abernethy. We actively participated in planning for these changes. We consider ourselves significant players in always striving to improve the juvenile justice system in Marion County.

Additionally, our members have been involved in local and state bar organizations, community groups, and have been involved in the legislative process at the county and state level. Lastly, we have several members who have served as pro tem judges in various courts.

Question 29

First, we have a commitment to children, families and our community. We seek to include members in our consortium that understand that attorneys have a special responsibility to work to improve our community that goes beyond zealously representing individual clients. We all have a sense of community involvement and the need to look beyond individual cases in order to improve the lives of children and families. We often contribute financially to charitable causes - i.e. Campaign for Equal Justice, foster programs for kids, the HOST programs - among others.

Second, we collaborate well with each other. We rely on each other for support - both in terms of legal strategy and moral support. The cohesiveness of the group is definitely something we strive to achieve because the work can often be depressing and frustrating.

Third, we believe we have a good ability to resolve cases that can be resolved, but zealously litigate case where resolution is not possible. We think we have a good reputation with the court and district attorneys for resolving cases. However, we litigate cases that cannot be resolved. For instance, one of our members has successfully obtained reversals on three termination cases in the last three years.

Fourth, we are able to manage clients well. We have a very low percentage of cases where attorneys are changed due to conflicts with their clients.

Question 30

We need to create a structure that will provide continuity for the future. We need to recruit younger members and develop their skills to the point where they can eventually handle full case loads.

BIOGRAPHY
JEFF J. CARTER

FAMILY

Born on May 24th 1956, Jeff is the youngest of four children to Herbert W. Carter and Goldie L. Carter. Herb Carter practiced law in Salem, Oregon for over 30 years before he died in August of 1982. Goldie Carter remarried and is now residing in Florence, Oregon. Jeff has been a life long resident of Salem.

EDUCATION

Jeff was educated in Salem public schools, graduating from North Salem High School in 1974. He received a Bachelor of Science Degree from Southern Oregon State College in 1979 and received his Law degree from Willamette University in 1982.

EMPLOYMENT

During his college years, Jeff worked as a farm laborer and at the local canneries. During the 1977 and 1979 legislatures, Jeff worked as a Legislative Assistant for two legislators in the House of Representatives.

After receiving his Law Degree, Jeff went to work as an Associate at the Salem law firm of Burt, Swanson, Lathen, Alexander, and McCann. In 1990, Jeff opened his own law practice in Salem as a sole practitioner where he currently maintains a general trial practice in the law office his father built in early 70's.

LEGAL ORGANIZATIONS

Jeff became a member of the Oregon State Bar in 1982 and was admitted to practice In the United States District Court for the District of Oregon in 1984. He is also currently a member of Marion County Bar Association and the Oregon Trial Lawyers Association.

Jeff was elected the President of the Oregon State Bar in 1996-1997 and was elected and served on the Board of Governors of the Oregon State Bar from 1994-1997. He is also a former board member of Marion-Polk Legal Services - a non-profit organization dedicated to providing legal representation to the poor in Marion and Polk Counties.

Other legal organizations include:

- Board member Oregon Legal Services Corporation — a non-profit organization dedicated to providing legal representation to the poor throughout the state of Oregon.
- Board member Campaign for Equal Justice — a non-profit fund raising organization that distributes funds generated to other organizations throughout the state of Oregon that provide legal services to the poor.
- Member of the Statewide Joint Bench-Bar Committee for New Judgeships — the committee is charged with the tasks of investigating the use of Referees as opposed to statutory judicial positions and report back to the legislature in the 1999 legislative session. Appointed by the Oregon State Bar and Chief Justice Wallace P. Carson, Jr. The Committee will also review applications submitted by the different judicial districts throughout the state and report the Committee's recommendation to the 1999 legislature.
- Member of the Oregon Law Commission — Appointed by the Oregon State Bar for a three year term. The legislatively created commission is charged with the responsibility of providing a continuous substantive law revision program that will report back to the legislature.
- Access to Justice Conference Committee Chair

JUDICIAL EXPERIENCE

- Judge; Salem Municipal Court Judge Pro Tem.

PUBLIC AND COMMUNITY SERVICE

- Member and past president of the Capitol Lions Club in Salem, Oregon.
- Salem Chamber of Commerce
- Board member of Spruce Villa Inc., a non-profit corporation that operates several homes, vocational programs and semi-independent programs for the developmentally disabled.
- Chair of the Northeast Neighborhood Association in 1987.

OTHER COMMUNITY GROUPS/MEMBERSHIPS

- National Federation Independent Business; The Historic Elsinore Theatre; Mid-Valley Woman's Crisis Service, North Santiam Historical Society;

INTERESTS AND HOBBIES

Jeff is an avid snow skier and fisherman. He dabbles in restoring antique cars and recently rebuilt an older model Harley Davidson motorcycle. He has a strong interest in area history.

RESUME OF PHILLIP WISEMAN
Wiseman Law
1828 Lancaster Drive N.E.
Salem, Oregon 97305
(503) 364 – 2642

Education

Mercer Island High School	1974
University of Washington B.A.	1979
Willamette University College of Law	1994
Numerous postgraduate seminars and education programs;	1994 to present

Primarily in two areas:
a) Childhood development/Brain development
b) Juvenile law practice

Work

1. Amtrak, Seattle, WA – Sleeping Car Porter — 1977 – 1979
2. Harborview Medical Center, Seattle, WA — 1980 – 1982
   – Assistant Administrator
3. Nordstrom, Seattle, WA – Advertising Copy Writer — 1985 – 1987
4. Hillis Clark Martin Peterson, Seattle, WA – Legal Assistant — 1987 – 1991
5. Marion County District Attorney's Office – Clerk — 1992 – 1994
6. Beckfield & Wiseman, LLP, Salem, OR — 1996 – 2003
   Partner in two-person law firm, specializing in all areas of civil law.
   Started doing full time Juvenile Court Practice in January 1998.
7. Wiseman Law, Salem, OR — November 2003
   Solo Practice, specializing in Juvenile Law from 1998 to present

Organizations

Oregon State Bar	1995 to present
Federal Bar	2003 to present
OTLA	2000 to present
ATLA	1996 to present
Juvenile Advocacy Consortium	1998 to present
Member of Marion County Public Safety Committee	2003 to present
Member of Marion County Judicial Review Board	2003 to present

Personal

I have four children, ages 22, 15, 10 and 5 years, and I am a full time family guy outside of my law practice. Doing typical volunteer work, coaching, school and raising my children.

Carla M. French
Ferder, Casebeer & French, LLP
515 High Street SE; P. O. Box 843
Salem, OR 97301
(503)399-9097/(503)585-9197
cfrench@ferder.com

Professional Experience
Ferder, Casebeer & French, LLP, - Partner - 11 years
Ferder, Brandt & Casebeer, LLP, Law clerk
State of Oregon, Judicial Department -
Judicial Assistant and Law Clerk

Practice Areas
Personal Injury
Criminal Defense
Juvenile Law
Corporate Law

Admitted to Practice
Oregon State Bar
U. S. District Court - District of Oregon
9th Circuit Court of Appeals

Affiliations
Oregon State Bar
Marion County Bar Association
Marion County Bar Board of Directors
Oregon Paralyzed Veterans Advisory Board
American Bar Association
Oregon Criminal Defense Lawyers Association
National Criminal Defense Lawyers Association
Oregon Women Lawyers

Judicial Appointments
Marion County Circuit Judge Pro Tem

Education
High School Diploma, McNary High School
Bachelor of Science, Cum Laude, Linfield College, Major: Business and Economics
Doctor of Jurisprudence, Willamette University

Resume

John W. Jensen

Personal:

DOB: June 7, 1944
Home Address:
1638 Onyx Street NW
Salem, Oregon 97304
Phone: (503) 581-6905

Office Address:
3387 Center Street NE
Salem, Oregon 97301
Phone: (503) 391-0391

Married, with three adult children

Education:

Albert Lea, Minnesota High School: 1962

St. Olaf College, Northfield, Minnesota: 1966

University of Minnesota Law School: 1969

Employment:

Marion County Deputy District Attorney: 1969-1974

Private Practice: 1974-Present
General practice emphasizing family law including domestic relations, adoptions, and juvenile law.

Blair, MacDonald et al: 1976-1994

Sole Practice: 1994-Present

Professional:

Oregon State Bar: 1969-Present

United States Supreme Court: 1986

United States District Court Oregon: 1985

Marion County Bar Association: 1969-Present

Juvenile Court Experience:

Deputy District Attorney assigned to juvenile court: 1972-74

Juvenile Court Indigent Defense: 1974-Present

Juvenile Advocacy Consortium: Founding Member 1993

Community:

Cascade Council Boy Scouts Board of Directors: 1982

Salem Exchange Club: 1987-2002

First Presbyterian Church elder: 1998-2003

LINDSAY R. PARTRIDGE

Attorney at Law
2985 River Road S.
P.O. Box 4195
Salem, OR 97302-8195
(503)375-9920/Fax (503)581-7112
e-mail - partridgelaw@msn.com

EMPLOYMENT

1998-present	Judge, pro tem, Salem Municipal Court, Salem, Oregon
1994-present	Attorney at Law - Lindsay R. Partridge, P.C., Salem, Oregon (solo practitioner). Emphasis in criminal defense and juvenile law
1991-1994	Attorney at Law - Kaino, Jones & Partridge, P.C., Salem, Oregon (partner)
1989-1990	Administrative Analyst - State of Oregon Judicial Department - Trial Court Programs Division
1987-1989	Head Resident, Willamette University
1988	Law Clerk - Zeigler, Cloudy, King & Peterson, Ketchikan, Alaska
1985	Intern - State Senator Jeannette Hamby

EDUCATION AND TRAINING

1989	J.D., Willamette University College of Law, Salem, Oregon (cum laude)
1986	B.S., Willamette University, Salem Oregon (cum laude). Major in Political Science, minors in Economics and Speech Communication
1982	Lebanon Union High School, Lebanon, Oregon

LICENSING AND CREDENTIALS

1992	Admitted United States Federal District Court
1989	Admitted Oregon State Bar

MEMBERSHIPS

Oregon State Bar Association

Member of Criminal Law and Juvenile Law Sections
Criminal Law Section Board of Directors
2000-present (Chair 2004)
Marion County Bar Association
1999-2004 (President 2003)
Marion County Association of Defenders
1994-97 Board of Directors
Marion County Public Safety Coordinating Council
Oregon Criminal Defense Lawyers Association (life member)
Willamette Valley Inns of Court
Marion County Juvenile Advocacy Consortium
Marion County Juvenile Court Family Drug Court Steering Committee
Marion County Juvenile Court Dependency Improvement Group
Criminal Justice Advisory Committee
2003-present

STUDENT ORGANIZATIONS

1988-89	Associate Editor, Willamette Law Review, Willamette College of Law
1987-88	Staff Member Willamette Law Review, Willamette College of Law
1985-86	Vice-President, Student Body Willamette University

PUBLICATIONS

Lindsay R. Partridge, "Making The Grade: Can Student Drug Testing Programs in Public Schools Pass a Legal Challenge?" 25 Willamette Law Review 165 (Winter 1989)

Lindsay R. Partridge, "Developments in the Law: Workers' Compensation Reform" 24 Willamette Law Review 341 (Spring 1988)

FAMILY

Married to Sherri L. Partridge - Salem Hospital and West Valley Hospital Foundations and one daughter - Lucy

Tahra Sinks

ATTORNEY AT LAW

TELEPHONE

VOICE: 503-363-5588

FACSIMILE: 503-363-5585

MAILING ADDRESS

PO BOX 1114

SALEM, OREGON 97308

OFFICE

1443 COMMERCIAL ST SE

SALEM, OREGON 97302

E-MAIL

TSINKS@COMCAST.NET

PROFESSIONAL

ATTORNEY IN PRIVATE PRACTICE

Juvenile / Dependency / Criminal / Adoptions / Domestic Relations

Salem, Oregon. 2000-present. Private client plus tribal and government contract work specializing in juvenile advocacy, which includes delinquencies, dependency proceedings, terminations of parental rights. Also criminal defense, child support enforcement and domestic relations cases in the Mid-Willamette Valley. Persuasive and resourceful with strong negotiating skills; trial and out-of-court settlements. Child custody consultant for Marion County. Previously partner in firm of *Alway Craig & Sinks*, also in Salem, Oregon.

Current and previous contracts with:

- Marion County Juvenile Advocacy Consortium
- Marion County Association of Defenders
- Polk County
- Confederated Tribes of the Grand Ronde

MARION COUNTY DISTRICT ATTORNEY

Juvenile Section / Misdemeanor Section / Child Support Section

Salem, Oregon. 1998-2000. Court certified law clerk prosecutor with felony and misdemeanor trial work in juvenile court; misdemeanor cases in Circuit Court.

EDUCATION

UNIVERSITY OF OREGON SCHOOL OF LAW

Eugene, Oregon -- J.D., 2000

Criminal and juvenile law emphasis. Dean's Student Advisory Committee. Women's Law Forum conference coordinator. Alternative Dispute Resolution Forum. University of Oregon Law School Community Service Award.

WILLAMETTE UNIVERSITY

Salem, Oregon -- B.S., 1996

Double major Spanish and Psychology, with honors including Noel F. Kaestner Award to top graduating psychology student. President, Psi-Chi pre-law fraternity. Teaching assistant. Minor in environmental science.

LA UNIVERSIDAD de IDIOMAS de BENITO JUAREZ

Oaxaca, Mexico -- 1994

Spanish linguistics and Mexican culture / exchange program.

LEGAL AFFILIATIONS & SERVICE

Oregon Bar Association, Marion County chapter
Oregon Criminal Defense Lawyers Association
Marion County Association of Defenders, board member
Marion County Domestic Violence Task Force
Oregon Criminal Justice Commission - Blakely v. Washington criminal sentencing workgroup appointee

RESEARCH & PRESENTATIONS

JUVENILES AND MIRANDA RIGHTS
Performed research on Miranda and application to juveniles with Margie Paris for inclusion in second edition of her textbook, "Constitutional Criminal Procedure." (Foundation Press Inc., NY)

TIME MANAGEMENT
Presenter at conferences in Portland and Salem sponsored by the Oregon Bar Association and Willamette University School of Law.

CAREER EXPERIENCE

COBB STREET CHILDREN'S LEARNING CENTER
Roseburg, Oregon -- 1996-1997
Taught Spanish and Hispanic culture to children in grades pre-K to 8.

WILLAMETTE UNIVERSITY
Salem, Oregon -- 1994-1996
Psychology department tutor and teaching assistant. First-ever undergraduate to teach classes in psychology department. Emphasis on dual diagnosis, substance abuse and dependancy, dysfunctional family dynamics.

U.S. VETERANS' AFFAIRS MEDICAL CENTER
Roseburg, Oregon -- 1995
First-ever undergraduate staff intern at inpatient substance abuse and addiction unit. Supervised cases, led group therapy. Led seminars for staff on time and stress management.

HILLCREST YOUTH CORRECTIONAL FACILITY
Salem, Oregon -- 1994-1995
Counselor intern for juvenile sex offender unit. Co-facilitated group sessions.

CIVIC SERVICE & BOARDS

Boys & Girls Aid Society - Cherry Branch, senior board member
Morningside Elementary School - Local School Advisory Committee
YMCA of Marion and Polk Counties, parent club
Salem United Soccer Club, volunteer
South Salem Little League, volunteer
Greater Douglas YMCA (Roseburg, Ore.) - volunteer

MISCELLANY

BUSH ELEMENTARY PROJECT
Salem, Oregon -- 1993-1995
Created and coordinated bilingual aide program in conjunction with Willamette University Community Outreach Program. Worked one-on-one with Hispanic students.

Todd C. McCann

Address

Work
1795 Commercial Street, Salem, Oregon 97302 (503) 566-2822

Education

Willamette University College of Law Salem, Oregon
Juris Doctorate May, 1993
Certificate in Dispute Resolution

California State University Fresno, California
Bachelor of Science, Business Administration May, 1986

Employment

Todd C. McCann, P.C. Salem, Oregon
1995 to Present

Practice emphasis on juvenile law.

Burt,Swanson,Lathen,Alexander, & McCann, P.C Salem, Oregon
Associate 1995 to 1998

Practice emphasis on criminal, personal injury and employment law. Active representation in Federal Court and all State Courts.

Chris L. Lillegard P.C. Dallas, Oregon
Associate 1993 to 1995

Employer was State contractor of Public Defender services for Polk County, Oregon. Practice consisted of a high volume of criminal litigation, including major felony trials, mental commitment hearings, juvenile hearings, and extradition proceedings.

Organizations

Oregon State Bar Salem, Oregon
Bar Number 93357 September, 1993

National Association of Counsel for Children
2000 to Present

American Bar Association, Child Law Section
2000 to Present

Oregon Criminal Defense Lawyers Association
1993 to Present

Marion and Polk County Bar Associations
1994 to Present

Willamette Valley American Inns of Court
1996 to 2003

OSB House of Delegates
2000 to 2002

OSB Local Professional Responsibility Committee
2000 to 2001

OSB Medical Profession Joint Committee
Chairman, 2001 2000 to 2001

Marion County Bar Association Board of Directors
2004 to Present

Craig R. Rockwell
Attorney at Law

Rockwell, Cowan & Habekost
1496 Commercial Street NE
Salem, Oregon 97303
(503) 585-3351

Education:

- Willamette University College of Law School, JD 1973
- University of California, BA History 1970

Legal Work History:

- Private Practice 1973-Present
  - Associated with Hattie B. Kremen
  - Associated with Joseph Guimond
  - Associated with Eric R. Johansen
  - Associated with Robert J. Thorbeck
  - Partner, Rockwell, Cowan & Habekost

Legal and Volunteer Activities:

- Marion County Bar Association Judicial Screening Committee
- White Oaks (Drug and Alcohol Treatment Facility) Board Member
- Instructor for Naturalization classes
- MCAD Board Member

Jeanean West Craig
P.O. Box 2810, Salem, Oregon 97308
(503) 588-2587

Employment

PRIVATE PRACTICE
Sole practitioner, April 1989 to Present
General practice of law with emphasis in domestic relations, juvenile and mediation.

Education

CHEMEKETA COMMUNITY COLLEGE
Associate Degree in Corrections

WESTERN OREGON UNIVERSITY
B. S. – Major Administration of Justice/Psychology

WILLAMETTE UNIVERSITY
Juris Doctor, 1988

Training

Advanced training business, family divorce, mediation.
Certificate in Dispute Resolution, Willamette University College of Law.
Continuing Legal Education

Professional Organizations/Past and Present

Mary Leonard Law Society
Oregon Mediation Association
Willamette Valley Inns of Court
Family Law Section – Oregon State Bar
Oregon Women Lawyers
Director – Salem-Keizer School Board
NACC
Marion County Bar Association

Awards

Recipient of Marion County Bar Carson award.

Volunteer Service

- Juvenile Facilities Task Force
- Judges Classroom Law project
- Marion County Courts – Domestic Violence Council
- Marion County Commission on Dispute Resolution
- Willamette Valley – Oregon Women Lawyers Mentor
- Speaker – Juvenile Judges Conference 1999

DORA L. LUTZ
Attorney at Law
348 Leslie Street SE
Salem, Oregon 97301
(503) 585-9202
(503) 585-9232 (fax)

RESUME

Education:

Bachelor of Arts - Willamette University - 1979
Doctor of Jurisprudence - Willamette University - 1984

Legal Experience:

Member of Oregon State Bar since 1984
1988 - 1993: associate attorney - O'Neill, Evans, Swogger & Cowan, Salem, OR
January 1994 - present: sole practitioner, attorney

Practice is primarily devoted to Marion County juvenile appointed cases. Other areas of practice are limited to retained family law including adoptions, guardianships, intervenor and retained juvenile.

Representation of children and parents in Marion County Juvenile Court has been continuously provided since 1989.

Richard W. Condon, P.C.
Attorney at Law
3387 Center Street NE
Salem, OR 97301
Phone 503.581.6452/Fax 503.371.3616/Mobile 503.930.8482
Email: rwcondon@quik.com

Professional Employment:

1980 – present R.W. Condon, PC: Family Law practice, with an emphasis on juvenile matters law

1978 – 1980 Associate Attorney, General Practice, Allen & Vick, Salem, Oregon

1977 – 1978 Law Clerk (research and writing), J.P. Harris II, Attorney at Law, Salem, Oregon

1976 – 1977 Law Clerk (research and writing), William C. Crothers, Attorney at Law, Salem, Oregon

---

Other Professional Experience:

1993 Founding member of the Juvenile Advocacy Consortium

1988 – 1994 Circuit Judge Pro Tempore, Marion County

Education:

1978 J.D., Willamette University

1975 B.A., Law and Society, University of California at Santa Barbara

1969 Graduated Saratoga High School, Saratoga, California

Professional Organizations: Current Membership

Oregon State Bar (Family and Juvenile Law Section), United States District Court, Oregon
Marion County Bar Association, National Association of Counsel for Children

Personal:

I am married with two sons aged 18 and 15. I am an active supporter of their school and extra curricular activities.

Martin C. Habekost, P.C.
Attorney at Law
P.O. Box 725
Salem, Oregon 97308–0725
503-378-0405

Experience:

ROCKWELL, COWAN & HABEKOST: Salem, Oregon. 2003-Present
Partner. Provide legal counsel to private and indigent adults and minors in criminal matters.

O'NEILL, EVANS, COWAN & HABEKOST: Salem, Oregon 2000-2003
Partner. Provide legal counsel to private and indigent adults in criminal and civil matters.

MARTIN C. HABEKOST, P.C.: Salem, Oregon 1996-2000
Solo practitioner. Provide legal counsel to private and indigent adults in criminal and civil matters.

O'NEILL, EVANS, SWOGGER & COWAN: Salem, Oregon 1990-1996
Associate. Provide legal counsel to private and indigent adults in criminal and civil matters.

Education:

WILLAMETTE UNIVERSITY, College of Law: Salem, Oregon.
J.D. - 1990

LOMA LINDA UNIVERSITY: Riverside, California
M.A. - English/Writing - 1987

LOMA LINDA UNIVERSITY: Riverside, California
B.A. - English - 1986

Bar Admission & Activities:

Member: Oregon State Bar - 1990 - Present
Member: Marion County Association of Defenders (MCAD Board Member)
Member: Marion County Bar Association (MCBA Board Member)

Appendix C

APPENDIX C

PUBLIC DEFENSE SERVICES COMMISSION

Excerpts from the Commission's July 28, 2005 Meeting Transcript
Senator Meeting Room
Courthouse Square Building
555 Court Street NE
Salem OR

MEMBERS PRESENT: Barnes Ellis
John Potter
James Brown
Janet Stevens
Michael Greenfield
Wallace P. Carson

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Rebecca Duncan
Ingrid Swenson
Laura Anson
Shelley Dillon
Laura Weeks

[Tape 1; Side A]

01 Chair Ellis [The meeting was called to order at 9:00.] Judge Abernathy, we welcome you and appreciate the time. Why don't you go ahead and share with us your thoughts.

003 Judge Abernathy Mr. Chair and members of the Committee I am Pamela Abernathy, Circuit Court Judge. I have been assigned to the juvenile court for almost four years. I went out there November 1, 2001. So I am here to give my thoughts with respect to the juvenile consortium, rather than with respect to MCAD, because I think my information with respect to MCAD is fairly out-of-date. I don't have much of any contact with those lawyers since I do 100 percent of the juvenile work. At this point, I would sort of like the juvenile lawyers to leave because frankly I am only going to say good things about them. In a nutshell, I have been very pleased with the quality of their work. It is a small group. I think you have received the basic information. They have 14 and are going to 16 lawyers now. Everyone in the group is dedicated to juvenile law. It is a difficult job dealing with meth-addicted parents and meth-addicted children. There is more to it than meth, but perhaps these days not much more. This group of lawyers seems to approach the job with the notion that, "If I can go an extra mile, I will." Here is a good example. When I went out to the juvenile court, I didn't feel that lawyers were regularly going out to visit children placed in foster care early enough in the case. These lawyers regularly make the effort to see kids and sometimes spend a number of hours with them, really getting to know them. Another example: I instituted the practice of asking the Department of Human Services to create a child-centered case bank because I felt that the child's needs were getting lost in the shuffle. This necessitated that the child's lawyer – and these lawyers rotate from being assigned to the parent or the child in dependency cases – has some notion about what a good children service case claim might be. So they took the initiative to study child development. They also worked with me and some people from the

agency on getting some kind of guide so we could have a framework for review. The delinquency side is less complex in some ways, although we are dealing with teenagers. These lawyers actually seem to like teenagers. They have decided that in bringing new people on, which I think is the biggest hole in the system, to start the "newbies" out on the delinquency side. In the last year, they have recruited three new lawyers. They have made extra efforts to bring those new lawyers to court in the last few weeks and I have met with them. They have spent time observing court and they all seem to be supervised by one of the consortium lawyers who has been doing this for quite some time. I think they are taking steps to mentor these two lawyers. As a group, even though they have no apparent head, they meet weekly. So they are actually more in touch with each other than many groups who have a more formal organization. There are benefits to not having a leader but, eventually, I think they will get large enough that they will have to do that. I run monthly meeting designed to look into court improvements in a variety of ways. Rather than just getting their designee to those meetings, I tend to get different people depending on the subject. That tells me a lot. I can have three, four, five different lawyers all floating in and out of those meetings. That tells me that it is not just, "Oh God, I have to go to these judge's meetings because the judge wants us to talk about improvements." It tells me they are as interested as I am in making the court more effective and more efficient. On that topic, let me just close by taking a specific example. We have what we call a dependency group that is looking at ways to improve the dependency court because Marion County is just overwhelmed with abuse and neglect cases. The lawyers on their own initiative decided that it might be a good idea to have parents represented from the very first hearing. So they went to Multnomah County and they saw how it was done there. They created a protocol and we have in fact adopted that protocol. To fast forward, I was asked to speak at four different meetings that the Judicial Department had planned for all 28 judicial districts with an eye toward juvenile court model court practice. I was asked, "Well, I see that you have just started attorney representation at shelter hearings in Marion County. How did you ever do that?" This was a question put to me by a Juvenile Court Improvement Project staff person. And I said, "Well, I didn't do it. The lawyers decided to do it. They went out and figured it out and they are doing it." This person, who works in the other judicial districts throughout the state, was absolutely flabbergasted because she had never had that experience. She was pushing that pebble up a mountain in other places to try to get lawyers to do these very things. I thought, "Well gee, I guess we do have a good group." So that's what I wanted to say. I don't think there is much to worry about here, except bringing new people in. And I think if we get some people who speak Spanish, that would be absolutely great.

110 Chair Ellis — Are there any now?

111 Judge Abernathy — There are some lawyers who can converse in Spanish, but not to the level of legal representation. They still need interpreters. They may continue to use interpreters, but I think if you could get a truly bilingual/bicoastal attorney – someone who was born in Mexico or born in Latin American – they will understand the cultural issues, and that would be great. I'm sure this is true all over the state – that we need more bilingual attorneys everywhere. But I think, especially in the juvenile area because so much has to do with, not the law, but getting the parent to take some steps – not the law, but getting the child to take some steps. So I think the relationship is more critical in the context of juvenile court than it might be in other parts of the court system where the attorney-client relationship is more formal. These lawyers are going out to homes so, if you can speak Spanish, they would be well served. So those are my two points. I think Mr. Ozanne came to the same conclusion with respect to building toward the future.

132 J. Potter — You speak glowingly of the current situation. Has it always been this way?

133 Judge Abernathy — I have been out at the juvenile court for about three and a half years. I can't speak to what it was like before then. Frankly, I haven't been interested in the history before I got there because I've had enough to do.

137 J. Potter The only reason I am interested in the history is, if it were different five or 10 years ago, I wonder what transpired to make it how it is now and what lessons might we learn.

140 Judge Abernathy I think you should put that question to the juvenile lawyers who are here.

141 Chair Ellis Is 14 to 16 in your mind the right size or too many or too few?

144 Judge Abernathy There is some tension between my perspective and theirs because they have to look at it from an economic perspective. I don't know what the economic answer is as to whether having a certain size doesn't give them enough to make a living. From my perspective, I would have doubled its size because I am always fighting to get lawyers there for hearings. My feeling is they are spread awfully thin. But again, I recognize that they have to make a living. I like the fact that many of them just do this work. So if we get too many people in the consortium, they are not going to be able to just do this work and that could cause some other problems. I have tried to expand the resources out at juvenile court. We have gone from one judge and about three staff to 1.6 judges and about six staff. We have gone from running one courtroom to two courtrooms. And pretty soon, we are going to have a courtroom across the street. That changes the equation quite dramatically in terms of lawyer coverage. Part of the reason they have added delinquency-only attorneys is that we are trying to do delinquency-only calendars, so that the delinquency attorneys can be here while the dependency people are there. But there are never enough lawyers. If we had five more, I think we would still be okay. We are getting by with what we have right now. But on August 1, we are going to time-sensitive sets. We are no longer bucket-setting anything. This is part of our calendar improvement project. I don't know how it is going to work because, when I expect lawyers actually to be in my courtroom at a specific time. Now it is pretty loose because, sometimes, we have a 10-page calendar set from 10:00 a.m. to 12:00 p.m. There is a lot of give in that. Now they will be set at 10:00, 10:15, 10:30 and, if you are not there on time, "See you later." So it is going to be a whole new world on August 1 and they may well go, "Oh my God, we need five more lawyers."

177 Chair Ellis Do I understand they have delinquency specialists?

178 Judge Abernathy I don't know if you would call them specialists. They started out with one lawyer just a few months ago doing delinquency only and trying to learn the ropes that way. Then two more new lawyers who will start on August 1 as delinquency-only because it is a little bit easier. So we have three lawyers who are delinquency-only. I assume that, once they get their sea legs, they may well expand their caseload to do dependency, child abuse and neglect cases.

189 Chair Ellis Do they also handle parental termination?

188 Judge Abernathy The delinquency-only lawyers don't, but the dependency lawyers do.

190 Chair Ellis So when you have a case that involves potential termination of parental rights, the same consortium, but different lawyers within the consortium, represent the child and a different lawyer within the consortium represents the parent?

194 Judge Abernathy Exactly. One day one of the lawyers is going to be assigned to the parent and the next day the lawyer will be assigned to the child, which is good. I believe the reason we get the volume of work done in Marion County with so few judicial, lawyer and staff resources is because we have a very non-adversarial culture. Generally speaking, people focus on what is in the best interest of this child rather than, "I have to do certain things because I represent the parent." That's not to say they are unethical in terms of their attorney-client obligations. But I think there are ways to represent a parent with an eye toward the best interests of the child, rather than ways to represent the parent with blinders on. In the other states where you have bars that just represent the parent and bars that just represent the child, you start to get what I

would say is advocacy around parent-only issues. I do think you can ethically represent the parent while focusing on the child needs. So we settle most of the cases, though we have very contested hearings. They do have cases that go to termination. But that is because the parent failed to get off meth or whatever.

224 Chair Ellis — You mentioned that they haven't really formed a structure and, of course. that kind of resonates with us. We are dealing with that kind of questions. Why hasn't a more formal structure emerged?

228 Judge Abernathy — You know, I can only speculate. That means the question is better put to them. But in my observation, you have 14 people or so who are a very close-knit. They meet every week for lunch and talk about issues. They are very collegial with each other.

237 Chair Ellis — So when you have an issue, who do you go to?

238 Judge Abernathy — It depends on the issue. A couple of lawyers went with me and a group to a training. So for awhile, I took every issue to them because we did spend a lot of time together. Sometimes I will send an e-mail to everybody. Sometimes I will bring it up in one of my court improvement group meetings. And sometimes I will call a specific lawyer and talk.

250 Chair Ellis — From your point of view, how could we do our job better?

251 Judge Abernathy — Well, if it ain't broke don't fix it. I think they are doing a good job. I think urging them to lay out some long-term plans for the next 10 years is what needs to be done. They are doing a very good job. We do need to bring in some new people. The two we are adding August 1 are at the very beginning of their careers.

262 Chair Ellis — Are there lawyers who want to practice in the field and are not included?

262 Judge Abernathy — I hope so. I don't know. We are trying to make juvenile law into something other than it used to be: the last place lawyers would want to practice. Thanks to programs like the Chief's Juvenile Court Improvement Project, I think lawyers are getting the message that it is tough, but that it is very rewarding work.

271 Chair Ellis — Of the 14 to 16, how many would you perceive to be full-time?

275 Judge Abernathy — Some of them have a domestic relations practice, and a couple are in MCAD. I would imagine that the majority of them are spending about 70 to 80 percent of their time doing juvenile work.

286 J. Potter — You mentioned their mentoring program. We are interested in mentoring. It seems to be an informal program. What about training generally? Do you see any particular needs for organized training.

290 Judge Abernathy — Yes, I am a big fan of training. I just mentioned our Juvenile Court Improvement Program, which was started about five years ago, right Chief?

293 Chief — I think we are up to seven years.

295 Judge Abernathy — The way that works is juvenile court judges meet annually and focus on training. I think that alone has been a great help. I think we can do a lot more in the way training. I tell new lawyers that, "You are going to learn the law related to this field pretty quickly. All you have to do is memorize 419(b) and 419(c) and you are done. It is a small section of the statute, but what you really need to focus on as you advance in your career is to learn things from all the other fields that impact the work that you do."

351 Chair Ellis Other questions?

354 Chief I would just like to commend Judge Abernathy because she has been a real leader in the juvenile arena. I appreciate it.

358 Chair Ellis Thank you very much.

361 P. Ozanne Mr. Chair, I would like to welcome Presiding Circuit Court Judge Paul Lipscomb.

365 Chair Ellis Good morning.

365 Judge Lipscomb Good morning, and thank you for taking your time to assist us. I don't have any prepared remarks today and would be happy to answer any questions you have. I hope that you won't tinker much with what is going on with our juvenile consortium program because the size is about right for its operations. It is still small enough to be operated on a largely informal basis. They provide excellent service, not only for the court, but also to the people that they serve. They interface very well with the juvenile department. That system is really working very, very well. It doesn't need much, if any, tinkering with.

In terms of the overall operation of indigent defense services in Marion County, I have become increasingly convinced that we need a more structured organization, that we have grown beyond the point where we can operate efficiently and with as much quality as I think we should be demanding of ourselves and the people that represent the indigent defendants in this county. I think the current decentralized structure works reasonably well when there is a small group of providers and a small group of judicial overseers, if you will. But we have a lot of judges and we have a lot of lawyers providing the service. At least to me, there isn't a strong enough organization to make that marriage work as well as it could. I probably should have started off saying this. We have been served very well by the attorneys in this county who have been providing indigent defense services for years and years. It has happened at much personal sacrifice to the lawyers involved. They are not paid as well as most lawyers providing indigent defense services in this state because they work on an hourly basis rather than a contract or per case basis. I think that if we change to a per case basis, the cost will go up. I think if we change to a public defender system, the cost will go up. But I think it is time to do that because I think with a change to a public defender system, the quality will go up. I think our indigent defendants deserve the same type of high quality representation that is available elsewhere and I am not sure we are always able to deliver that under the current structure. I think that the attorneys who are involved in the system deserve the same pay as attorneys in the rest of the state. I guess that is the second factor that I wanted to share with you. I think it is time to look at the structure of MCAD and I think it is time to consider to carefully whether we should be moving to a per case basis or to my preference, a true public defender system. A public defender system will provide better benefits to the individual lawyers and I think better quality representation. I think that quality on a per defendant, per case basis would go up as well, since we would have more professionalized delivery of services and I think it would be easier for the judges.

450 Chair Ellis Certainly one of the arguments supporting a public defender model is that you have full-time criminal defense specialists, so you have a concentrated training program, concentrated CLE access, and much more centralized caseload management than you see in MCAD today. From your point of view, do you sense that having as large a group as MCAD, which has I think around 55 lawyers, most of whom make it only a portion of their practice but not the dominate part of their practice, that the lack of specialization is something you see?

468 Judge Lipscomb I can't candidly say that that is what I think it is. I will be real candid here. I think what happens is this. A lot of individuals get their law school degree, pass the bar and go into private practice here in Marion County. It is harder to get into MCAD than it was, but it is still fairly easy to get into MCAD. Some lawyers get into MCAD and find they love the work

and they become career defenders. They are with the program forever because that is their choice. Several of those lawyers are in this room behind me. I have nothing but the highest praise for those folks. There are also some individuals who come in and find they don't really care so much for the work, but it is the work that is available. Others get stuck in criminal defense work. I think we have a fair share of people in MCAD who are kind of stuck doing indigent defense work because they haven't been able to move into something else that they would prefer. I would say that is less than the majority of people. The majority of people that are doing that work are doing it because that is what they want to do and it is what they believe in. But I think there are some people who are doing it because it is the only thing that is available to them. I don't think that is good for the indigent defendants in this town. I think there is quality control issue.

509 J. Potter — I understand your point,. The Chair clearly understands your point. He was Chair of the Public Defender Board for 30 years in Portland. Are there other ways to "unstuck" these folks who are melancholy at best, other than a public defender system? Is there some other way to motivate or weed out these lawyers under the current system?

521 Judge Lipscomb — Well, we try when we see issues. We bring them to the attention of the MCAD Director and there is always a response. I don't fault the leadership of MCAD for that response. It might not always be what I would want to see. I might want to see something stronger, but there is always a response. But when the system is as decentralized as it currently is, I am not sure how much more effective they can be, and there doesn't seem to be much that we can do effectively. I think we are beyond the days when we can say, "I don't want you appearing in my courtroom anymore because I don't think you are doing a good job on behalf of your clients." I also want to say this, and this is my opinion as one judge in Marion County. There are other judges in Marion County that think this system has served Marion County well for many, many years and they don't see the need for change. But in my own view, it is time for change.

563 Chair Ellis — The system as it now exists seems a bit like the old individual appointment system, only it is managed by Steve primarily. Do you see much difference between what we have now in Marion County and the old individual lawyer appointment system, other than it is privately administered?

575 Judge Lipscomb — I think we had better quality control under the old system because we knew who was capable of doing what. One reason we have allowed as much of the responsibility to switch to MCAD is because the judges in this county are overloaded. In terms of quality control, we certainly had more quality control under the old system. [end of tape]

[Tape 1; Side B]

080 Judge Lipscomb — I honestly believe there is less quality control now. There are reasons for that and the tradeoffs might be unavoidable. But I honestly believe that, in terms of quality for the indigent defendants, it was probably better under the old system than under the current system. But other than that. I would say that the systems are very similar.

092 J. Potter — You had mentioned the pay issue. Two things I think you said. One was that, if there were a public defender, the lawyers would get paid more than they are now; or if we switched over to a contract-by-case system they would get paid more than they are. Using the second example, is there a scenario that you can paint which would suggest that we should move to a per case pay system and that would address the concerns you have that a number of lawyers might not be working up to snuff?

099 Judge Lipscomb — Well, I think if you did it on a contract per case basis, you limit the number of people who participate. I think that the concerns they would have, or I would have if I were a contractor, is that, if I wasn't delivering quality service, then I wouldn't get the contract next time around.

The currently system based on an hourly rate I think is inequitable. Everybody else in the criminal justice system, whether it is a interpreter or a doctor or an investigator, gets their full hourly rate. Psychologists get paid their full hourly rate. Investigators get paid their full hourly rate. But the lawyers get substantially less than there full fair hourly rate. I don't think that is right.

115 Chair Ellis — If we were to go to a more concentrated group, what is your sense as to the size that would be right for the caseload?

118 Judge Lipscomb — I don't know. I haven't looked at that or thought about that.

120 Chair Ellis — If we were to go towards a public defender organization in Marion County; we know we can't do that to the exclusion of other providers because of the conflict problem. Do you have a view as to how the county would be best served in terms of multiple providers?

127 Judge Lipscomb — I don't, but I would be happy to help you folks figure that out, if that is the direction that you want to move.

132 Chair Ellis — We have heard your thoughts on the quality control, which is a very important issue to us. Let me move to the administrative side. How do you feel that is working from your point of view.

135 Judge Lipscomb — Steve Gorham is very responsive and does very well. I really don't see that changing the administration will do anything other than change the administration. It is not going to move us in the direction that we want to go. I think Steve works hard, cares and believes in this kind of work, and does a good job as manager. I share his frustration. It is difficult to manage people over whom you have very little control. I know the Chief Justice can sympathize with that.

149 Chair Ellis — Who do you perceive that Steve reports to. To whom is he accountable?

151 Judge Lipscomb — To the judges and his own board. His formal reporting is to his Board of Directors.

155 Chair Ellis — All of whom are MCAD providers? Do you have a view whether it would be beneficial to have a board which included membership that was not also MCAD providers?

156 Judge Lipscomb — I think it would be good for the system to get a little outside involvement from time to time. It would probably be less comfortable for the current membership on the board. All of us benefit from an outside perspective from time to time.

165 M. Greenfield — You have mentioned three theories. Is the problem the design or the implementation of the design? I guess I would ask you whether the current system is working as designed?

170 Judge Lipscomb — It has been an evolutionary design. Back in the days when I started practice, it was designed to assist the lawyers and to provide a floor for them to make their overhead while they were generating some business and building up a practice. The expectation was that they would move on to something else. It has evolved from that. That is no longer the structure of indigent defense in Marion County. It has been designed by evolution and I guess I would like to see some further evolution at this point. I don't think it is the execution of the current design that is at fault. I should also probably say that I think the system still works reasonably well. But I think we can do better and I think if we can do better, we should do better. We have that responsibility. I wouldn't fault the board. I wouldn't fault Steve's leadership. I think our indigent defense practice is large and I think it is time for change.

198 Chair Ellis — If we were to look at the direction you are suggesting, do you think there is a climate that is conducive to that or will there be big resistance?

200 Judge Lipscomb There will be some resistance. There will be some people who probably wouldn't survive the transition. I am not insensitive to that issue and that problem. I would feel for those people. Nobody likes it when somebody from the outside changes the way things are done. And people in the system probably wouldn't be particularly happy. Things might even get worse for awhile before they got better. That commonly happens when institutions change. But I don't think we will be muddling along down the same path 10 years from now in the same way that we are today. I think the change has to happen at some point, and this is a good time and climate for it.

221 Chair Ellis Any other questions or comments?

222 Chief I want to thank Paul much like Pamela Abernathy. Paul has provided great leadership here in the county, but also I want to thank you for indigent defense, budget reduction and all kinds of things.

228 Judge Lipscomb Thanks Chief, and you make a pretty good boss.

229 Chair Ellis Thanks very much.

241 P. Ozanne Members of the Commission, Judge Terry Leggert is coming at 11:00 a.m. due to her calendar. So my suggestion would be to have Dick Cowan and Steve Gorham come up and speak about MCAD before then.

245 Chair Ellis That's fine.

250 Steve Gorham This is Dick Cowan. He has been the Chair of our board for many years. I am going to start out with a little bit of a presentation. You have a lot of materials in your agenda packet. Some of what I am going to be referring to is included in that. I have a couple of other handouts, but I will pass them out after the presentation. As you know, MCAD was founded in November of 1993. We have been in existence for about 11 ½ years although my math isn't always correct. We are a mature organization. We are a 501(c)(3) non-profit corporation, with a Board of Directors, three full-time employees and three part-time employees. I think it is fair to say that my management style is to follow the rules, but sometimes to make reasonable exceptions to the rules to make the system work.

[Jim Brown arrived at 9:55.]

270 S. Gorham Especially here in Marion County to make the criminal system work. All of my decisions can be reviewed either by a written appeal process or by the Board of Directors. Thus, I would submit to you that I am not an autocrat. While a lot of what we do is management of costs, we have always been concerned about the quality of indigent defense services and the whole criminal system both here in Marion County and the State of Oregon. As you know, MCAD is the exclusive contractor for all indigent defense matters starting in Marion County. I would submit to you that the PSRB is really a statewide issue rather than just a Marion County issue. I want you to understand this is not criticism of anybody. Certainly not criticism of Harris Matarazzo, who I think is the only contractor for the PSRB. As some of you may or may not know, when the PSRB began in 1978, I was the exclusive indigent defense provider for several months. After I did it for several months, we split that job into three and all of the three people were Marion County attorneys. Eventually Harris was willing to do that job. I know from my experience that this is a very, very stressful area, especially given the lack of mental health treatment throughout the State of Oregon. The system really needs to change. I would say also when you look at the civil commitment system in Marion County, the state and in particular the indigent defense system should put more resources into the representation of the allegedly mentally health. This is clearly not news to anybody who has

looked at that system. MCAD in particular has been saying this for 11 ½ years. With more resources, more quality work could be done to divert the allegedly mentally ill away from the Oregon State Hospital. If you are really concerned about quality work in Marion County, this should be your first priority. Basically, I have heard criticism and you have heard some of it today about our organization and how we provide indigent defense services to the accused in Marion County. It is clear any organization can improve, and particular in Marion County where we have always sought to improve. Change, however, just to change without improvements does not get the defendants in Marion County or the state indigent defense system anything other than turmoil. I believe Judge Abernathy said, "If it is not broke don't fix it." Throughout its existence, I submit to you that MCAD has provided quality, cost efficient service to our clients in the State of Oregon. What is the measure of quality service? As Peter has so aptly said over and over again, he could spend all of his time trying to come up with its measure and still not be successful. Is it the complaint rate of clients? Is it the complaint rate of judges? Is it the complaint rate of the District Attorney? Is it how these complaints are handled? Is it successful post-convictions, successful appeals? No one can really know what quality service is. In MCAD, we have a vigorous, quality assurance process and have had it long before the statewide indigent defense has had a complaint policy. Written complaints are handled formally, with due process for a person who has the complaint filed against them and with an appeal process. Now maybe that is cumbersome, but I hope that you as leaders of indigent feel that due process, especially for the attorneys doing your work, is important. Should we substitute this for an pre-autocratic system where attorneys got blackballed because someone in the system did not like them or because of their personality quirks? I don't think so, and I hope that you don't either.

364 Chair Ellis — When you describe the former autocratic system are you thinking of it pre-1993 individual appointment system managed by the court?

368 S. Gorham — I would say, yes.

369 Chair Ellis — That is what you are referring to?

370 S. Gorham — Yes, and I would also say managed by the court and the District Attorney's Office in the criminal system. I heard Judge Abernathy and I would say, in the juvenile system as I think Mike knows probably better than anybody, it was managed by a judge in an autocratic manner. Sometimes that worked very well in the juvenile system and the criminal system, sometimes it didn't.

378 Chair Ellis — I don't think anybody is proposing to go back to the system that you just described, so as you go forward keep other alternatives in mind.

382 S. Gorham — But I would submit to you that there are very few causal complaints about representation. If you actually look at most of the complaints that happen they are about style or what I call personality quirks. That is not true of all of them, but if you actually look at the number of complaints, that is what you will find. MCAD was borne out of effort, as Judge Greg West, our then presiding judge said, "to provide quality, cost-effective service to the indigent in Marion County." I submit to you that we have provided this service within the context of a diverse legal system and we have sought to provide a unique service delivery plan to help the state provide this service. I don't know how many of you remember the Spangenberg reports. There are some newer ones and older ones, but I think if you look at the ones that existed when we were actually created, they think that a diverse system of service delivery ends up being the best. Now what I mean by that is a system has some local defenders, traditional public defenders, and various other types of organizations such as consortiums, such as we have. It is said there are advantages to providing indigent defense services by use of traditional public defender groups. In Oregon. and just as I said we provided those diverse methods over the years, I would submit to you that you can still do so. While we are a consortium, we are a consortium of either individuals, sole practitioners, or small law firms

with individual attorney membership. I think that what that gives you is diversity from the local bar, especially in the county. But also we provide a wealth of experience that can be used, and has been used, by statewide indigent defense to do cases in other parts of the state. We have a core group of aggravated, death penalty qualified individuals. As you know. we provide service not as case counters. but I would submit to you as efficient hourly rate attorneys. I agree with Judge Lipscomb that our hourly rate should be increased. It is not enough. If quality is really to important to the State of Oregon, then increase the hourly rate. I would submit to you that more quality attorneys would chose to do indigent work exclusively over a civil practice; or as Judge Lipscomb said, doing this kind of work just to start and then move on. I submit again, as Judge Lipscomb pointed out, that we have a very good core of individual attorneys and this is primarily all they do. They do some private criminal defense and a few other things, some civil practice, but as you know from talking about post-conviction relief and habeas corpus practice, which we do a lot of in Marion County, the civil rules are what those two practices revolve around. So if you just did criminal and were not updated on civil rules, they would be lost in the post-conviction and habeas practice. Here is where we talk about a service delivery plan. We primarily provide our service by providing an attorney of the day to the main criminal court at the Court Annex. Some of you may or may not know that we have two courthouses in Marion County. The majority of the criminal work is done at the Court Annex, which is six miles out on the Aumsville Highway next to the jail. It is kind of what happens in Multnomah County, only instead of being just across the street, we are talking about six miles away. We have a misdemeanor attorney of the day. We have an EDP attorney of the day. We have a felony attorney of the day and a Spanish speaking attorney of the day. These attorneys of the day are appointed to represent the criminal defendant in each of those categories as soon as the appointment is approved. So the individual gets the actual attorney that is representing them at the arraignment. Now some of our judges in particular think that this is a great system. They have their attorney, they know who their attorney is, their attorney starts that attorney/client relationship right away. Some don't think that is important. I think that is diversity of the criminal justice system. We also have drug court attorneys. Dick Cowan is one of the main drug court attorneys. We also have a SED attorney of the day. Those aren't at the criminal Annex. Those are done downtown. For some of you who may have been involved in that type practice, that is a very hard practice and a very cost-inefficient practice. The state as a whole probably spends more money trying to squeeze money out of our indigent clients for political reasons than they actually get. I think if people actually look at the cost, rather than the politics of it, that system would change drastically. But we do SED attorney of the day. The system in Marion County works pretty well, but I don't know if it works better or worse than the systems in other counties. I just think it works different than systems in the other counties. I think, as Judge Carson and Judge Lipscomb say, it is kind of hard to direct or herd the cats because an elected judge has their constituencies and power. I think, if you look at the MCAD system, you have to look at the court system in Marion County. For such a large jurisdiction, we have a unique system of judicial administration. Some of you may not know this. I think we have 14 judicial positions. Eleven of them have individual calendars to which the criminal defendant are assigned after they plead not guilty. Most of our criminal work is done at the Annex with one judge and a part-time referee. If a person pleads guilty, and of course most criminal matters do end up in a plea negotiation with a plea of guilty, those are done at the Annex. The sentencings are done at the Annex. The whole proceeding happens at the Annex with one judge. That currently is Judge Leggert. It has been a sort of rotating position. The judge before Judge Leggert, and at various times before that, is based on how the judiciary decides to do it. Then relatively recently, we have had a referee, who is also a pro tem judge, do the work. So two judges who do most of the criminal work. But as soon as an individual pleads not guilty, that case or that defendant is assigned a judge – one of the other 10 judges downtown. Eleven judges downtown. Of the 14 judges, Judge Abernathy doesn't take criminal assignments because she is our juvenile judge right now. Judge Dickey doesn't take criminal assignments because he chooses not to and you have Judge Leggert who is out at the Annex. So out of 14, 11 take individual assigned cases. In that case, that defendant is always with that judge. This may surprise you

or maybe it doesn't, each one of those judges have some common procedures, but mostly separate systems for handling their criminal cases. The rules of these 12, and I include the rules out at the Annex, are mostly custom, not written, and they change frequently. I am not sure it is a system that a traditional public defender would be welcome. Different judges, different systems.

571 Chair Ellis — You are suggesting that, notwithstanding its population size, because of individual judicial calendars a PD system would not work in Marion County?

576 S. Gorham — I don't know if it would work or not, but it would just be more expensive. Probably more expensive than the system as I know it exists for Metro PD, where you have a coordinated case assignment system, if you will, where an individual either goes to trial that particular day or doesn't. There is sort of a one rule system in Multnomah County, whereas here we have a 12 rule system. So I think it could work, but it would probably be less efficient than our system and more expensive.

594 J. Potter — Before you go on, do you think the dynamics of the system of change, if the system changes, would affect other parts of the system. We know that different DAs and their personalities and charging practices affect the system. We know that judges and whoever the Chief Judge is can affect the system. If we went to a different system in Marion County would that affect the other parts of the system as well? If we had a public defender system, might the judges make some adjustments to that system?

607 S. Gorham — I just don't know. They might or they might not. I don't know. What I do know is before MCAD existed, in essence, the criminal justice system in Marion County was run by the then presiding judge and the district attorney. There is no doubt about that. Since MCAD has existed, the criminal defendant and indigent defense has had an increasing voice at the table. We are no longer the stepchildren of the criminal justice system and, I would submit to you, one of the reasons is because of MCAD's existence.

623 J. Potter — Doesn't that address my point though. Because MCAD came into play, judges changed and the DA practices changed. So if something else came into play, can't you assume that there are going to be some more changes?

629 S. Gorham — You may be correct. I think it really depends on the structure that you have and what the change actually does for you. I think, as I'll tell you in a moment, change just for change sake just won't get you anywhere. I just don't know and I think it depends on how the other components of the system viewed it. I guess I would submit to you that you would see maybe some structural changes, but you wouldn't see any real change in what we are here to talk about – quality of representation. Certainly, on average, we give as good a quality service as anybody in this state and I challenge you to say that we don't, or prove that we don't. You can say it all you want.

660 Chair Ellis — I don't think we are here to prove it or even say it. But let me take a few topics and you tell me how MCAD does it, and we will compare that to other alternatives. The ones that come to mind are training, supervision, CLE, and case assignments so that the cases are assigned to lawyers of appropriate skill level and specialization.

674 S. Gorham — Can you hold off until I finish my remarks, and then I have answers to all of those questions.

677 Chair Ellis — I know where our minds are.

678 S. Gorham — I have answers to all of your questions. I do want to say a few words about the cost of our system. I recently reviewed the actual case costs. If you remember, I think this happens mostly everywhere, but at least particularly in Marion County. The defendants' cycle is what

we are talking about. Each defendant in Marion County primarily gets an attorney for how many cases he might have. [end of tape]

[Tape 2; Side A]

001 S. Gorham — The statistics were from 2004. Marion County saved the State of Oregon a minimum of $300,000. I tried to include every cost I could think of. Our administrative costs were included, our case expenses were included, the attorney fees were included. Everything I could think was included. I came out with a minimum of $300,000, given if you had an average case count system in Marion.

009 Chair Ellis — That is annual or biennially?

009 S. Gorham — Annual. That was for 2004. Now you have to remember, I believe I am correct about this. The traditional public defenders in Oregon have been paid on a case count system. So I substituted a public defender and gave them the average costs. I think you probably could give them the average cost because of some of the things I just talked about for Marion County. At a minimum, you would have to be spending $300,000 extra. And that doesn't include the start up costs, which I have talked about at various times and have never really penciled out. But I would say to you it is probably a $1,000,000. So with start up costs of a $1,000,000 and an average extra cost of probably $300,000 for what would be a traditional public defender. That doesn't factor in the conflict issues, which in Marion County we don't have. Because we are individual members of the consortium, we have no systematic conflicts. We have conflicts that anybody is going to have, where you might have multiple defendants in a particular incident or someone who has represented somebody in the past. But those are very minimal in the system we have. So I would submit to you that you would need an awful lot more money if you changed the system. The question I think you really need to look at is does the increase in cost get you the increase in quality that you may be looking for? I want to say a couple of other things. It is clear that the management of MCAD is an efficient, well-run management. Now it is easy for me to say that because I run it. But I hope that you think so too because the statewide management of our contract is minimal and we are not a problem. We efficiently do our jobs and the management of our system and, thus, we haven't needed a lot of oversight by statewide indigent defense. Add to that the fact that you hired two of our officers, I think shows the quality of our administration. We hire quality people and you do too. I heard, and Barnes I think you alluded to it earlier, that MCAD is too big. Yet I think if you actually look at what we have as a core group of attorneys, we have a quality core group of attorneys.

057 J. Potter — How large is the core group of attorneys that you are referring to?

058 S. Gorham — It is about 50 or 51.

058 J. Potter — No, the core group?

058 S. Gorham — The core group is around 30. I have heard that you want to provide a post-conviction service contract in Marion County. It shouldn't surprise any of you that we have been asking for help in various areas of the post-conviction process for years. We have asked the Oregon State Bar. Criminal defense providers such as Jim Hennings has been doing this for years. If we want to increase the quality of post-conviction work in Marion County, it is not by getting rid of MCAD. Certainly it would probably be by providing more resources. I hate to keep going back to that, but to get more quality you have to provide more resources. That is one of the things that you have to look at, if not the primary one. I can't say anything more than PCR is a hard, hard practice. The system has helped us to develop our systems But if you look at the systems we have developed in MCAD, they are pretty darn good systems. They provide you with a system where there is the ability to get paid more for the more work that we do. We are an efficient hourly rate system. You all have copied our system in Yamhill County and

maybe a little bit in Lane County and in other consortiums that you are talking to. The current extraordinary expense system started in Marion County. So I guess what I want to conclude with, other than answering your questions, is that I submit to you that MCAD does provide quality, efficient, indigent defense for the State of Oregon and Marion County.

107 Chair Ellis Dick, do you want to make your opening comments?

108 D. Cowan I will maybe touch base on a few things. I want to say that I have a great deal of admiration for Judge Lipscomb, the Presiding Judge. We have been hanging out together for an awful long time. We both started here about the same time. We happen to disagree on things here this morning. So. of the issues that have been touched on, I think they perhaps need clarification. Mr. Chair, I will try to get to those five areas that you mentioned as well. There is much specialization in MCAD. The bulk of the people doing MCAD work don't do anything else.

126 Chair Ellis How does that work with this attorney of the day process?

127 D. Cowan The process is this, and this also touches on the supervision and the specialization issues. The attorney of the day process is this. You have a calendar. We have a monthly meeting of the membership and at that monthly meeting you sign up on the calendar for a day to do the representation work, depending upon your own qualifications and your own calendar. As Steve mentioned earlier, we have these EDP folks, the misdemeanor folks, the felony folks. SED is a separate calendar and drug court is separate. We alternate and vary the way assignments are made, so that everyone gets a fair shake. That is to say, we will go to oldest bar numbers first for awhile, and then we will flip and go to most recent bar numbers, and you simply sign up. At the monthly meeting, I say, "I'll take next Tuesday as the misdemeanor attorney," and my name goes on the calendar.

141 Chair Ellis That doesn't sound like a selection process which deals with competence.

141 D. Cowan I disagree with you. I think the disagreement is this. Your view is too focused in terms of the competence. I am looking at this individual case and I'm saying, "Is Barnes Ellis qualified for this case, or is Jim Brown qualified?" However, it is pre-done when you categorize, i.e., the person is qualified to do misdemeanor work by virtue of meeting certain statutory criteria set out by the state – qualified to be the Hispanic attorney of the day, qualified to be the EDP work. It isn't the same as when Judge Sloper's secretary Alice use to call me up and say, "Okay Dick, the judge decided now you can probably do a Theft I because you have done some of those driving while suspended cases. You did okay with those, so we are going to try you with these." That is what used to happen and that was a long time ago. The system of today and the old system are not even in the same world. They don't coexist. We created this system in 1993 out of need and necessity. I have been hanging with this particular system since 1977. In listening to the PJ's remarks, that is a mixed bag. He is not up here advocating to get rid of MCAD. He had many complimentary things to say about the way we operate. I think he is probably reflecting on: "Maybe it is time to structure some changes." But in that regard, that all took off on the attorney of the day case. You would sign up as a misdemeanor attorney, and if you were also a felony qualified, you would sign up for felony. We have two separate calendars that we pass around. The Hispanic group is a separate group because there are only three or four of those folks. If you are there at the meeting, after the meeting you then have an opportunity to sign up. First preference is for those folks who show up regularly for the meetings – a way of helping those folks come around to the regular meetings and hear what is going on and get the latest pronouncements, announcements and share information. The juvenile consortium meets weekly for lunch. That is great, but we are happy to meet monthly. The system then has that individual going to the court and dealing with all those appointments on that given day. If you run into problems around the numbers, and that occasionally occurs. I haven't done that aspect of the work for three or four years now. The only indigent defense I do is associated with drug court. It used to be that you would get

appointed to 30 or 40 cases a day. Folks have their own comfort level. We encourage that. And there are other indigent defense attorneys present at that point in time. If you get to that comfort zone level, you have to draw the line someplace. So you simply turn to somebody else who is there and they will pick up that slack. We have the ability to call the MCAD office and find out who is the attorney of the day today. So they cover a simple appearance for you sometimes. That is how the attorney of the day thing operates. If somebody has a specific complaint, they are getting shut out or they have gotten a bunch of lousy, rotten cases, -- I can recollect actually having a day once upon a time where I went to the be the attorney of the day and not one soul was appointed on that day.

223 Chair Ellis I think John can analogize that to his fishing.

226 D. Cowan You can call the administrator and say, "Can we do something?" and we allow that. We encourage folks to swap amongst themselves, if they run into some other kind of conflict. Suddenly some judge says, "We aren't going to do this thing next Thursday," and that is your attorney of the day. We call up Steve and say, "Can I work a trade?" or whatever. We eyeball that to make sure little groups inside don't play games with the idea of fairness. Once upon a time, Judge Miller tried to do something akin to evening out the numbers. Barnes gets five, John gets the next five. That would maybe work in a perfect world, if you were willing to forego the personal connection. The attorney of the day scheme works that way. If there is dissatisfaction, the individual can get before the judge and request that somebody else be appointed. And, generally, the substitution is to whomever is the next attorney of the day, unless there is some sort of specialized issue. Judges always keep their own shopping list of folks with certain types of character or character defects. Sometimes, people get personally challenged in working with some of the folks in system.

249 S. Gorham I wanted to add a comment. I think, frankly, the fact that we have a misdemeanor attorney of the day, even though most of our attorneys of the day are felony qualified, shows that we do work toward specialization. You have that gross specialization and then you have an individual specialization, where a judge does not think someone is matched to a particular case. They know who to call. They call me and, as I stated my presentation, we have rules. Primarily it is the attorney of the day who is the default attorney appointed. But what normally happens is the court and I and the attorney who is appointed work out who is going to be representing this person. If the court calls and says, "You know, this is a particularly difficult case, this is a particular difficult defendant, this is a particular difficult whatever," we then try to match then to somebody from MCAD. And like I said, we do have a diverse group of individuals. I can't think of a time that we haven't been able to match -

271 Chair Ellis How often does that happen?

272 S. Gorham Maybe once a month. I'm saying that it may happen 12 times a year out of 80,000 cases. A very small number. It happened two weeks ago, where the court, I think unfortunately at the instigation of the district attorney, sought a different counsel. But it worked out. We worked it out.

281 Chair Ellis The five things I asked about, you have addressed just now some aspects of specialization. But let me remind you of the list --

282 S. Gorham Let me address some of them, and if I miss some of them you can tell me.

285 Chair Ellis Alright.

285 S. Gorham You talked about CLE training. I think I have provided you with some of the documents that show our attorneys and our CLE. I think maybe my answers to the questions that were provided to us, some of those other things are there but I will highlight them. We have monthly meetings. Probably about half of each monthly meeting is devoted to current issues

both in the law and in the Marion County courts. We provide CLEs, I would say five or six a year – particular CLEs. We have one scheduled for tomorrow. Of course, we encourage all of our members to go to as many CLEs as they can; in particular, criminal law programs hopefully run by OCDLA.

300 Chair Ellis Let me ask you, Steve, about that. At OCDLA meetings, how many regular attendees are there from MCAD?

302 S. Gorham I would say between 10 to 15 out of the core group of 30.

304 Chair Ellis Out of the core of 30 and the total of 55?

307 Chair Ellis That group of 10 to 15. Would you describe them as 100 percent of their practice is defense work?

312 S. Gorham Yes, primarily. When I say 100 percent, I really mean 90 percent.

314 Chair Ellis That next tier, what percentage of their practice would be defense work?

318 S. Gorham Of the non full- time attorneys?

321 Chair Ellis Right.

321 S. Gorham Oh, I would say at least half of them.

322 Chair Ellis We are probably not communicating. Would you say that group, between 15 to 30, half of their practice is devoted to criminal defense?

324 S. Gorham No, I would say probably most of them do primarily criminal work.

326 Chair Ellis So you think there are 30 members who are substantially full-time defense?

328 S. Gorham Yes.

328 Chair Ellis The group above that – the 25 others?

329 S. Gorham I would say half of them primarily do criminal defense in some way. Again, I would say Tom Bostwick does primarily criminal defense and Walter Todd. So those are the quality of people that are in that group. We have Noel Grefenson who is one of, if you will, newer members. I would say that he does primarily criminal defense.

340 Chair Ellis You made a statement that I thought was interesting, which was, if the hourly rate were increased, the quality would go up. I thought I heard your logic being a higher hourly rate would attract a quality of practitioner we are not attracting now.

346 S. Gorham I did say that and I think that is true.

347 Chair Ellis Why wouldn't we achieve that result if we restructured in a way that recognized different people have different experience and competence levels and you had a compensation system that reflected that, rather than the one size fits all.

353 S. Gorham If what you are talking about is paying the experienced attorney more, I don't believe we would object to that at all. But it would then be harder I think to get the initial person in, if we are talking about a system like MCAD, because they would be paid less. I'm sure as you worked up in your experience level, you would be paid more. But what we are having a problem doing is getting the good quality, experienced attorneys involved in MCAD. If you

look at our roster, I would say about half of it is people who have been around since the beginning of MCAD. But half of the people haven't been.

370 Chair Ellis — Do you disagree with Judge Lipscomb's characterization, and I'll rephrase it for him, that MCAD is an employer of last resort for some of its members?

372 S. Gorham — As you can see, I am having a hard time answering that question. I think there are a few that that might apply to, but I don't necessarily think that those are people are providing bad legal services. I think what you have for a percentage of those people is people who you would describe, or some of the people you would describe, as weird ducks, people who have personalities that you might not want to see everyday. That doesn't mean that they are bad attorneys or don't have the qualities that you want. That just means they are a diverse group of attorneys.

392 Chair Ellis — He was pretty direct in stating his perception that some of the MCAD membership would not be able to attract work in the private sector.

396 S. Gorham — I don't think that is true. I think every MCAD member would get work in the private sector because they do. I guess in that sense the proof is in the pudding: they do.

400 J. Potter — Can I twist the question around and say, "How many of those people would get a job if we switched to a public defender office?" Let's say that a public defender was created and we got a group of 30 lawyers, the core group just doing it full-time. The public defender office needed to hire 22 lawyers. And I'm not just picking a number randomly. I am thinking of the Lane County model --

405 S. Gorham — I know what your question is, and I am going to answer it this way. I didn't get a job at the public defender's office. Now would I today? I certainly hope so. Should I have when I applied at the Metro Public Defender 30 years ago? I would have hoped so. But you know, how do you really answer that question. Do I personally provide quality legal services? I sure hope so. And, sure, part of that is experience. But I think I was as good then, without the experience component, as I am now. Part of that is, again, that personality kind of thing. But I think, when you have been through the wars, if you will, of a system like Marion County, you end with good quality service for your clients. That is, I think, what we are talking about. So I don't really know how to answer your question. There are people in MCAD who I could say would not be hired in a corporate type structure of a law firm. A typical public defender's office is a structured environment. That to me, frankly, is part of the beauty of MCAD. We have cross-fertilization of people with frankly weird ideas. But those weird ideas eventually, sometime eventually, become the mainstream of the criminal justice system in Oregon and in the United States. Who thought of Crawford? Maybe it was a public defender, but maybe it was that lone practitioner someplace who thought of this idea and brought up that idea and kept plugging away at that idea. And those, if you will, weird ideas are I think an important component of a quality system. The diversity of a public defense system.

450 Chair Ellis — So that is an argument for a completely random system?

452 S. Gorham — It is a partial argument for a completely random system. I don't think that and I don't think we have that. I think that what you have is, again going back to training, we have a formalized e-mail list like OCDLA's, where thoughts are expressed and threads run through it, legal thoughts are expressed, legal challenges, legal ideas are put out and answered. That is part of the training. We have a formal mentoring system and, when I end, I will pass out one of those documents. We have a form mentoring system. I provide periodic memos. One of the things, and you did get it, I call it a newsletter, but it is a training device for our members. These are things that have been formalized through MCAD. And I think our members, not every one of them, not everyday, do learn from it. Now, if you want to improve the system in

Marion County, I would submit to you do this. Give us a $100,000 to have a full-time trainer. We have saved you $300,000. Give us $100,000 of that back. We will hire a full-time trainer. Someone to go sit full-time and watch our members, help them if they need help, help train. You give that to the Metro Public Defender. We are just a different structure. You could give it to us because we have saved you money. There is an idea for you.

486 Chair Ellis — Steve, I don't dispute your estimate of the cost-savings. I think everything that I have always been told is consistent with that. But isn't the reason that the hourly rate model is driving that is that we are attracting lawyers for whom $55 an hour is attractive to them? That is what is causing the lower cost.

497 S. Gorham — That is partially it, but it is primarily the efficiency of our particular system.

500 Chair Ellis — So you think it is lower administrative costs?

501 S. Gorham — Lower administrative costs and that people know they are going to be questioned about the work they do. I think that actually adds to quality as well.

504 Chair Ellis — Let me ask a financial question? You are a 501(c)(3) entity?

508 S. Gorham — Yes.

508 Chair Ellis — What does your balance sheet look like? What asset level do you carry?

509 S. Gorham — We basically have all of it in our attorney fees and billings of experts. We get paid by you and we pass those fees on to our attorneys and others.

517 Chair Ellis — The billing system that was described in the materials, where does that reside?

518 S. Gorham — The state part of that, which is the component that is in our office, is owned by the State of Oregon, indigent defense. So while Steve Krasik developed that system, there are two parts of it. One is the billing system and attorney tasks and you pay Steve to provide that for our members. There is monthly cost to ensure that it is run well. They produce an electronic bill on a disk. That disk is plugged in every two weeks to the MCAD system, which is owned by the State of Oregon.

544 Chair Ellis — So, is the answer to my question there is no assets on your balance sheet?

546 S. Gorham — Correct.

547 Chair Ellis — So it is all passed through?

547 S. Gorham — Correct, except for the fact that we have office equipment. Three or four computers that the state helped us buy. But most of our assets, if you will, there really aren't any.

555 Chair Ellis — The next question I have, and this may have been true since 1993: you are today an exclusive provider for the mainstream defense work here in Marion County?

561 S. Gorham — Occasionally, with some murder cases, we enlist the help of other providers.

568 Chair Ellis — If we were to move away from MCAD being the exclusive provider, what do you see as the problems for MCAD?

570 S. Gorham — One of the problems would be if you target the training component. Our new members really come in right now and deal with PCR and habeas corpus. So those are clearly two

components that would clearly split off. Thus the training that our new members get would be taken away from them. Some of our members would like to do PCR.

587 Chair Ellis — If we went that route, and it doesn't have to be a full-blown PD but a startup PD, then we get the benefit of seeing alternatives in this marketplace. Does that present particular problems for MCAD?

595 S. Gorham — Same problems. In your other jurisdictions that have big PDs, you have seen them. There are the conflict problems and there are the problems of jealously, if nothing else, where there are a group of providers that are being paid differently, maybe more, maybe less – different providers in the same system getting different resources for doing the same work. Now if you equalize that, but you haven't been able to equalize that in Portland and I think that causes problems. So I think it does cause problems. But it does pare down the number of MCAD attorneys because there wouldn't be the work, obviously.

627 Chair Ellis — I am going to make a suggestion. Shaun McCrea is not here and her usual assignment is to kick me in the shins and say, "We need to take a break." What I would like to do is return at 11:10, and I hope you two will stay here. But we are going to have Judge Leggert appear and then we will return to talking with you.

Take a break at 11:00

[Tape 2; Side B]

[Meeting called back to order at 11:15 a.m.]

055 Chair Ellis — Thank you, Judge Leggert. We appreciate you coming and look forward to your comments.

056 Judge Leggert — My name is Terry Leggert and I am a circuit court judge in Marion County. I have met several of you on the panel, including my boss, although I guess he doesn't get to vote. Mr. Greenfield was head of the Juvenile Department when I was a DA. Just a few comments I want to make.

Maybe I will start with the juvenile system and just give a little background for Chair Ellis, who I haven't met before. I started in 1977 and, for eight years, with a one year hiatus on the coast, I was a deputy district attorney and then I went to the AG's office and did appellate work for several years. I stayed in the Attorney General's Office until 1994, when I became a judge. So I have been here for a long time and have done prosecution and appellate work and the change has been interesting. I know Justice Carson would remember this, but when I was first practicing a lot of the big cases would come up and you would look in the back of the courtroom and all of the attorneys who had been sitting there disappeared pretty quickly, having to go to the restroom or something, because Judge Sloper was looking for somebody to appoint in important cases that he thought really needed good lawyers. A lot of very good attorneys in private practice represented murderers and did very serious court-appointments. Then there was a shift and I know the court was continually changing who was on the misdemeanor court-appointment list and Jim Brown may have gotten snagged –

080 Chair Ellis — He was always in the restroom.

082 Judge Leggert — Judge Sloper also knew some people weren't qualified to do criminal defense work.

083 J. Brown — That could have been me.

084 Judge Leggert — In any event, there was a shift and I know Steve Gorham and Dick Cowan were there. Although there was some arbitrariness in terms of who was appointed, I really felt like on the big cases, the real serious cases, that Judge Sloper's arbitrariness resulted in good lawyers

being required to represent defendants in very serious cases. And the reason I am bringing that up is that I feel like one of my concerns is what is the consortium's training, what is the process? And do we have a good process for giving quality representation for criminal defendants? I was thinking about this last night. One of the things I think that has happened is, as MCAD has expanded, some of the quality issues have drifted. I think part of it is the number of cases and the number of attorneys. Probably some of it is people's lack of interest in doing this type of work and people's willingness to do it. When I think back, I look at the board. Dick Cowan is a very good trial attorney and he doesn't take appointments regularly. Greg Rockwell is a very good trial lawyer and he had been there a long time. He is now doing dependency work. Steve Gorham, again, a very good trial lawyer. So there is a lot of experienced lawyers who are not the people who are picking up cases everyday at MCAD. I am not saying there are not other attorneys that do a good job. But what I am concerned about, and I'll tell you what I read before I got here. I read the answers to the questions both by the juvenile attorneys and the MCAD lawyers, the introductory concerns and the description of our county. You nailed the demographics based on that description because we have the second highest number of criminal cases and we are right behind Multnomah County in terms of numbers per thousand. We have huge dockets and we keep telling the legislature and our boss, the Chief, that we have huge numbers here and very high poverty rate. And we are off the charts in lots of different places. Anyway, there is a huge volume of cases. So with all that as background, my concerns with MCAD are that there are people who handle cases that are over their heads. Although they can ask for mentoring and do get mentoring, the inside person is also very busy. I mentioned that Ted Coran is a very good trial attorney and his trial skills are excellent. Among all of the judges, I can't think of one who hasn't mentioned he is a very good trial attorney. But he was mentoring the person who was actually expelled from MCAD. I had a conversation with one of the judges that the attorney who was being mentored by Mr. Coran was trying a very serious felony case. I asked Ted Coran what happened to his mentoring and he said "Well, I told him he really shouldn't do it that way, but he did anyway." So, "I can mentor you, but I can't direct you," and that is a big problem. If you are mentoring somebody, and maybe this is a problem statewide, they have to have some control over the case because, as the ex-criminal defense attorney told me the other day, "I don't think the defendants should suffer. It is not a training ground for the defense."

145 Chair Ellis — It is very real.

145 Judge Leggert — Yes, it is very real. The judge felt the evidence was overwhelming and a very strong case for the state. I don't know anybody who could have gotten that defendant off . But some tactical decisions that the defense attorney used were incredible – very ineffective and startling to the court. The person who was mentoring said the same thing: "I told him, don't do that because that is not going to go over well with the jury." Anyway, he is not practicing anymore. But that is a concern. Some of the answers MCAD gives is, "We encourage people to do this, we encourage the mentoring and we ask about how the person does and try to get feedback from the judges." I think part of the problem is not really coming down hard on people and forcing them to perform at a certain level of practice. I don't know the numbers now, but MCAD has 35 or 40 individual people with individual practices that vary all over the board. Many of the attorneys, including Mr. Gorham, when you call their office you can talk to somebody, whether it is an answering service or someone. A lot of attorneys, however, we try to find them and we don't know where they are and they are late. We get a voice mailbox that is full. Or we get their mailbox and you have no idea whether they are on vacation this week, or are they in court somewhere. I told several lawyers who don't have staff to answer their phones or, at a minimum, have somebody to answer their phone. So that if you are missing or lost and we are in court and we don't know where you are, we can find you. I'm not saying that it is all the attorney's fault because there are lots of courts you have to be and things happen and trials carry over. But we need to be able to contact them. The attorney says, "Well, my voice mailbox gets full because my clients call me over and over and it fills up." Well, if your voice mailbox said to your clients. "Today is July 28 and I am going to be in court this morning until 11:00 and I will be testifying at the Public Defense Services Commission and then I will

be back in my office at 1:30," they won't leave 15 messages. My staff will call, and if they don't get an answer back and an hour later you still aren't there, we call back. The client is sitting there and we can't find the attorney. We need to know where they are. So that is an example. Shouldn't there be some minimum requirements you have to satisfy to get court-appointments – like there should be a way we should be able to contact you? Can't they require some of these minimum things? Another example: some of the attorneys are really good about this. They will have a piece of paper that explains to their clients, which they hand to their clients, stating, "Here is a description of the process." Some of them set appointments with their clients when they are out of custody that day. "Here is the process and here is an appointment right now, here is your next court date." They write it all down for them and answer their questions right there. Other attorneys hand them a card and say, "Call me and make an appointment." Not surprisingly, a lot of those clients don't show up for their next court date. It is true that I tell them when their next court appearance is. And some of the judges have had them sign things. But it is some of these minimum quality issues that the MCAD board hasn't dictated to the attorneys and I think it is because they have 50 individual attorneys. I am also concerned about how they move up from a misdemeanor to a felony. Right now they have a misdemeanor and a felony category. I think it should really be divided among the individual types of cases. It is relatively easy to handle possession of a felony controlled substance, methamphetamine case. You either file a motion to suppress or not. They either had or it or they didn't. There are very few trials because they are usually decided in motion practice, versus an Assault IV domestic violence case. If you look at the collateral consequences for a misdemeanor Assault IV domestic violence charge, of which you have many in our county, they include immigration issues, a lifetime ban on possession of weapons and potential felony criminal charges if you possess a weapon or ammunition. So there are a lot of collateral consequences and a lot of those cases potentially go to trial, and it is a very tough trial sometimes. A lot of times in those cases the victim doesn't want to prosecute and then, with Crawford v. Washington, there are a lot of issues about evidence. So that is a very complicated misdemeanor case and an inexperienced lawyer may not be aware of the issues. I also don't think you can figure out what is an appropriate plea agreement until you have tried a lot of cases. As a DA, I tried a lot of cases and you start figuring out, "Oh, that isn't such a good case." So the experience of going to trial, winning or losing, that affects your assessment of cases and, especially in a jury trial, what you should wager. So I have some real concerns with a lot of these things. There are some very good lawyers who get the work done and do a really good job. But there are times when you just cringe at what is going on. And as a judge I can't do anything about it. I can't help one side or the other because I have to be independent. I can certainly take them aside and I do. If I am concerned about the quality of somebody's work, I let them know.

241 Chair Ellis — So what happens when you do that? Anything?

242 Judge Leggert — A long time ago, I was out at the Annex and relatively new on the bench. Attorneys were just so late and not calling. Steve said. "Put it in writing." and so fine, I put it in writing and then he talked with attorneys. Being late isn't a quality issue. The defendant is not going to jail for the wrong reason. But part of what happened was I followed judges at the Annex who started court late. So when I started out there on time and walked into court at 8:30, I said, "Where is everybody?" Part of it is catching up to the fact that this judge starts at 8:30. So those kinds of issues are fine. But there is one pending issue right now. I sent Steve an e-mail on a very serious quality issue and he talked to the attorney. Sometimes I copy him. On one process issue the other day, I personally talked to the attorney and found that the attorney didn't know what the process was. So what I am concerned about is that it seems to me that the initial question should be: "How does this person qualify to do this work?" There are people that I'm stuck with because they are supposedly qualified. I am going to be real candid and say that there is somebody who is on the murder-qualified list, not because Mr. Gorham says this person is okay to be on the murder list, but because of the way the process is done. I would not let that person represent a murderer, ever.

277 Chair Ellis You described early in your comments that there were a number of lawyers who are over their heads. Do they tend to be ones that have been around for a long time, do they tend to be ones who were just starting, or is there any pattern?

283 Judge Leggert Both. Some people are good at some things, but not others. I could be wrong, but I thought a long time ago it would be nice if there were attorneys in a group, so if you felt like you were over your head, "my partner" or whatever could step in and help.

290 Chair Ellis Or supervise.

291 Judge Leggert Supervise or take the case over. A lot of times the case can start out being real simple and then turn into something that is not so simple anymore. And you don't realize it until whenever and I think the attorneys are pretty loathe at that point to say, "I'm in over my head and I may need your help." What do you do if you are a sole practitioner and you have been appointed to represent somebody and people are saying, "You can do it," and halfway through you realize you are not competent. I guess if you realize you aren't competent, you withdraw.

303 Chair Ellis You may be the least willing to recognize that you are in over your head.

304 Judge Leggert Yes, 100 percent, no question about it. In fact, in the case that is pending right now, the woman thought she did a fine job. And in that particular case, the person was acquitted and he should have been because it was a very bad case for the state. I'm sure they recognized it. This was a felony assault case and she is on the felony appointment list.

310 Chair Ellis Is part of what you are describing in the cases you see that the prosecutors are professional, career players, but you are seeing a range of skill levels and experience levels on the defense side? And, therefore, the adversary system can't work very well?

333 Judge Leggert What I am concerned about in the criminal arena is we keep losing the best lawyers to the juvenile consortium. In the juvenile consortium, the quality of lawyers is excellent. It always has been and they steal the best lawyers from MCAD. I think that is what happens to MCAD. The best lawyers move on to other things. Just a footnote, Mr. Ellis. At the DA's office, when you start fresh out of law school, you do traffic tickets, you do court trial, you do misdemeanor work. My first jury trial was against an unrepresented defendant and I think I was completely mismatched because he was way better than I was. So you try a lot of cases and you have someone staying right on top of you if you screw up. Judge Sloper said, "You will do it this way," and you didn't have discretion. At MCAD, you have all these individually operating people and a lot of them don't have the skill level, and how do you get that? How do you try a bunch of cases? In the DA's office, it is nice because, if I lose, at least the defendant isn't going to jail, although I would be terrified if a rapist got off. In the defense arena, it is much more serious, and I'm guessing there are problems statewide. There is a unit in the DA's office that specializes in domestic violence. That is all they do.

357 J. Potter You have mentioned pay and you have mentioned training. If you were to design the system or improve this system what would you do?

360 Judge Leggert Clean slate, if you want to do felonies, tell me how many trials you have had. Somebody independent has to look at what your experience is and it has to be real specific. What is it that you have that tells me that you have the qualifications to do those kinds of cases. Again, somebody may be real good at drug cases and not rape cases. You need expertise in that area of the law. So, if you want to do it, what is your expertise? And then you have to require minimum things they have to do – standards that have to be met. Maybe urge people to get CLEs in criminal defense for their minimal CLE requirement. Pay-wise, they need to get paid enough to make a living, if you want them to do it full-time. And they need staff. So pay enough to have staff to answer their phones. I think it is real scary to have individual lawyers coming straight out of law school with no requirement that they be mentored, or that they sit

with somebody else and try cases. You can't just walk in and watch a case and figure out what is going on, unless you know something about the case and talk to the attorney about strategy. You can't tell anything just by sitting and watching. That's why I like partnering where you can sit down and say, "Now what are we going to do on this case? Why do you think that is a good idea?" I remember Steve Krasik telling me about a case in which he had defendant that wanted to testify in a murder case and he knew it would be horrible. So they videotaped him and it was just scary. They showed it to him and said, "This is what the jury is going to see." That is the kind of strategy that is effective. But if you are by yourself, you are not going to have someone to talk to and figure this out, unless you understand the case.

409 J. Potter — Does this require in your mind a structural change in the defense of this county?

410 Judge Leggert — I don't know if I am going to say, "yes," for sure. But I would be happy to listen to a lot of different options. You know, 50 lawyers have to be in 12 different courts, including the Annex, and it is nuts. I always tell them, "Tell me if you get stuck somewhere, so I just know where you are and we can estimate your ETA and factor it into everything else we are doing." If they banded together, they could cover for each other when someone got stuck in trial. They could help each other.

431 Chair Ellis — Do you think the court here in Marion County would be willing to restructure its own scheduling system to match a more concentrated provider organization.

433 Judge Leggert — I would encourage us to do that because I think it is too scattered right now. I have been out at the Annex full-time since January and I have made some changes. And I think I have done a good job of getting the attorneys out before the lunch hour and by 5:00. I have evened the docket out a little bit. I am a process person and there are some more changes that we can make that will make it easier for the attorneys out there. I will say Steve Gorham goes to tons of meetings that I also attend, and we talk about the process and how it could work better. And his voice is heard and is very helpful. He has been around as long as I have. I think we can do things better.

457 Chair Ellis — Do you think there is a climate that would welcome change, or is the climate for change "Over my dead body," or somewhere in between?

459 Judge Leggert — You mean the courts?

460 Chair Ellis — Not just the courts, but within the defense community.

461 Judge Leggert — I don't know. I think some people would be unhappy because, you know, I would be saying, "Gee, you are off the murder list now." Obviously, some people who have been practicing a long time and think they are qualified to do this work would be very upset about it. I don't want to speak for the board, but after reading about people wanting to restrict the board's power because they didn't want so many restrictions on them, I think that is part of the problem because they are all independent. Of course, they are all colleagues and they all know each other. So it is kind of hard to say, "You know, you're incompetent and you can't do this anymore." If I cringe when I am appointing somebody to a case, that is not a good thing. I am supposed to appoint the attorney of the day. If I have to take somebody off for whatever reason, I always find out who it is. If I don't feel comfortable, then I don't appoint them.

494 J. Potter — Do you ever talk to Steve about lawyers that don't pass your cringe test in an informal way?

495 Judge Leggert — Only if it is about a particular case because he needs more information to talk about it. I would be happy to sit down and talk to him about it. To get back to your question about the courts, I think our Presiding Judge could make us do whatever we need to do.

511 S. Gorham I doubt the courts would be able to do that because I think Judge Lipscomb has tried over and over again to get his minions to have a more coordinated system, and it just hasn't happened. It is hard, but that doesn't mean that some changes haven't happened. I think I told you that the defense now has a place at the table. We try to go to these meetings where we meet every month. All the components of the criminal justice system meet and, depending on which judge was at the Annex, we were either very successful in doing that or not. And that was a systematic change that has been very good because we all sit down and try to have a more efficient and effective system. About people's quality though, as Judge Leggert was talking, every one of those 12 or 14 judges has a different opinion. Where Judge Leggert might not appoint X attorney, some other judge wants to appoint that X attorney. That is the system we have. So when Judge Leggert says this person has no quality, there is another judge who says this person does have quality. So you tell me, how do you deal with that? One way we have dealt with it in the cases that are the heavier cases is MCAD gives, even though our contract says something different, the judges three names of attorneys and we do it on a rotating list. That judge can take and appoint them or not. If they don't, the judge gets three more names. What really ends up happening is I end up negotiating, or the group does, to try and be fair about it and say, "Okay, these are the people on our list. Do you want any of them?" The person Judge Leggert has talked about, I thought did quite well. It is a very hard system to administer and I think we do the best we can. Frankly, one last thing about that is that, what Judge Leggert or another judge may think has been tried, well, I would submit to you five attorneys looking at the same case would disagree, and that is my job. My job is to look at it as if there are problems and sometimes I agree with them and sometimes I disagree with them. To give you the example of Ted Coran being a mentor of a particular individual, that person is no longer at MCAD. We gave him a process that I thought was a fair process and he didn't measure up and he is are no longer a member.

595 Chair Ellis Is that the only time that has happened?

595 S. Gorham No, I think maybe three times. So, no, it happens periodically. But we have done it three times.

602 M. Greenfield Is it impossible to define quality work in the terms of getting rid of someone?

604 S. Gorham The people just didn't get it.

607 M. Greenfield So it is possible to define it?

609 S. Gorham Yes.

609 Chair Ellis The Potter Stewart pornography test?

610 S. Gorham I think that really is true. That is really what it comes down to because of the diversity. You know, I am really not kidding when I say Judge Leggert has an opinion about X attorney but Judge Norblad has a totally different opinion about X attorney. In fact, the attorney I think that Judge Leggert is talking about, I think I mentioned this a few months ago where a judge said, "I don't want this person practicing anymore. I don't think that they can do it. I have the backing of all the judges and I want you to suspend this person immediately." The judge said to me, "I will send you a formal written complaint next week," which is our process, and it never happened. That judge and all of the judges backed down. What do you do?

630 Chair Ellis But Steve, don't you believe that, over time on average, you are likely to have fewer of these outlier quality issues if we went to a system that had supervision and not just coordination? That had people making these judgments on a peer basis? People that are experienced defenders deciding who seems to be consistently better qualified?

643 S. Gorham I just don't know. It is easy to say when you have somebody who is the boss that the boss can fire X, Y and Z. Sometimes those are correct judgments and sometimes they aren't.

649 Chair Ellis I'll agree they can sometimes not be the best judgment. But over time on average, don't you think the likelihood of consistency is stronger if you have management, rather than what feels after listening to people like a very uncoordinated system.

659 S. Gorham Well, I disagree with your opinion that it is uncoordinated system. I think it is a very coordinated system. I do not have the power to hire and fire without some reason. That is true.

677 Judge Leggert I just wanted to say something about the person that Ted Coran was mentoring. I don't know how he ever got qualified to do felony cases in the first place. The trial he had was for felony person crimes and that is not good.

711 S. Gorham I will say this in regard to that. If you give us the average case count money we will do that. Give us the extra $300,000.

722 Chair Ellis What would you do if we said, "Fine, you have assured us if we give you $300,000 more you will improve quality but you keep MCAD structure." Now what would you do?

727 S. Gorham Certainly we would have less attorneys. I think the other alternative that I gave you is give us the $100,000 for a supervisor/trainer –

737 Chair Ellis No, stick with the $300,000. So if the $300,000 were forthcoming, how would this work? You would reduce the membership of MCAD?

742 S. Gorham Yes –

742 Chair Ellis And you would concentrate with the group that is essentially the full-time practitioners?

745 S. Gorham Well, we certainly would.

747 Chair Ellis So why don't you do that now? Why wait for $300,000? Why not do that now?

750 S. Gorham Give us the money and we will do it. [end of tape]

[Tape 3; Side A]

002 S. Gorham One of the things you will get if you have a higher hourly rate in our system, you will have more resources going to what Judge Leggert said is staff. Because, at $50 an hour, you don't have the money for staff.

008 Chair Ellis If you had a group of 30 practicing as a unit, couldn't you could afford to have staff and telephone response and office equipment?

010 S. Gorham If you gave more resources for those 30, I agree with you. But you have to give more resources to those 30. As I have told you, our core group is about 30. You give those 30, who are very hard working, more resources, they will be able to have staff.

020 Chair Ellis Have you been on any of the site visit teams?

020 S. Gorham I have not, but Steve Krasik has. And as much as he can, considering confidentiality, he has told me things in general about what is happening. Frankly, they have told me every system has problems, maybe a little different problems than we have, but every system has problems.

026 Chair Ellis So we should give up trying?

026 S. Gorham No absolutely not. You should absolutely keep trying. But I would like you to at least in Marion County focus on making our system that we have better. And I don't think throwing MCAD out is the way to do that. Clearly, as you can tell by the way I am talking, I feel that there is some push to do that. I don't believe that that is the right way to go in Marion County. I think you can still get an efficient system with less resources than you are spending in other counties and still get a good system because I think we have a good system now. I hate to be a broken record, but give us $100,000 for a supervisor/trainer, if you will, or a quality assurance person, and see how we do. I would submit to you that we will do really well.

039 Chair Ellis Other questions?

040 Judge Leggert If you do that, the quality assurance person shouldn't be working for MCAD. It should be someone else. I think it is too hard for them because they are friends.

059 Chair Ellis Would you personally favor us working to assist formation of a public defender office here, not to completely displace MCAD, because you can't from a conflict point of view, but an office of five to 10 lawyers on a full-time basis, with MCAD as the alternate provider?

066 Judge Leggert I will support whatever you say. There is also this whole other issue with post-conviction cases because those cases are hard. These attorneys do them and we are having a lot of trouble finding people who are willing to do them. That is a big bulk of my work and they do a very good job keeping those cases moving. We have one of the highest counts of post-conviction cases and the clients are difficult.

081 Chair Ellis Thank you very much. I did want to have an opportunity to talk with the representatives from the juvenile consortium. So Steve, before you leave, any other questions for Steve?

086 S. Gorham I gave you two other attachments. A couple of months ago, Peter asked me to submit something o the diversity issue and this talks about the diversity of MCAD. Also, I omitted the actual mentoring policy in the other materials I submitted to you.

090 Chair Ellis Thanks a lot. Okay, Richard Condon and Jeff Carter.

092 J. Carter Just by way of introduction, Mr. Chair and Commission members, my name is Jeff Carter and I am a juvenile consortium attorney. And to my left is Richard Condon. We have in the audience Lindsey Partridge and Phil Wisner, also of our consortium. The others are here in spirit, but they are actually covering for us in court. I think what we are going to try and do is be brief. Richard has been at the consortium much longer than I have and I thought maybe he could answer questions about where we started from and how we got where we are today.

105 R. Condon Thank you. I want to thank the Commission members for their time and effort. It has been alluded to earlier by Judge Leggert and others, but originally, the bar members who practiced in the juvenile court were selected by Judge Norblad for 25 plus years. I began working in juvenile court shortly after that. For many years after that time, we basically consisted of a group of five to six attorneys who did the juvenile court practice. Somewhere within a ¼ to 1/3 of our entire practice would be general criminal and domestic relations practice. The juvenile caseload has increased since that time to the point where we have added attorneys on a consistent basis over the years. We have basically changed to a system where the attorneys that practice in this area are really full-time practitioners of juvenile law almost exclusively.

133 Chair Ellis What is your secret to getting quality people? We have had two judges who think very highly of your quality and spoke about you guys succeeding in attracting some of MCAD lawyers. What is your secret? How do you do it?

136 R. Condon I don't know that there is a great secret. The attorneys who handle juvenile court cases enjoy juvenile court practice very much. It is something they feel strongly about. We recruit additional new members as we are able. We have a desire to add diversity, Spanish speakers, quality practitioners in juvenile law. We value our reputation very dearly. We have been able to operate effectively in Marion County because we are a very small group that essentially operates by consensus. We are a group of people that get along very well and respect each other. We do things always by consensus and that process really hasn't changed. Currently, we are 14 members. Ten of those 14 are full-time juvenile law practitioners. We recognize that we need to be larger. We recognize that we need to be younger. We have a preference to accomplish training primarily through mentoring. We recognize as we continue to grow that we need to add structure in the form of a board and to assign responsibilities for administrative management. An administrator was mentioned, a full-time administrator. At this point, I don't think we agree that a professional full-time administrator is appropriate for our group. I envision doing things with our Board of Directors by appointing committees. We have done things by committee in the past, and we intend to do that in the future when particular issues come up that we need to deal, such as hiring issues and quality assurance issues. We have a very activist judge who is committed to excellence in every form of juvenile procedures, and we have followed her lead in that respect.

221 Chair Ellis How did you go about the expansion? Sounds like you recognized that you need additional members. Did you go recruit or is there a waiting list?

225 R. Condon Our practice has not been to publish a notice that we want to hire an attorney. We basically have relied on a system of searching among ourselves to find out who is out there. We identify resources and recruit.

231 Chair Ellis That is how you got the four that you recently added?

232 J. Carter One of the four we were real fortunate to get, and that is Carla French, who was actually a juvenile court referee for awhile. So she was able to start immediately and hit the ground running. We are fortunate to have her. The others are doing delinquency work. That is part of the plan of starting them doing delinquency work and then bringing them up.

243 Chair Ellis Is your contract, like MCAD's – an hourly rate contract?

243 R. Condon No, we contract to do the entire juvenile caseload on a case number and price per case basis. I would say, with respect to managing the number of lawyers and the caseload itself, with every contracting period, we have anticipated that there would be somewhere in the neighborhood of a 50 percent increase in the caseload. In each case, we have ended up contracting for something less than the increase. The caseload has exceeded not only what we contracted for, but what we projected originally would be the increase, and most recently very substantially.

262 J. Potter When this overage happens, are you paid per case above the contracting amount?

265 R. Condon Correct.

267 Chair Ellis You have no central coordinator or staff person?

269 R. Condon We don't have an attorney coordinator. I perform some clerical administrative functions. We have a clerical person we have hired, who receives appointments from the court and who does reporting to the state. One of the purposes of our consortium is to distribute the individual appointments and manage records, but we each have very individual private practices. A consortium model works very well for juvenile court. I think it is virtually required by the nature of the cases that we get appointed on. Very frequently, we need three attorneys on each case.

288 M. Greenfield Listening to Judge Abernathy and your comments, is it fair to say Judge Abernathy performs many of the quality control issues that might be performed by a manager?

290 R. Condon I think Judge Norblad did that. I think Judge Leggert did that. I think Judge Abernathy has been very enthusiastic, energetic and demanding in terms of what she expects and what she wants the attorneys to do.

297 M. Greenfield So, she has performed many of those functions that might have been handled by a manager within the organization?

298 R. Condon I think so.

301 J. Potter But if there was something beyond what she might do, who would she call? Would she call you? Is there a recognized contact person if the judge said this issue may be beyond my scope, or it may be a quality issue that I want to talk about in the consortium?

309 R. Condon I would say that is unlikely. With our history and through our processes, we have arranged to deal only with people who we thought were competent. As long as we operate in the form we do now, we are free to make changes through each contracting period.

321 Chair Ellis Let me ask a question that is dangerous, I recognize. How can we make your life easier? What if any observations do you have about how you relate to PDSC?

326 R. Condon I think this process has already been useful in requiring that we examine our own structure and our own needs as we grow. We need more attorneys and we need to arrange to have the payments under the contract occur in a way that we can hire more attorneys. This process has been healthy in that it will result in our having a board of directors and our having a structure that allows us to do certain kinds of decision making and quality assurance functions within our group that would have been difficult in the present arrangement.

342 J. Potter What is your vision of the board of directors and its makeup? Obviously, the question that I am asking is are all of the board members going to be from the consortium? Will there be somebody from outside the consortium? You have heard some discussion on the pros and cons on this.

347 J. Carter One of the concerns that we have, and we talked to Mr. Ozanne about it, is that we don't want to through the baby out with the bathwater. We have something that actually works very, very well. So the consensus process has worked very well in the past. In terms of the board structure, we have been looking at adding someone from the outside community and this is in the formative stage. We are looking at lawyers who do business work because none of us on this group are qualified to make those kind of decisions. Our goal is by July 30 to have that up and running, but I don't know if we are actually going to make it. But I think within 30 days it will get formed. What the initial form is may not be what it will be eventually. We are not a group that does a lot of impact work. We do the pick and shovel work of the juvenile court and, although we do consider policy decisions, it really is an external management question for us right now, and also to have somewhere to go to if someone like this Commission or a presiding judge wants to know who to go to.

381 Chair Ellis Any other questions?

382 J. Potter This is clearly an editorial comment on my part and it doesn't reflect the Commission's position. But on boards generally, I think another component that you should consider when you are looking at a board is having an outside person. You mentioned having a business manager type or business law type. Clearly, I think it would serve you well to have someone like that. But beyond that, there is a real political advantage to having a board, and especially

in juvenile work because it is a sympathetic area of the law that the public understands. So having someone who has some notion of the policy of juvenile law and the politics who might be able to help us in the legislature would be a nice addition to a board too.

394 Chair Ellis — Are you concerned the restructuring that you are in the process of doing may put you in a unit role mode.

398 R. Condon — I didn't mean to interrupt, but it is something I want to be mindful of. I think it is possible to maintain the strengths of what has made this group work, but still have the benefits of a decision making board that sets policy and sets standards.

408 Chair Ellis — Thank you both for coming. We appreciate your time. Peter are we at the point that we should now go to the OPDS piece?

413 P. Ozanne — Yes.

Agenda Item No. 1 — **Approval of the Minutes**

458 P. Ozanne — I suggest that we deal with approval of the minutes.

460 Chair Ellis — The draft of the minutes was circulated, both the summary and the full details. Are there any additions or corrections? I would entertain a motion to approve both sets of minutes.

MOTION: Mike Greenfield moved for approval of the minutes; John Potter seconded the motion; hearing no objection, the motion passed: **VOTE 5-0**

470 P. Ozanne — Because we have a short period of time, Mr. Chair, I want to mention that we have a couple of action items, which I don't anticipate will take more than five minutes. Item No. 3 is an important topic but is not an action item. I also see on the Agenda under 2(c), Review of OPDS report on Marion County. We are coming back to the county next month and I would recommend that we return on our regularly scheduled meeting on August 11. We have two other attorneys with separate contracts that I would like you to hear from. We may want to hear again from people who have testified today. So we could take up the report during the next meeting in August or, if you would like to discuss the report now or ask questions, I would suggest that we have about 10 minutes for that.

491 Chair Ellis — I think that would be constructive. I would like to. I don't mean to take the lead here. Does someone else have a thought or comment they want to make? I thought it was impressive that the two judges who spoke about MCAD rather than JAC did express real concerns about quality issues. The way it came across to me is that MCAD has performed a very important service in this county. I do want to commend Steve for what I think has been a marvelous contribution in what I see as a transition from the old system to wherever we may go. I do believe that where we are now does give us a real opportunity to move to a system that will be much more professional than we are able to do with the current efforts at coordination of a very large group of providers. I would like to see us move to whatever model is best and to a much more concentrated group. It just doesn't compute for me that you can have quality training but you are doing it for over 50 people. Now there is no one with real supervisory authority. Steve is doing a great job of coordinating, but I just don't see how the supervision happens. I thought the comment of Judge Leggert that, given the fact that most of MCAD's members are single practitioners and are not even accessible in an effective way, was very telling. So what I would like to suggest we look at breaking up the monopoly, if you will, because I think you have been an advocate of diversity here. I think we might consider finding a way if we can to move toward opening a PD office here. I know that has both capital costs and membership issues and lots of things to do. But it doesn't have to be a full-blown office at the outset and it doesn't have to displace MCAD. It would start at whatever level is appropriate and makes sense – say eight to 10 lawyers -- and let's see how the two

systems operating together would work. I think MCAD would shrink, obviously, when that happens. But I think the county is obviously a very critical county. It is among the largest in the state and it is among the most challenging from a legal services point of view. I would personally welcome staff, and this may be rather ambitious to do between now and August 11, to start thinking about how would we go about a process of transition to get to a point where the core service provision is done by people who are full-time and focused on criminal defense, with a structure that includes supervision, training and coordination. That is how I reacted to what I've heard.

568 J. Potter — Peter, may I ask who the other folks are we are planning to hear from next time and do they potentially include the DA?

571 P. Ozanne — Yes, and I did speak to about six judges, most of them to varying degrees had similar impressions to what you heard today. They were complimentary of Steve and MCAD in many ways. But I haven't surveyed all the judges and I plan on inviting other judges to the next meeting. I would also hesitate to get too deeply into the design yet. I would like to remind the Commission that we are going to Klamath Falls in September, which means I am in Klamath Falls in August to investigate that county, and then we meet in October in Bend, when we have no county we are visiting. We would have time at the October meeting to deliberate on Marion County and I would suggest that might be the time to think through design. So, for the August 11 meeting here in Salem, maybe Steve and Dick could recommend a judge that they would like to have speak to you, perhaps from a different perspective. The District Attorney, who has been on vacation, will be here to comment and answer your questions.
[end of tape]

[Tape 3: Side B]

078 J. Stevens — Can I ask a couple of technical questions. I am not sure that I understand, or whether it is true generally, but does a group that is paid hourly tend to make less per individual lawyer than a group that is paid on a contract per case basis? That is the first question. And secondly, does the consortium have the ability to choose which payment system they contract with you for?

086 P. Ozanne — I will quickly answer your first question, Janet, at least in conceptual terms, because I have been wrestling with this since I became your director. We talk about hourly rates and that it tracks with actual work performed, but we can't allow any lawyer to leave the meter running. So MCAD's argument that an hourly rate permits its lawyers to perform the work actually needed, while a per case rate does not, is hard for me to sort out. "The hourly rate is superior because we can do all the work necessary." Well, that is not true in the sense that the hourly system, like any compensation system, need caps or a prevailing or presumptive rate for particular kinds of cases in order to manage our budget. So I offer that conceptual framework. Kathryn can answer your questions as a factual matter.

096 K. Aylward — My personal opinion is that I don't like hourly rate contracts and, if a contractor is negotiating with me and they currently have an hourly rate contract, I am going to try and convince them to move to a flat rate. Usually, I am not successful because nobody likes change and they cling to what they have. Steve Gorham testified earlier that he thinks because we are paying him hourly, rather than by the case, that we are spending $300, 000 less per year. So how that translates into what goes into an attorney's pocket as salary, that is crucial.

104 J. Stevens — Do they have the right to choose which way they are paid?

106 K. Aylward — Apparently they do because I unable to convince them to do it my way.

108 M. Greenfield — I would just suggest that the current MCAD approach could be managed and executed in a significantly different way that could change the result. Frustration with a certain

organization and therefore placing another one next to it, instead of actually asking the organization to operate differently, is problematic. I just want to think about the option of perhaps a more dynamic, different and slightly more autocratic approach to managing the consortium because I think it is not being executed as designed. You could design that particular operation and execute it differently and get a different result. You could also horribly mismanage the alternative. Not that I'm suggesting that MCAD is mismanaged, but you could manage differently and get different results. Those are just my comments.

128 P. Ozanne

In addition to ideas about design, I would really want the Commission to have the opportunity to discuss process. If you were to consider significant structural changes, I would urge you to think about a process and how to reduce resistance to change. My personal suggestion would be that OPDS hold a meeting with the bench in Marion County because we don't have the opportunity under this current process to hear from more five or six judges at our meetings. Perhaps we ought to have a process where more stakeholders have the chance to speak about proposed changes. We may be talking about significant change in one of the state's largest counties.

139 J. Potter

I think, as Steve Gorham has pointed out a number of times to us, there is a significant cost factor in whatever change we may look at.

Appendix D

MCAD
MARION COUNTY ASSOCIATION OF DEFENDERS, LTD.
130 High Street SE, Salem, Oregon 97301

Steven H. Gorham
Executive Director

Telephone:(503) 391-1420
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September 13, 2005

Peter Ozanne
OPDS
1320 Capitol Street NE
Salem, Oregon 97301

Re: OPDS's Report to the Public Defense Services Commission on Service Delivery in Marion County, Second Draft.

Dear Peter:

Below you will find the answers to the questions posed in the Second Draft of the above mentioned document. My methodology, in doing so, is to set out the question in the second draft, and then the answer.

- **Describe specifically the current allocation of management authority and responsibility among MCAD's Board of Directors, Executive Director and members, including decisions to (a) add and remove members, (b) establish and implement qualification standards and practice requirements for MCAD's members, and (c) sanction members for substandard performance or misconduct?**

MCAD is an Oregon 501 c 3 non profit corporation. MCAD is 100 per cent fully funded by the OPDS/PDSC. Attorney fees and expenses are 100% passed through to the attorney or subcontractor doing the work, after the work is performed and a detailed bill is submitted. MCAD's administrative costs are 100% funded by the OPDS/PDSC under strict contract criteria. MCAD's members currently elect a nine (9) person Board of Directors, from the membership, which has ultimate corporate responsibility for the operation of MCAD. The Board has a Chair, Treasurer, and a Secretary. MCAD's Board meets at least once a month. Every year, three members of the Board are elected.

MCAD has a part time Executive Director employed to administer all of MCAD's operations, including the running of the office, the supervision of the MCAD employees, and the payment of the attorneys and subcontractors. The Executive Director is employed by the Board of Directors and the membership.

The MCAD Executive Director has overall responsibility for the operation of MCAD with oversight by the Board of Directors. MCAD's Executive Director reports to the Board formally and informally. Formally at each Board meeting. Informally, almost every day, through contact with Board members. The Executive Director consults with the Board Chair on all MCAD issues or decisions that occur between Board meetings.

a) Decisions to add and remove MCAD members is currently vested with the Board.

b) The Board in consultation with Statewide Indigent Defense establishes and implements qualification standards and practice requirements for MCAD's members. MCAD demands that its attorneys comply with the qualification standards and practice

requirements of the Oregon State Bar and the OPDS/PDSC. In addition the Board sets additional requirements as it and/or the quality assurance process dictate.

c) MCAD both formally and informally sanctions members for substandard performance and misconduct. Members can and have been removed from membership for substandard performance. Members can and have been removed from cases by the Courts either before or after consultation with MCAD's Executive Director.

MCAD depends on the Oregon Bar's disciplinary process for ethical misconduct complaints. MCAD's quality assurance process, both formal and informal deals with quality issues.

The MCAD Executive Director, in 2004 was given authority to immediately suspend a member for good cause. Suspension may include any and all sanctions such as removal from cases (with the approval of the court) and/or the inability to take new cases. The sanction stands unless appealed to the Board, and until the Board makes a decision as to whether to continue, increase or decrease the sanction.

- **To what extent do the written materials that MCAD has submitted to OPDS and PDSC accurately reflect the current allocation of management authority and responsibility within MCAD, as opposed to the aspirations of MCAD's current management to move the consortium away from past practices to a new management and governance structure? More specifically, MCAD revised its Attorney Manual on July 13, 2005, one day before it submitted its original materials to OPDS for PDSC's July meeting. What significant changes were made in the July 13, 2004 version of MCAD's Attorney Manual and to what extent do those changes reflect the consortium's current practices?**

The Attorney Manual accurately reflects the current allocation of management authority and responsibility within MCAD. It is in the process of being revised to reflect recent and not so recent changes in Statewide Indigent defense. Most, if not all of these changes are cosmetic. For example, the title page of the Manual still reflects the past name of the "Oregon Judicial Department's Indigent Defense Payment Policies" rather than the OPDS/PDSC's change in name of these policies.

- **The materials that MCAD originally submitted to OPDS and PDSC contain references to MCAD's mentoring program "described in the Attorney Manual." The Attorney Manual, however, does not contain such a description. At PDSC's meeting on July 28, MCAD submitted a detailed written description of its mentoring program, but it does not appear to have been adopted yet by the consortium's Board of Directors. If the program has in fact been adopted by the Board, why did the Board chose to encourage "mentees," including new members and members on probation, to select their own mentors (albeit with the approval of MCAD's Quality Assurance Committee), rather than directing MCAD's management to assign mentors to mentees? How many members are currently participating as mentees and mentors? Among the mentors, how many mentees have been assigned to each mentor?**

The mentoring program has been in effect since MCAD's first year. At the time that the Executive Director wrote the mentor program in 1993-1994, there were few formal mentor/mentee programs available in Oregon and elsewhere to use as an example. At the time, the Executive Director did extensive research into the few programs that did exist, and attempted to take the best from these programs and put them into the MCAD mentoring program. The mentoring agreement, like most, if not all of MCAD's procedures, were collaborative processes, agreed to and negotiated by MCAD, then Statewide Indigent Defense, and the then Presiding Judge of the Marion County Court system.

MCAD's management through the approval of MCAD's Quality Assurance Committee and consultation with the Executive Director has a substantial say in what mentors are assigned to mentees. Since there is no current funding for mentors, all mentors must be volunteers. Over the years, MCAD has been fortunate to have qualified mentors volunteer for these positions. Having mentees initially select their mentor helps ensure as who they can work with and can match their needs.

MCAD is open to progressive changes in its mentor program suggested by anyone, especially OPDS/PDSC.

- **MCAD's Executive Director appears to have taken the position in his presentation to the Commission on July 28 that the quality of an attorney's professional performance is impossible to determine, or that such a determination is so subjective that it depends on (a) who is making the determination or (b) unreliable judgments about a lawyer's individual personality traits. OPDS submits that this view of service quality is inconsistent with the concept of law practice as a profession with recognized standards and practices, and is irreconcilable with MCAD's position that it administers a systematic and meaningful quality assurance process. MCAD should be given an opportunity at the Commission's August 11 meeting to explain or clarify its views on this subject.**

As explained at the August 11th meeting, the Executive Director does not take the position that the quality of an attorney's professional performance is impossible to determine. The practice of law does require recognized professional standards and practices and MCAD's history is that it has, and does administer a systematic and meaningful quality assurance process. As has been explained, MCAD can do better. After the July Commission meeting, MCAD took immediate steps to improve the quality of its representation.

- **With regard to a key component of MCAD's quality assurance process – i.e., procedures to sanction attorneys for substandard performance or misconduct that cannot otherwise be remedied – MCAD's Executive Director spoke to the Commission at its July 28 meeting with apparent pride and conviction regarding the due process MCAD affords its members who face such sanctions. In his view, MCAD's elaborate due process procedures serve as the alternative to "a pre-autocratic system where attorneys got blackballed because someone in the system did not like them or because of their personality quirks." OPDS observes in response, first, that it has failed to detect such a "pre-autocratic system" among Marion County's current circuit court judges, at least to the extent that the risk of abuse of judicial discretion so far outweighs the risk of attorney underperformance that it calls for procedural protections for MCAD members that appear to exceed the rights of civil service employees. Second, OPDS finds it hard to imagine how busy lawyers serving in MCAD's management positions are able to easily undertake or efficiently negotiate their way through such a sanctioning process, which apparently includes various levels of appeal and rights to binding arbitration. Finally, can't MCAD establish some middle ground involving a more workable sanctioning and removal process for underperforming members that falls somewhere in between the extremes of full-blown due process and autocratic decision-making?**

OPDS's observations not withstanding, an objective, confidential and substantive review of the Marion County Judicial system will still find several if not many examples of the "pre-autocratic system" of justice in Marion County. If it has not been found, in all likelihood, the system has not been candid with OPDS's observers. MCAD understands OPDS's opinion about the risks of abuse by the judiciary vs the benefits to what it claims are "procedural protections …that appear to exceed the rights of civil sercie employees."

This being said, MCAD agrees with OPDS that searching for these examples is not productive at this time. As MCAD stated, the complaints by a few judges of the few underperforming MCAD members tainting their and the PDSC's overall view of MCAD, was a wake up call to MCAD that MCAD has taken seriously. As was testified to at the PDSC hearings and expressed to OPDS's observers, the judges in Marion County know who to direct attorney underperformance issues to, the Executive Director. They testified and observed that the Executive Director is responsive to these complaints and acts to correct them.

MCAD has involuntarily removed three members. Others have moved on, on their own accord, after being confronted with underperformance and other issues.

OPDS's observers comment that "underperformance that it calls for procedural protections for MCAD members that appear to exceed the rights of civil service employees" is not correct. All MCAD members are under probation for at least their first year of service. They can again be put on probation for underperformance issues. Civil servants have a multitude of rights under the laws and rules in the State of Oregon. Public Defenders in Oregon have labor unions, potential labor union issues, and union contracts that they must comply with. Nothing in MCAD's procedures are as complicated or as protective as these legal issues. While it is true, that it is not easy for busy attorneys to find the time to give the process that is due, they have, and do volunteer their time to do so. OPDS/PDSC can help make this process easier by either providing funding for, or allowing substitute case funding for these attorneys to substitute their case work for their quality assurance functions, as it does with other indigent defense contractors in the State of Oregon.

Not only do the informal methods used by MCAD work, but as stated above MCAD since 2004, has had a procedure to immediately suspend a member by the Executive Director with minimal but still some process, while quality and other issues are worked on.

MCAD is open to improving these processes with the help of anybody, especially OPDS/PDSC.

- **Three judges expressed their opinions concerning the quality of public defense services in Marion County at PDSC's July 28 meeting in Salem, and OPDS has solicited the opinions of at least seven other judges on the subject. Moreover, there was considerable discussion between MCAD's representatives and Commission members on July 28 about views on the quality of lawyering by judges past and present. OPDS is confident that everyone would agree that judges' opinions about the performance and ability of lawyers is but one factor, albeit an important one, in the determination of a public defense attorney's skills, abilities and quality of performance. Indeed, one of the reasons for establishing an independent commission like PDSC was to avoid placing the authority for determining the qualifications and eligibility of attorneys for court-appointments solely in the hands of judges before whom those attorneys will appear. OPDS has detected no interest on the part of any judge in Marion County to regain that authority. Nevertheless, in light of the foregoing actions and discussions, as well as MCAD's description of its commendable responsiveness to judge's complaints about the consortium's attorneys, an observer might conclude that the primary or exclusive "trip wire" for MCAD to initiate investigations into its lawyers' potential underperformance or misconduct is a judge's complaint. What other systematic processes or indicators does MCAD employ, including, for example, periodic surveys of judges, prosecutors, defense attorneys and MCAD members and periodic courtroom observations or peer reports, to detect problems with its attorneys' performance or conduct?**

OPDS observes,

"Indeed, one of the reasons for establishing an independent commission like PDSC was to avoid placing the authority for determining the qualifications and eligibility of attorneys for court-appointments solely in the hands of judges before whom those attorneys will appear. OPDS has detected no interest on the part of any judge in Marion County to regain that authority."

While this observation might be accurate, it is not accurate that there is no interest in any judge in Marion County to regain that authority. The Executive Director has been in contact with at least two such judges since the OPDS's observations who want this authority.

What is important here is that OPDS not overreact to the public declarations by those in the judiciary. One thing is clear in Marion County, the judiciary no longer speaks with one voice and as the processes of each of the 14 Circuit Court Judges indicate, most of the time the judiciary speaks with 14 voices.

This being said, it is important to have various methods to determine and detect problems with attorney performance or conduct. As much as possible, within the confines of the MCAD/OPDS contract, the Executive Director tries to observe as many of MCAD's attorneyss performance as possible.

As part of the wake up call, MCAD has just completed a judicial survey to help identify underperforming attorneys. A follow up survey to determine the actual individualized areas of performance that need improvement has just been finalized, and will be completed within the next month. It is MCAD's intent to use this survey to determine the areas and processes within which to help underperforming attorney's better perform.

Understanding that nothing is static, MCAD hopes that it will be able to constantly improve its surveying technique, and conduct surveys every six to 12 months to help improve member performance.

Anyone can complain, and does complain to the Executive Director about the performance of member attorneys. OPDS, MCAD members, clients, court staff, relatives, prosecutors, and others have all complained, and as was testified to, the Executive Director takes these complaints seriously. As the OPDS does with its new "Complaint Policy", MCAD, through the quality assurance process and the Executive Director give all who complain the option to make these complaints informal (not in writing) or formal (in writing) and all complaints are handled in kind. If the complainant does not view the resolution appropriate to the complaint, the process allows it to continue up to the ultimate authority, either the Court or the MCAD Board.

In addition, in this year's negotiation with OPDS/PDSC, it is hoped that, as they have done with other contractors, OPDS/PDSC will put actual resources into helping MCAD improve, not only its methods of surveying the performance of its members but in actually improving their performance. In the past, Statewide Indigent Defense, even after being converted to OPDS/PDSC has apparently been most concerned with the efficiency of the service delivery in Marion County. In the recent past, training funds in the MCAD contract have been cut. This trend must be reversed. It is difficult, given the other MCAD responsibilities of the part time Executive Director, for suggestions like periodic courtroom observations to be done on a consistent basis. Even with its limitations, this does occur. With additional funding, this is a real possibility and MCAD is open to this suggestion.

In most of its contracts OPDS/PDSC pays for OCDLA membership and in some OCDLA CLEs. While MCAD conducts its own CLE's and has given limited scholarships to OCDLA CLEs, increased funding of these items in the MCAD/OPDS contract would be helpful to an increased quality membership.

- **During its meeting with some of MCAD's directors, as well as the Commission's meeting on July 28, OPDS did not detect much enthusiasm on MCAD's part for changes in its long-established organizational structure and operations. Is MCAD considering, or is it willing to consider, <u>any</u> changes in its current organization or operations? For example, the MCAD Board members who OPDS met with did not see the need for adding any outside directors with business experience or political acumen. Is that the official position of MCAD? MCAD has noted that the membership on its Board of Directors has remained the same for some time. Has MCAD weighed the advantages of greater participation and support by its attorney members and the new ideas that might be generated by more frequent turnover in the membership of its Board of Directors?**

As was said at the last PDSC meeting, MCAD is willing to change or modify most if not all of its organizational structure. We are open to almost anything, if it will actually improve service to our clients. In particular, MCAD is proceeding with the addition of one or more outside the membership Board members. This has always been MCAD's position. While we are resistant to some changes, this does not mean that we oppose change. This includes, but is not limited to Board structural changes and potentially going to a case count system. It is clear, however, that a case count system in Marion County would be substantially more expensive then the current system and Statewide Indigent defense, both before and after, the creation of OPDS/PDSC has been as reluctant, if not more reluctant, then MCAD, in discussing this change. There has been turnover of the Board's membership since its inception. MCAD is open to new ideas.

The same is true about changes in operations. There has been some recent criticism of the Attorney of the Day system. MCAD could change this system tomorrow with little effect to its overall operations. Some of these potential changes could be accomplished with little cost, some with substantial costs. MCAD submits that changes to these systems, however, must be done in consultation with the other components of the system, not only because the other components of the system would be severely impacted by these changes, but because the costs to the other components of the system would be impacted. In other areas of the State, the Courts, the District Attorney's office and the OPDS/PDSC have been affected by the very changes that some have suggested. Unless there is a consensus that these changes would bring about at least better service to the indigent defendant, why make them? OPDS/PDSC has expended over $123,000 to institute, in Portland, a case assignment system that MCAD could institute. Does OPDS/PDSC wish to contract with MCAD to change its system and provide the resources that this would take? If so, MCAD is more than willing to discuss these changes in the upcoming contract negotiation.

Besides the economic costs that these system changes would entail, there is apparently no consensus in the Marion County Judiciary to make a change in the Attorney of the Day system. Historically we have had one judge assigned to the Annex, where most of the criminal matters have been conducted. This judge has changed more than three times in the past three years, with corresponding changes in procedures at the Annex. As has been said, one of the advantages to having the Attorney of the Day system is that the defendant immediately meets their attorney. While in some cases this is not important, in some it is. Regardless, there is no consensus amongst the parties involved how important this or any of these changes actually are. MCAD believes that until there is either some consensus to make this change, or some other overriding reason to make it, then there is no real reason to make it. While the current Annex

judge, may have some problems with this system, this judge, just today (September 13, 2005) stated that she might not be there in 3 months and the next Annex judge might prefer the Attorney of the Day system.

MCAD is only resistant to change for change itself. If change would help the indigent defendant, MCAD would support such change.

- **Many judges and prosecutors in Marion County and some members of MCAD are critical of the consortium's "Attorney of the Day" process of assigning cases to attorneys, including MCAD's attorney qualifications for case assignments based solely or primarily on crime classifications such as "felony" and misdemeanor." This criticism is based on the fact that MCAD's case assignment process results in (a) wide variations in the number of cases assigned to individual attorneys and (b) the assignment of cases to attorneys who are unsuited to handle them by virtue of skill, training or experience. MCAD's Executive Director pointed out that he makes changes in individual case assignments when specific circumstances or complaints by judges indicate the need for a change. Mr. Gorham estimated, however, that such a change occurs "12 times a year out of 80,000 cases." What changes, if any, is MCAD willing to make to this cases assignment process? If changes will be considered, how will the decision to implement the changes be made (e.g., by majority vote of the Board of Directors; by majority vote of the membership)?**

First to correct the above statement. If it was correctly quoted, then Mr. Gorham was incorrect. It was probably incorrectly quoted. The changes of attorneys based on substantive reasons of attorney quality occur, "12 times a year out of 8,000 (not 80,000) cases." per year. This is approximate number of defendant cycles (cases) that MCAD handles per year.

Again, MCAD is willing to make any necessary changes to the Attorney of the Day system that would improve the representation of the indigent accused. As stated previously, these changes to be effective and correct must be made in consultation with the rest of the criminal justice system. If a consensus of the system or a demand from OPDS/PDSC was made to change the system, technically it would be made by the Board in consultation with the Executive Director and the membership and then be executed by the Executive Director.

While it is easy to make anecdotal complaints of inadequate representation, the actual number of complaints is and has been very small. As has been stated, MCAD could have a case assignment attorney divvy the cases to specialized attorneys in whatever area is deemed best.

- **The public comments and discussions at PDSC's July 28 meeting revealed a concern for the level of specialization and amount of public defense work preformed by MCAD's attorneys. Although MCAD's active roster of attorneys apparently numbers between 50 and 55, there was much discussion and many questions about a "core group" of somewhere between 20 and 30 attorneys who specialize in criminal defense law and handle most of MCAD's caseload. OPDS requests MCAD to provide the Commission with a written inventory of its active members and their caseloads, including the number of hours each member billed for work performed for MCAD during the last twelve months.**

Attached as "CompiledMCADAttorneyLIst9-12-05.xls" is the requested information. MCAD's roster is first separated by the type of case taken in the past year. (attorney of the day in the past year) Next is the total number of cases (MCAD defendant's representing) on September 1, 2005. Next is the approximate total percent of time spent on an MCAD type criminal case. Next is the Total MCAD hours billed from July

1, 2004 through June 30, 2005. Next for the same period of time is the total number of defendant cycles (defendants) billed and finally the total number of MCAD cases that the attorney had as of September 1, 2005. Also attached as "CaseloadSept1st.xls" is a roster with just the caseload numbers.

- **During the Commission's July 28 meeting, MCAD's Executive Director estimated that, due to efficient administrative practices and close-oversight of attorney billings, MCAD saves PDSC at least $300,000 annually in administrative costs, attorney fees and non-routine expenses. OPDS requests MCAD to provide the Commission with a written description of that analysis and breakdown of those cost estimates.**

MCAD has previously provided this analysis to the OPDS. It is attached to this answer as "MCAD Totals". At the August 11th Commission meeting, OPDS submitted a brief review of the non case costs of a 10 person public defender office in Marion County based on a Lane County model. The review submitted here only includes case costs, not non case costs. The methodology used is two fold. First the figures for MCAD are 2004 final figures. For example, an average 2004 A felony in Marion County total case costs (not just attorney costs but all direct case costs such as investigation, but not including administrative costs) was $585.96 There were 328 of these cases paid in 2004. The average case count cost for the same type of case statewide was $870 and the Lane County case count cost was $600, these cost probably include some administrative costs but not all capital costs. Thus the Marion Coutny case cost savings was between $4,605.12 and $93,165.12 for A felonies alone.

This spreadsheet adds all of these savings, or not, and the total case savings was $532,695.28 over the average case count cost and $818,878.28 over the Lane County case count cost. The final calculation on the spreadsheet subtracts the actual MCAD administrative cost for these cases, for a total savings of between $294,336.09 and $580,519.09. Not an insubstantial number.

In addition, as OPDS testified, these costs are only the case costs not including at least in the case count numbers the capital costs of the office. Desks, telephones, copy machines, computers, etc. OPDS/PDSC must remember that the administrative costs of MCAD are minimal. MCAD has a one room storefront office in downtown Salem. It does not supply, through its administrative contract costs, desks, telephones, copying machines or computers for its attorneys. (Nor does it supply these things for its Executive Director or Computer Consultant) It does supply these items for its three full time employees only.

MCAD believes that the savings figures in this spreadsheet are also underestimated. An MCAD attorney represents a defendant on every case that they have per defendant cycle in the criminal justice system. This can be anywhere from one actual case to over 20 actual cases. In reality this can be, and in most cases is more than one case count. Thus in the MCAD system, a defendant cycle (billing) is in reality more than one paid for case count. How much this underestimation actually saves OPDS/PDSC has never actually been determined. What is clear by any objective finding is that the savings listed are under estimated.

- **MCAD requested PDSC during its July 28 meeting to return this $300,000 in estimated savings for the purposes of improving MCAD's operations and the quality of its services. MCAD indicated that it would reduce the size of its membership and retain a higher proportion of full-time criminal law specialists, without explaining why $3000,000 in funds would be necessary to accomplish that result. MCAD should provide the Commission with an explanation of why those funds are necessary to implement its**

proposed changes, as well as any alternative plans it may be considering for the use of those funds.

Either MCAD misspoke or the PDSC misinterpreted the import of this comment. See following answer.

- **At the July 28 meeting, MCAD also requested that the Commission remit $100,000 of the $300,000 in annual estimated savings to hire a full-time attorney to train and supervise MCAD's lawyers. This request raises at least two issues that MCAD should address at PDSC's August 11 meeting or in subsequent written materials that it provides to the Commission. First, does MCAD need a full-time trainer? For example, how many lawyers will that trainer train and supervise at any one time? Does MCAD believe that all of its lawyers will require training and, if so, what kind of training? Second, MCAD's request for a full-time trainer calls for an inventory of its current staff and their deployment. Mr. Gorham indicated to the Commission that MCAD employs three part-time and three full-time employees, including 70 percent of his time at just under $70,000 per year. How much staff time is devoted to the administration of MCAD's operations and its contract with PDSC, as opposed to monitoring, training and supervising the consortium's attorneys. More specifically, what proportion the Executive Director's position is allocated to these functions, and how many hours per week does Mr. Gorham devote to his own public defense and retained caseload?**

See below answer concerning the surveys to determine which members are under performing and how they are under performing.

While MCAD disagrees that MCAD's request for a full time trainer calls for an inventory of its current staff and their deployment, this is not, and has never been a secret and is information that OPDS currently possesses. It does not take a request for more funding to know the answers to these questions.

The MCAD/OPDS contract specifically funds three full time employees. Two former MCAD office managers currently hold positions in OPDS, and MCAD has not changed its staff operations, except with the addition of additional workload, since the addition of its new office manager. MCAD's full time staff processes the MCAD attorney and sub provider billings making sure that they are accurate and appropriate under MCAD and OPDS rules. MCAD's three full time staff take the attorney billings process them, submit them to the OPDS, and then pay the attorneys after the OPDS deposits the appropriate funds in the MCAD attorney fee account. This is a pass through process.

The MCAD office also maintains a cloths closet for use of all indigent defense clients in Marion County. Since its inception, thousands of indigent defense funds have been saved because when a defendant needs clothing it is almost always available in the MCAD office. Most of these cloths have been donated by MCAD members and the MCAD staff makes sure that they are clean and ready to be worn by the next defendant.

One of these full time employees is the office manager who besides her functions in processing the billings, manages the other administrative duties of running an office.

MCAD also has a part time Computer Consultant that makes sure that the computerized systems in the MCAD office function properly. This position not only has set up the computer systems in MCAD, but maintains them so that they are functionally properly. In addition the consultant wrote and maintains the computer software system that OPDS owns, that collects and processes the attorney billing information electronically for OPDS. An example of this person's work is that one of the main computers in the MCAD office had a hard disc crash last week in the middle of

processing the billings. Through the use of the backup system established and maintained by the Computer Consultant, the processing was delayed hours rather than days and OPDS was able to pay MCAD's attorneys on time.

MCAD also has a part time law clerk who writes and distributes the bi weekly newsletter which includes updates in the law for all MCAD members. The law clerk also does research and writing on issues that have more than individual defendant effect. This saves OPDS substantial funds because each attorney does not have to "reinvent the wheel". In addition the MCAD law clerk maintains the memo/brief bank, the MCAD website, and the MCAD list serve.

All of the above staff time is fully spent on the above listed functions, although some of the bill processing, it might be argued does go to supervising the representation of clients by making sure that the appropriate functions are happening in the representation of the client.

Thus the monitoring, training and supervision of the consortium's attorneys is mostly done by either the volunteer efforts of MCAD's attorneys through the quality assurance process or through whatever time the Executive Director can find within his part time duties to do these functions. Why is this? As stated above, it is because these are the functions that through its existence, Statewide Indigent defense demanded and contracted with MCAD and its Executive Director to do. Most of the Executive Director's time is spent administering the MCAD central office, helping in the processing and correct accounting of the billings (approving NRE requests, making sure that all billings are reasonable and necessary) and being the head of indigent defense in the Marion County criminal justice system (going to meetings and helping organize and implement the components of this system). It is estimated that between one third (1/3rd) and one quarter (1/4) of the Executive Director's MCAD time is spent on monitoring, training and supervising the consortium's attorneys.

It should be noted that neither MCAD nor OPDS provide the Executive Director with an office, with office supplies, with office equipment, or with staff to perform his functions. All of these are provided for in the part time salary provided to the Executive Director. Throughout the years, Statewide Indigent defense has encouraged the Executive Director to decrease his caseload to help provide these services to MCAD/OPDS. It should also be noted that Statewide Indigent defense has never once offered to make the position full time or to pay for any of these expenses.

The remainder of the Executive Director's time is spent on his private caseload which at this time is exclusively indigent defense work. He currently has one aggravated murder post conviction, one trial level death penalty aggravated murder case, one trial level habeas corpus case specially requested out of Washington County, and a few indigent defense appeals, mainly post conviction and habeas corpus.

In its next MCAD/OPDS contract negotiation, MCAD will welcome a new emphasis on quality and putting resources to ensure better quality service. Apparently, the past emphasis on efficiency will not longer prevent even a small increase in resource directed towards the Marion County indigent defendant. Since it is clear that MCAD saves OPDS/PDSC at least $300,000 in representation costs, it seems fair to return to this population at least $100,000 in resources directly aimed at quality issues in said representation. The example given of hiring a full time attorney trainer is but one example of how these resources could be spent to help increase that quality that OPDS now expresses that it wants. Lane and Multnomah County indigents are provided such a resource for approximately this amount. This position might be a shared a assignment of case position and trainer as in Multnomah County and might be in the

$123,000 range to provide a full time attorney/trainer and a paralegal instead of or as part of a trainer/case assignor.

Of course most of the resources put into quality should be put into a system to help underperforming under performing attorneys in MCAD. The position could also be used to provide case monitoring and additional supervision to MCAD attorneys. A formal case review process could be established using additional staff to provide service to not only the under performing members but to the whole membership. Funding quality improvements should come out of some of the at least $300,000 that MCAD saves OPDS/PDSC each year. It is clear from the history of the MCAD/Statewide Indigent defense/OPDS contract negotiations and contracting that there is apparently a change in emphasis that OPDS/PDSC now is making in quality, training and supervision versus efficiency of providing otherwise qualified service.

As has been said, MCAD is open to this change and welcomes any increased resources directed to this area and seeks to join with OPDS/PDSC in figuring out the proper way to expend these additional funds to increase attorney quality.

- **In many of the counties in which it has conducted investigations as part of PDSC's service delivery planning process, OPDS has encountered law firms and consortia in which one, two or a handful of underperforming lawyers – lawyers who observers and stakeholders in the justice system consistently observe should not be practicing criminal law – have compromised the general reputation of the law firm or consortium and its members and affected prevailing perceptions of the quality of the services of those organizations and their lawyers. The inability or unwillingness of law firms and other legal joint ventures to address the substandard performance of its members is certainly not unique to criminal law practice or the delivery of public defense services. Nevertheless, OPDS has found it necessary to encourage and assist some law firms or consortia in the difficult process of removing such underperforming attorneys. Without exception, while the process was painful, the benefits in terms of improved reputations and perceptions of quality, not to mention the protection of clients, have justified the effort. Based on its investigations in Marion County, OPDS concludes that MCAD has a small number of lawyers that are compromising the reputation of the consortium and its members, perceptions of the quality of their legal services and the interests of their clients. Does MCAD recognize the possibility that OPDS's conclusion may be accurate? If so, what does the consortium plan to do about it? What processes and procedures will MCAD employ in the event that it reaches the same conclusion as OPDS?**

MCAD does recognize that MCAD has a small number of under performing members. MCAD has realized this in the past and has acted on this information in the past using the quality assurance process in place. As has been said, the depth of the complaints by the judiciary at the public hearing was a wake up call for MCAD. MCAD immediately started several processes to identify the problem, identify the under performing attorneys, and to either help those attorneys perform better or remove them from MCAD membership.

The complaints by the judiciary could be summed up in two categories.

Communication/professionalism/organizational (being able to be contacted or being in the correct place at the correct time) and representation (not representing clients correctly). MCAD immediately proposed and has enacted a mandatory communication plan to help alleviate the first category of complaints. This took effect on September 1, 2005 and demands that every MCAD attorney possess an email address that they check at least daily. That they join the MCAD email list-serve. That they have an interactive

telephone system and as a last resort provide MCAD with a way to get in touch with them in an emergency. (See attached communication plan)

To correct the second problem area, and to help with the other systems of quality assurance, MCAD has already conducted a general judicial survey to help determine who the under performing members are. MCAD is currently designing and will soon conduct a detailed survey to help determine specific areas of concern, so that MCAD and the member can improve the member's under performance. MCAD will periodically update the survey instrument and conduct updated surveys to help the member improve. If the member does not improve within a reasonable period of time, MCAD will start the process to remove the member from MCAD. MCAD is considering surveying not only the judiciary but the other components of the criminal justice system with the goal of improving member quality.

MCAD welcomes the help of OPDS/PDSC in improving its systems and member quality and is open to any suggestions to do so. In addition over the next several months MCAD's Board will continue to explore ways or methods to increase its member's quality representation.

This is the last question asked in the second draft.

I also wanted to make a few comments concerning a few of the statements in the body of the Second Draft document.

- **MCAD's process of admitting new members to the consortium remains unclear to OPDS. The four board members indicated that they recently interviewed and hired several new attorneys pursuant to a relatively new formal hiring process. They explained this process as beginning with an interested attorney's letter of inquiry, followed by an interview with the Executive Director and members of the board, and concluding with a vote of the Board of Directors to grant or deny the applicant's admission to the consortium. This process appears to be memorialized in MCAD's Attorney Manual as follows: "New members must be voted in by a majority of the Board of Directors." MCAD does not appear to have any formal policies or procedures to actively recruit qualified candidates for membership, in addition to responding to the applications of interested lawyers. Several past and present MCAD members whom OPDS has spoken with indicate that MCAD's admission process has historically been quite informal, based upon a candidate's personal contacts with consortium members and the assessment of a candidate's qualifications by the most influential members of MCAD.**

MCAD has been fortunate to, except for a few exceptions in its history, to have had sufficient membership and turnover in membership to not to have had to advertise for new member. Thus MCAD's membership has been filled mainly through word of mouth. When in the past this has not supplied sufficient membership, MCAD did what public defenders have had to do, advertise for new membership through the Oregon Law Schools, Oregon State Bar and Oregon Newspapers. MCAD for years has had the same hiring process. Attorneys have inquired as to how to become a member. MCAD requests a cover letter and resume from the prospective member. The Chair of the Board, another member of the Board and the Executive Director interview the prospective member. The Executive Director reports as to an investigation of the prospective members qualifications and references and the "hiring" committee makes a recommendation to the "hiring body". Originally this "hiring body" was the membership. Several years ago the "hiring body" changed to the Board of Directors. MCAD does not see this new member policy to be much different than the hiring processes of most, if not all similar indigent defense organizations.

While the prospective members interest in MCAD might be considered informal, the new member process is and has not been. As has been said about in answering some of the above questions, MCAD is open to changing this process if it can be improved. MCAD is certainly interested in taping into a data base of potential new members that OPDS or other organizations might start to help prospective defenders acquire positions. One of the important differences that does separate MCAD from other organizations is that MCAD membership is not just a job but is a vocation, the MCAD member does not earn a salary but earns compensation for the actual work performed per hour and their position is open to have a variety of criminal defense and other legal experiences even though the emphasis of most members is criminal defense.

- **In response to the Site Visit Questionnaire, MCAD indicated that it has a formal mentoring system for new and inexperienced members, which is described in its Attorney Manual. OPDS was unable to locate that description in the Attorney Manual, though Section 1.0 D. of the manual does set forth a requirement that "[a]ll new members are required to develop and complete a personal mentoring program" and Section 1.0 G. refers to a "Quality Assurance Mentor Program." MCAD's "New Member Information Sheet" also refers to a mentoring program, stating that "[a]ll new members are required to enroll in MCAD's mentoring program," but does not contain a description of the program either.**

As has been already stated it has been an oversight that the mentoring document was not included in the Attorney Manual. It has existed at least since 1994 and is being included in the Attorney Manual's current revision.

- …**Several of these prosecutors complained about encountering Attorney of the Day lawyers who they had never seen or heard of before. One indication of the declining quality of MCAD's legal services from this group's perspective is the apparent inability of MCAD's less-experienced lawyers to assess their clients' cases accurately and counsel their clients to accept reasonable plea bargains. In a similar vein, several of these prosecutors were convinced that a few MCAD lawyers, including some experienced ones, proceed to trial instead of accepting a reasonable plea bargain simply to generate more revenue for themselves. While these last two observations may simply reflect the perspectives of advocates in an adversarial system, they do serve to remind OPDS that the methods of compensating lawyers under PDSC's contracts create economic incentives and disincentives to protecting the interests of clients who are confronted with the choice of proceeding to trial or accepting a plea bargain. (Second Draft, p. 20)**

Two comments about this paragraph. It is hard to believe that the statement that several prosecutors complained about "encountering Attorney of the Day lawyers who they had never seen or heard of before" is accurate. It is not hard to believe that someone would say this, but it is hard to believe that this is a true statement. All of the MCAD attorneys receiving cases through the Attorney of the Day system have been doing so for at least a year. They also have had more than one day in this year.

Second, the statement that several "prosecutors were convinced that a few MCAD lawyers, … proceed to trial instead of accepting a reasonable plea bargain simply to generate more revenue for themselves" is also hard to believe that this is a true statement. As shown above, MCAD's cost controls are extensive and most MCAD attorneys, especially the experienced ones are busy. What this statement reflects is the different perspective between a prosecutor who has no client other than the State and a defense attorney who has a human being defendant as a client. While

the plea bargain may be reasonable there are many reasons that a particular defendant is not willing to take it even with a defense counsel who is recommending that he or she does.

MCAD thanks the Public Defense Commission and the Office of Public Defense Services for the opportunity to review the drafts of the Marion County Service Delivery Plan and allowing us to not only correct some misinterpretations but to answer your questions. If you have other questions please feel free to contact us.

As we have said, the Marion County Association of Defenders, is the creation of the collaborative processes of the Marion County indigent defense providers, the Marion County judiciary and Statewide Indigent defense. These processes should not be stagnant, and for the sake of better representation of the indigent accused in Marion County, should continue.

Sincerely yours,

Steven H. Gorham
Executive Director

Appendix E

PUBLIC DEFENSE SERVICES COMMISSION

EXCERPTS OF EDITED TRANSCRIPT

Meeting of August 11, 2005
Senator Meeting Room
Courthouse Square Building
555 Court Street NE
Salem, Oregon

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Michael Greenfield
Chip Lazenby
John Potter
Jim Brown
Wallace P. Carson

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STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Ingrid Swenson
Shelley Dillon
Laura Weeks
Caroline Meyer
Laura Anson

[Tape 1; Side A]

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Agenda Item No. 2 **Continuation of the Service Delivery Planning Process for Marion County**

067 Chair Ellis Why don't we go to the Marion County issues, and you start by summarizing the supplemental report that you prepared. We can go from there and take witnesses as they are available.

072 P. Ozanne I thought it was time to include in this draft of the report the substance of investigations by Shelley Dillon, a contract analyst at CBS, and me as a result of our interviews of a number of judges and others in the county. To summarize, while any organization can improve, the general sense from those interviews was that the juvenile consortium was doing an excellent job and that MCAD, in general, was also doing a good job, which I think is consistent with the testimony of the witnesses who appeared here at your last meeting. Regarding MCAD, we heard that Mr. Gorham, who is Executive Director, is generally responsive to concerns and complaints. MCAD has also made attempts to change in terms of addressing problems with some of their attorneys' performance. But most of the people we talked to thought issues of quality were frequently raised about particular MCAD attorneys, but never resolved. Of course, as my report indicates, the representatives of MCAD can address these issues today and in their subsequent written materials.. Essentially, the supplemental report recommends that, with the time available to the Commission, it should focus on the concerns that have been raised about MCAD. While there are many important issues to address in the county, I

think the Commission can return to juvenile law issues in a separate planning process in 2006, which should include participation from the Juvenile Advocacy Consortium from Marion County as well as contractors from across the state. Secondly, I promised last time that we would invite our contractors who provide services in civil commitment hearings and before the Psychiatric Security Review Board. As Mr. Gorham rightly pointed out, these areas of practice raise pressing issues and I think they are areas of concern across the state, even though a lot of this work is done in Marion County. So my suggestion to the Commission would be that you address those issues in a separate service delivery plan in 2006 as well. Finally, MCAD does a lot of post-conviction relief work. Again, that is an issue that we have discussed a lot and I'm also prepared to recommend that we address post-conviction relief statewide as a separate subject in 2006. So again, in order to focus your resources and time, which is obviously limited, I am suggesting in the report that we devote the remainder of our time today to hearing from other witnesses like Judge Guimond, who just arrived, Judge Rhoades, if her docket permits her to attend, and a representative from the District Attorney's Office. I also suggest that we hear again from representatives of MCAD because they didn't have enough time at the last meeting to complete their presentations. I assume the Commission may also have some questions for them to answer. So with that I would like to welcome Judge Guimond.

127 Chair Ellis Welcome Judge Guimond

130 Judge Guimond Good morning.

130 Chair Ellis Thank you for coming.

130 Judge Guimond Thank you, members of the Commission and staff. My name is Joe Guimond. I am a Marion County Circuit Court Judge and have been employed in that capacity for almost 10 years. Before that, I was in private practice for about 12 and a half years with one of your members, Mr. Brown, in Salem and Marion County. So I have devoted pretty much all my professional life to the practice of law in Marion County. Thanks to Peter Ozanne I had a chance to review some of the excerpts of statements made by other judges, Judges Abernathy, Lipscomb and Leggert. I will try not to repeat those comments except to the extent I feel necessary to emphasize the points I wish to make. I also want to limit my remarks and observations to MCAD. Certainly, I will answer any questions about the juvenile group. I know all of those lawyers very well. But they don't appear in front of me on a regular basis. I generally see them about once a month. I don't handle that many dependency cases. MCAD lawyers, on the other hand, I see almost on a daily basis. In reviewing Judge Leggert's comments, I recall well the old days of court-appointments in Marion County. Justice Carson I'm sure remembers the so-called "Sloper method" where we would all sit in the front row and Judge Sloper would appoint lawyers as he saw fit. There were plenty of escapes when the cases weren't ones we wanted to try. Often in my recollection, those were cases in which the defendants we knew from prior experience and didn't want to deal with again. Obviously, Marion County has changed greatly. We are a much larger community now. Even assuming we would want to put that role on Judge Leggert out at the Annex, it really wouldn't work because we are just too big. Also, to the extent that it would appear that Judge Sloper always appointed a lawyer based on his or her ability to handle a particular case, in my view, that would be inaccurate. It was often based on who was in favor with Judge Sloper at that time. I don't mean to be critical of Judge Sloper, it was just the truth of the matter. It was not necessarily a merit-based appointment and, with that being said, we can't go back to such a system. I think what we have here with MCAD is an extremely effective service provider with one areas that needs to be improved. It has already been touched on, which is quality control. I think that this is something that needs to improve and I have a few suggestions about the front end as well as after lawyers become part of the group. I didn't know how many people are in MCAD. Dick Cowan was kind enough to provide me with a list of the lawyers in MCAD and I just had a chance to review that. I was quite frankly impressed by the quality of some of the names on the list. There are six or seven members of MCAD who

are six or seven of the best lawyers in Marion County – not just criminal defense lawyers, but the best lawyers. Peter and I talked about the possibility of a Public Defender's Office. In that event, those lawyers continued participation in public defense would concern me greatly. Those lawyers in my experience have done a great job of coming in and taking over difficult cases with expertise. Now on the front end, I think that as MCAD brings lawyers in they need to make sure they are properly trained. I talked to MCAD's Board of Directors a few days ago and they said that the new lawyers they bring in are assigned routine misdemeanor low-end cases to give them some training. I agree that is a way to train them. But you can't be trained as a second chair watching somebody else do something. I think that those new lawyers should have mentors, or at least somebody they can talk to. After they try a case they get back to that lawyer and just talk to them. I think that is something that partners do routinely. But if they don't have partners, I think it is very important that they have someone to talk to a mentor. I think that kind of training is very important. I would recommend CLE requirements.. With somebody that is new, I think that MCAD should require these new lawyers to complete some CLE in criminal defense and that they provide proof of their attendance. So I think at the front end that there has to be some more training and more hands-on mentoring by MCAD. Also there needs to be recruitment. I know within the juvenile consortium, and of course they are a much smaller group, they actively recruit lawyers who they think will fit within the group. I would like to see MCAD do the same thing. Maybe they are and I'm just not aware of it. But if they lose some lawyers down the road, when they replace them they should look for lawyers that would fit their needs and actively recruit those attorneys. I think that is very important. There was discussion when someone applies to MCAD that the Board of Directors makes a decision and it is a formal process. I think in the early days it wasn't as formal as maybe it is now. There is a suggestion to possibly have some independent, non-MCAD members on their Board of Directors. I think that is great in theory, but I'm not sure it would work in practice. I'm not sure you would be able to find people who would want to do that. I think the current board is capable of making decisions about whether someone is qualified to join MCAD. Then, after a lawyer gets on board, the second quality issue that I think has been missing, but I think has gotten a lot better, is, if you are having a problem with an attorney, what do you do? I also reviewed Steve Gorham's remarks and he brought up the very good point that one judge may say, "I think this lawyer is doing a terrible job," and if you talk to another judge, that judge might say, "No, I think he is fine and I have no problem with him at all." Well, in my experiences, that is pretty rare. It may happen but if it does, then that may be a personality issue. Maybe the question is how you approach this issue and the judge needs to be told about that. But I also think that this requires the implementation of a mentoring program or some possible changes in procedures to get such an attorney removed from MCAD. Most of the time the lawyers you are going to see who we are having problems with, most judges are going to agree about them. Maybe not 100 percent, but most judges are going to agree. Again, in Judge Leggert's testimony, she talked about a lawyer who was doing a very poor job. I know that case very well because I was the one who asked Mr. Gorham to select a mentor, who turned out to be Ted Coran. That particular lawyer did such a miserable job in the case before me that this lawyer is no longer a part of MCAD. So I think they are taking steps, but I think they need to be a little more aggressive if they think lawyers are not doing the job. Judges are the ones that see it. Some of the district attorneys and assistant district attorneys may also be able to tell you about problems. But, by and large, other MCAD lawyers aren't sitting in on trials unless there is a formal mentoring program in place. We are the ones that see it: the good, bad and ugly. I think we are all cognizant that we can call Steve or Dick and let them know there is a problem. I think with more aggressive quality control MCAD is the best form for delivering service. I have great respect for our presiding judge. . Paul Lipscomb is a friend of mine and does a wonderful job of herding the 14 of us and keeping us in line. But I do not agree that a public defender's office is the answer for this county. I don't agree that this is where we should be headed. One of the reasons is that the conflict issue is always there. I assume that has been resolved in counties where they have public defender offices. But the thing that concerns me is the people you would lose. I don't understand exactly how the financial structure of a PD's office would be set up. But my

guess would be that at least six or seven lawyers who I have mentioned to you as some of the best in Marion County would not continue in public defense. These criminal defense lawyers don't dabble in this, but they do other work. They take retained clients too. I am concerned that if we went to a public defender's office, possibly one of them who is former prosecutor might come aboard. But you would lose the other six. So instead of having the top attorneys, you have got the middle group. That would be concerning to me and to others on the bench. I have a bunch of others things I could say, but I don't want to take up all of your time because I know there are other people coming in. There is an old saying that if it ain't broke, don't fix it. With MCAD I think if it ain't broke don't change it. I think some fixing needs to be done, but not necessarily changed. I will be happy to answer any questions, if you have any.

283 Chair Ellis — I would like to go to your comment that you don't believe that a public defender office here would be a good fit. Is that on the assumption that, if we went toward a public defender office, it would totally displace MCAD, or are you thinking of a blended system?

288 Judge Guimond — Mr. Chair, I was not thinking of a blended system because I would probably be a little less adamant if it was a blended system and MCAD was allowed to exist in some form. It was my understanding that a PD office would replace MCAD.

292 Chair Ellis — If we went toward a mixed system where you had a PD office supplemented with MCAD, would you be more amendable?

295 Judge Guimond — It could work. But I still don't know that I see the need to move toward a PD office. But yes, I agree with you that that would alleviate some of my concerns in the sense that some of these really top notch lawyers would probably stay in MCAD and therefore would be available to handle some of the more difficult cases.

299 Chair Ellis — Aside from the concerns you have expressed about the six or seven lawyers, you think maybe only one would be interested in PD system and five or six would not. Are there other factors in your mind in moving toward a PD office?

306 Judge Guimond — No, I'm not seeing the advantages of a PD office over what we have now. Quality control is an issue with a PD office as well, and I think if MCAD starts taking that seriously and does a better job of that, there aren't any advantages to a PD. The PD office would be made up of many of the lawyers from MCAD. It is not like you would draw 30 or 40 lawyers from some other venue that I am aware of. I see some of the same problems in a PD office that we currently have at MCAD. I don't see it as being a huge improvement. I think MCAD is delivering a high quality job for the clients.

322 Chair Ellis — Have you yourself had experience with PD's office?

323 Judge Guimond — No I have not.

324 Chair Ellis — You made a comment referring to what you called the Sloper appointment method and you said the appointments there were not merit-based?

326 Judge Guimond — Not always merit based.

327 Chair Ellis — I thought I heard you say they were not merit-based.

328 Judge Guimond — Let me amend that. My recollection 30 years ago is that they were not always merit-based. There were some times that Judge Sloper appointed an attorney because he or she was experienced. But there were times that it was pretty obvious that lawyers were being appointed because they played golf with Judge Sloper.

334 Chair Ellis Now under the MCAD system as I understand it, there is an attorney of the day method that is almost random regarding who the attorney of the day may be. Do you consider that merit based?

338 Judge Guimond No, it is not the best system, Mr. Chair. It is for the convenience of the lawyers, quite candidly, at least that is my take on it. As you probably know, we have a situation where we don't do criminal arraignments downtown at the courthouse right across the street. We do them out at the Annex a good 20 minutes away. To have 20 or 30 MCAD lawyers out there, rather than have the attorney of the day, makes it almost impossible for those lawyers to be dealing with other cases downtown, where the trials start at 9:00 a.m. The attorney of the day frees up the other MCAD lawyers and it allows them to be handling the other cases. Is it merit-based? No it isn't, and sometimes the fit is very good and sometimes it isn't. I will say I have situations where I sometimes have to replace an attorney on a case for whatever reason. Sometimes the client has complained with a legitimate reason. I will often call out to the Annex because the procedure is I am to appoint the attorney of the day. If I get a difficult case and I get the name of that attorney and I say, "No, we are not going to appoint that attorney," we are going to appoint one of the six or seven I just talked about. Here is what I am saying: is the attorney of the day the best system? Probably not. But the alternative is almost chaos. If our courtrooms were five minutes a part, it wouldn't be a problem. The idea that the attorney can meet their client right away I think is overrated. But I don't see that improving with a PD's office either.

365 Chair Ellis Why not?

366 Judge Guimond Well, my understanding from whatever counties have them is that they send one lawyer over as a representative of the firm and he will essentially representing everybody. It is somewhat the same thing as the attorney of the day system. I know what you are going to say is that they are not necessarily assigned to all the cases. I am not sure that once those cases are assigned that they are necessarily merit-based either.

376 Chair Ellis I am not sure that I agree with your assumption.

377 Judge Guimond Okay.

378 Chair Ellis One advantage of a PD is that you have a management structure and you have the ability to make some of those decisions in a way that a random selection system does not.

381 Judge Guimond I agree with that, but I also want to say that the judges here in Marion County have the discretion. If we think the lawyer is mismatched and can't do the job, we replace that lawyer. I understand what you are saying.

387 Chair Ellis Other comments or questions? Not even going to cross-examine your former partner?

390 J. Potter Can you explain to me about the calendaring system that you use within each courtroom or each judge?

392 Judge Guimond Sure. What we have is Judge Leggert is at the Annex. She handles arraignments and also pleas. Judge Abernathy is at the juvenile court handling all the juvenile cases. That leaves essentially 12 of us downtown. The procedure out at the Annex is a lawyer is appointed, a Rule 7 date is established, they come back and a not guilty plea is entered, and the case is assigned to one of the 12. The case then comes downtown and we hold what is called a status conference, and that is a bit of a problem. That is something where the judges need to do a better job with MCAD. We all have different times and dates when we do this and that causes a lot of stress on the MCAD attorneys. I have suggested to my colleagues for years without success that we essentially all do them on the same day. I don't care if it is morning, afternoon or whatever, but in other words we do our criminal status and/or pretrial

conferences all on Friday morning. Yes, that would mean that the lawyers would have to go from courtroom to courtroom, but at least they would all be there. Now we do them all week long. Judge Wilson and I both do them on Friday morning, but we are about the only two that do. Then we set trials and all of us set trials according to our calendars. Some a little further out, and I think all of us under the calendaring system we have double and triple set almost everyday. That is just a fact of life and we rarely get burned on that. One of the good things with this system is, if we do have two trials going at the same day, normally one of our colleagues will take over the case. I think in 2005 I have reset one case that I double set and couldn't find anyone else to take over.

423 Chair Ellis — When we were here a week or so ago, Judge Leggert said that one real concern was the ability to stay in touch with lawyers who are appointed. If any of them are solo practitioners that don't maintain an office, they don't have good means to contact them. What is your experience?

430 Judge Guimond — Mr. Chair, I couldn't agree with you more on this. I think that lawyers who are going to take this work have to do it in a professional manner, and part of being a professional is maintaining an office with a live person answering the phone and taking messages. If you are going to have a voice mail, make darn sure that the voice mail isn't full so that people can leave a message at all. That is a problem. I think this is another quality issue that, if brought to MCAD's attention, they need to let that lawyer know that this is unacceptable. When my office or any judge's office calls a lawyer to find out about a trial, and we can't even leave a message that we called because the voice mail is full, there is something wrong. I agree completely with Judge Leggert's comments. That needs to improve.

447 Chair Ellis — How long has that been the case?

447 Judge Guimond — It is certainly not every lawyer, but several years at least. I became aware of it maybe three or four years ago and it just shocked me, Mr. Chair. I remember starting out with a partner and, goodness knows, we weren't making much money. But we always had an office and a secretary and I can't even imagine practicing law without them. That is part of being a professional. But it is not mandated and I am not saying to necessarily require that you have a secretary. What should be mandated is that people can get a hold of you and you will then respond in prompt fashion.

460 Chair Ellis — When you became aware of this problem, which sounds to me to be pretty significant, did you complain or take it to MCAD?

462 Judge Guimond — Yes, but at first in my experience it involved one attorney and I don't know how many more it now involves. There was one lawyer who we could not get through to and I spoke to her directly and I said "This can't go on." It seemed to get better for awhile and then, very recently, it happened again. I certainly would be prepared to talk to MCAD about it now. I agree that is something that should be reported to MCAD.

480 Chair Ellis — We are told that MCAD includes approximately 40 attorneys.

482 Judge Guimond — Mr. Cowan has indicated 56.

486 Chair Ellis — Of that group of 56, you have identified six or seven who you think are particularly strong.

487 Judge Guimond — Correct.

487 Chair Ellis — Who you would be reluctant to see not included in the system going forward. Take the other end of the spectrum. How many in that group of 56 do you think really are not serving the client base well?

493	Judge Guimond	First of all, some of them just do post-conviction relief, at least five or six. I was actually asked to provide Mr. Cowan with some thoughts on that and so I have. But basically, I found seven attorneys that in my opinion are not doing an acceptable job. Five of those lawyers I felt could, with training and mentoring, provide acceptable service. Two of them I felt could not, in my opinion. As far as people who are currently a huge problem, for lack of a better term, I think it is a very small number, but it is there. By the way, when I say six or seven of the best lawyers in Salem, there are another 10 or 12 or maybe more than that who are fine lawyers doing a good job.
515	Chair Ellis	Feels like a bell curve?
516	Judge Guimond	It is a bell curve.
517	J. Potter	Is there any optimum number that you can think of that can be achieved either by expanding MCAD or reducing MCAD? Does it make a difference to the judges or not?
521	Judge Guimond	I don't think I am in a position to know. I think that is up to their Board of Directors to know what they need. I agree with the Chair that I don't think it would be the worse thing to reduce some of the numbers they have now. On the other hand, as I talked earlier about recruitment, there are attorneys out there, and I can think of two or three attorneys in the Salem and Marion County area, who are not on this list and who I would like to see MCAD recruit. If they say "no" then they say "no;" but I think they would be an asset.
532	J. Potter	You made a comment about the Board of Directors and that the principle of having somebody from outside MCAD may be good, but that the practical application may be difficult. Why do you think that we couldn't attract somebody from the outside?
537	Judge Guimond	The Board of Directors, who are members of MCAD, obviously have an interest in the success of MCAD. If you could find outside folks who were willing to spend that time and the energy to do that, great; but it might be a difficult person to find.
543	J. Potter	Is there somebody from the outside with a particular skill set who we would want to look for, if we brought somebody from the outside?
545	Judge Guimond	Well, somebody with a criminal law background would probably be good; but other than that, someone with experience. But I don't have any express criteria for that, no.
552	M. Greenfield	You have spoken two or three times about the magnificent seven. I'm guessing that the way that you make judgments regarding those attorneys would be a model or idea about what a quality lawyer is.
561	Judge Guimond	Yes sir, I have seen a lot of good and bad in my years of service.
561	M. Greenfield	So it is possible to make judgments about attorneys and to evaluate their performance?
563	Judge Guimond	Seeing them in one case, that may not be fair.
566	M. Greenfield	As far as you know, does MCAD have any sort of formal process or regular way to ask questions or evaluate and try to make judgments about performance of the lawyers?
571	Judge Guimond	I think that is something that not traditionally been done as regularly as it should be and I would encourage it. Rather than wait for the judges to come to them and say, "There are problems with lawyer X," MCAD should come to us and say, "How is this lawyer performing because you had a two day trial with him last week?" I think that is an excellent suggestion. I think in fairness to MCAD, I have had Steve and Dick talk to me on occasion about lawyers,

but it seems pretty rare. It is mostly my going to them. I don't mean to make it sound like I am calling them everyday, because I am not.

596 J. Brown — One of the observations that I have had as I have been watching over the years is the inversion of the experience level of the prosecution and defense function, going back to our days when deputy district attorneys stayed for a few years and went into private practice, and defense lawyers routinely had their way with inexperienced lawyers in front of juries. It has been interesting, at least my observation has been, over the last 20 to 25 years that prosecutors have been career-oriented and there are many, many people out there who have stayed for a very long time. I worry just a bit about maintaining a level playing field where the deputy district attorneys have access to ongoing training that is pretty sophisticated. I wonder whether or not as we look ahead 10, 15, 20 years and try to lay a foundation for a criminal justice system, which feels like a unique opportunity that this Commission has had, to what extent, and I'm just asking Judge if you want to react to that, do you think that is a concern we ought to have in terms of laying in place a foundation for equivalency long-term? Can the consortium have the necessary level of sophistication and training, or ought we to be thinking about a blend that would offer the development, long-range, of equivalency?

627 Judge Guimond — Certainly, Jim, I agree with you completely on that aspect. When I started practicing, and we are talking about the Sloper method of appointment, I would often be sitting next to former deputy district attorneys who had spent a couple of years in Gary Gortmaker's office and they didn't stay very long. That just doesn't happen now days. I can count on one hand, with maybe a couple of fingers left, the number of deputy district attorneys who have left the Marion County District Attorney's Office and gone to the defense side. It just doesn't happen anymore like it use to.

641 Chair Ellis — Which probably means that you get the double whammy. The DA stays in a career path in prosecution, and that also means you are not populating the defense bar with people who have significant prosecutorial experience.

646 Judge Guimond — I agree with you, Mr. Chair. Now the DA does employ clerks every year, and they hire a certain number of them right out of law school. That is why I emphasize the training needs to be done at the front end for the MCAD lawyers.

659 Chair Ellis — With a group of 56 participants at MCAD, which I think the math is going to be clear, many of those are only going to be part-time in the defense practice.

[Tape 1; Side B]

044 Judge Guimond — My view would be, if somebody is a member of MCAD, they are doing 15 percent of criminal defense work then they are doing something else on a full-time basis. I think if you are going to be in MCAD, you don't have to do a 100 percent, but I do believe that your focus should be criminal defense. If not, you should not be doing it. But I think that training is an ongoing thing and I think, with mentors and partners, you can teach lawyers all the things in the world. But you can't teach them common sense, and sometimes common sense just isn't there. If the lawyer doesn't have it, then MCAD needs to be aware of that and take appropriate action. If there are dabblers in MCAD, I think they should be asked to leave. If they are not going to devote a significant part of their practice, certainly 50 percent I would think, then they probably shouldn't be doing it. That would be my take.

058 J. Potter — As you know, we have gone around the state and we are talking to a lot of counties, and looking at systems, and there are different problems in different areas. One of the things that is brought up periodically, and I would like your comment on it, is: should we be considering at all here about the graying of the defense bar. Do you see new lawyers coming in on a regular basis? I see Mr. Krasik sitting back there, and he claims he will do this until the day he dies, but not everybody will. Is that an area that we should address at all?

065 Judge Guimond Well sure, I really didn't go through the list of 56 and see how many are young and how many are old, but certainly with the experienced lawyers you have to worry about whether they will do this for another 20 years. I think most of them, especially the core 30 or so who do a lot of the work, are probably older. I agree with that. To answer your question directly, MCAD should be concerned about bringing qualified new, young lawyers in who will be able to get up to speed quickly and be able to handle serious cases. I think in any organization that would be a concern.

076 J. Potter Is there a relationship that you are aware of with Willamette Law School, for example, encouraging folks to get involved in criminal defense work?

078 Judge Guimond I am not aware of any direct link between MCAD and Willamette. But as I said, I do know that the DA's office hires clerks out of Willamette. The board can speak to that because I am not aware of anything directly. I don't think it would be a bad idea at all to do some recruiting in that regard.

080 J. Potter In Lane County, for example, they have a Public Defender Office and they have a defense clinic and also a prosecution clinic, which the University of Oregon Law School coordinates. Is there a mechanism to develop a defense clinic within the structure of MCAD, and is that a good idea?

087 Judge Guimond I think the folks at MCAD would be more qualified to answer that. We have a Willamette Legal Clinic right now that handles domestic cases and does a very nice job.

091 Chair Ellis Under the structure that we now have MCAD is unique in another respect. It is an hourly rate consortium. The hourly rate is the same for everybody. With regard to the six or seven lawyers who you think are terrific and the six or seven who you think shouldn't be there, my question to you is are you happy with that, and do you have any suggestion how to do that differently?

097 Judge Guimond Well, no I'm am not happy with it, but no system is perfect, Mr. Chair. I guess I feel fortunate that the top notch lawyers are willing to work for the wage they are paid at MCAD. I think the lower end lawyers are probably getting more than they are entitled to. I don't mean to be too negative. Most of those lawyers work hard, but they just don't quite grasp how it needs to be done. It is not like they are not putting in the hours. I have no information about people paying bills. But they are just not as effective as they should be and, in my opinion, are not doing a quality job. I am almost sorry I brought up the six or seven lawyers because there are another 20 who you could add to that at MCAD who are doing an excellent job. They are probably underpaid at the hourly rate, but they are willing to do it. They are devoted folks who want to represent indigent defense people and we are lucky to have them.

109 Chair Ellis Do you see admission to MCAD as a coveted honor, the employer of last resort, or somewhere in between?

111 Judge Guimond I hope it wouldn't be the last resort. I think a lot of us came out of law school and decided we'd better learn how to try a case, and the only way to do that because we didn't have paying customers flocking to my door is to get on the appointment list. So you might get some lawyers who only want to do it for a couple of years and move on to something else. But I don't think that is a system-wide problem with MCAD at all. I think most lawyers who they have actually have been there for quite awhile and I don't see a gigantic turnover in lawyers. .

[Chip Lazenby arrives at 9:55 a.m.]

121 Chair Ellis I had the impression at the last meeting that there were some very able lawyers in the county who have stopped taking MCAD cases. Is that a fair perception?

125 Judge Guimond Mr. Chair, I would have said that until I saw this list. There are about three lawyers who I didn't think were part of MCAD. I thought that, economically, they only take retained cases and very serious cases and they weren't taking court-appointments. I was very happy to see that they were still on the list. They may take DUIIs and things like that, but they still take serious cases.

130 Chair Ellis They may be on the list, but I don't think that tells us one way or the other whether they are actively taking cases.

131 Judge Guimond But would hope that they wouldn't just put them on the list. They may not take many, but I am assuming that they take a percentage of the cases. I have seen them in court. One of those attorneys tried a two-week murder trial in front of me in the last couple of months and did a wonderful job. He had a case that looked like a slam dunk conviction and got a hung jury and a much better offer the next day from the DA's office. He did a bang up job. I don't see him all that often, but he took that case.

138 Chair Ellis Have you spoken with your counterparts in Multnomah and Lane Counties and some of the other counties that have a mix of PD offices and consortiums?

141 Judge Guimond No sir, I have not. I have talked to some of my colleagues, but I have not personally spoken with judges in other counties.

145 S. McCrea You talked a little bit earlier about the attorney of the day appointments, and I missed the last meeting we had, so I am a little behind the curve. Can you talk to me just a little bit about what you think is good about that system and maybe what is not so beneficial about it?

149 Judge Guimond What I understand is that they have three attorneys of the day. They have a misdemeanor, a felony, and a Spanish-speaking attorney. As the cases are called, if the defendant is qualified for counsel, then that attorney stands up and I would think ask for a Rule 7 date, which is the next appearance. So there are three attorneys. The advantages are, as I mentioned earlier, it makes life much easier for the lawyers because the Annex is 20 minutes away, and to have 20 to 25 MCAD lawyers out there, when half of them have trials downtown at 9:00 a.m., just is not going to work. It also does allow the defendant to see his lawyer, even though you can't have confidential communications there in court. You can at least see a person and that is probably some benefit. The downside, as we have discussed, is that it does not necessarily insure the right fit. The felony attorney of the day is going to take the felonies. It may be an Assault IV felony. It may be a Sodomy I of a child. They are completely different cases. So it is not merit-based in that regard and it is not a perfect system. But right now, I can't think of a better one because, otherwise, if we had a ton of lawyers out there doing this, then we would get backed up downtown. You can't be in two places at once. Ideally, the Annex should be right here.

173 S. McCrea Thank you.

173 Chair Ellis Any other questions? Thank you very much.

175 P. Ozanne Mr. Chair, I am please to say that we have another Marion County Circuit Court Judge here, Judge Albin Norblad. I stopped by his office several days ago and spoke with his judicial assistance to extend a formal invitation. I understood at that time that he had a trial and probably couldn't make it today. I am pleased to say that he is here. I didn't have a chance to brief him, and Judge Norblad has no prepared comments or presentation. But I thought it would be a good idea to take advantage of his years of experience and perceptions. So if Judge Norblad is still willing, I would invite him to come up and comment and answer the Commission's questions. I might say for Judge Norblad's benefit that, Judge, we have decided to focus on the delivery of criminal defense services in the county. We did look at

the juvenile consortium, and I know you have had years of experience there, but we have decided to separately address the delivery of juvenile defense services across the state next year. Similarly, we are going to look at post-conviction relief, civil commitment, and psychiatric security review board issues separately next year, which are major activities that go on here in Marion County. So in the time the Commission has in the county, we have decided to focus on criminal defense service and, therefore, the operations of the MCAD consortium. I know the Chair and the Commission's members would welcome any comments you may have.

195 Judge Norblad — I had a divorce case today and one of the attorneys ended up in the hospital, so it was continued. I suppose in regards to juvenile services, I would like to say, because of the problems we had in getting the cases set and getting them done and getting the kids adopted out fairly quickly, Judge Lipscomb and I came to the conclusion that one judge ought to do it. So I am now doing all the terminations of parental rights cases in Marion County. I am doing about 150 to 200 a year, so I have worked very closely with the juvenile consortium and am very, very pleased with the work they do. I think they do an outstanding job. Now if we could just get the Human Services Department to do the adoptions in a reasonable time, we would be in great shape.

206 Chair Ellis — Do you do criminal cases?

209 Judge Norblad — Right now I have done criminal cases since 1989. Prior to that, I did juvenile cases and, prior to that starting in 1973, I was a district judge. So I guess I have been doing this for quite awhile. I'm told I'm the most senior judge in the state, is that correct?

214 Chief Justice Carson — Yes it is.

214 Chair Ellis — Do you have any observations you would care to share with us about MCAD?

215 Judge Norblad — I like the system the way it is. I'm not convinced I would be so supportive of a public defender office. I am not excited about dealing with another bureaucracy. Having said that, I like the system as it is. I think there needs to be some controls – a committee, a group that watches these attorneys, watches how they work. When the attorney is not doing an adequate job, it immediately removes him. There are lots of criteria to look at. Do they try a case well? Do they plead everybody guilty and not try a case? Do they answer their phone calls? Do they call the judges back? Do they let the judges know what they are doing? We have got real problems with some of them in that area. Do they talk with their clients? We get complaints all the time about attorneys from their clients saying, "They don't contact us." Do they go to the jail and see their clients at the jail? We get complaints all the time about that. There are problems, there is no doubt about it. But if somebody was put clearly in charge with the authority to remove the attorneys who weren't doing their job, I think the system could work and be a lot more effective.

237 Chair Ellis — Why do you react negatively to a defender office?

240 Judge Norblad — I suppose, simply because I like the system as it works now, that I am not convinced I want to deal with another bureaucrat.

244 Chair Ellis — Any other questions for Judge Norblad?

245 J. Potter — The same question about the current size of MCAD. It is a large group, but there is no bureaucracy. Is it a group that is manageable, as far as you are concerned from judge's prospective.

249	Judge Norblad	I don't see why it wouldn't be. My only problem is trying to get dates for trials fairly quickly. I am setting my calendar in, I don't know, one to three months, and sometimes they are so busy I have a difficult time getting a trial date. When the DA is too busy, generally, I can tell them they can hand the case over to somebody else. But I can't do that with defense attorneys.
255	J. Potter	If you had the magic wand and could say, "I don't want a bureaucracy, but I do want the kinds of things that you talked about" – that you want the lawyers better prepared, better trained, responding to judges – what would you do to ensure that?
256	Judge Norblad	I would probably set up an authority that had the duty to set down standards and guidelines. I don't know, maybe judges and outside defense attorneys, private attorneys, something like that, that would review how people are doing and maybe that could go around and check and make sure that these people are talking to their clients appropriately, that they are going to the jail when they ought to be going to the jail, and looking at the cases and saying "This is not one that should plead guilty; this is one that should be tried."
268	J. Potter	Understanding our role here, that we try to oversee what is going on, is it correct for me to assume that you might envision additional employees? Because right now, you have Steve Gorham, who sort of oversees things. But it doesn't sound like he necessarily is the person who has been going into the courtroom and assessing performance because he has other things to do. Would we have an additional person that would do that?
274	Judge Norblad	I think that would be very appropriate, and to set standards and guidelines for what they are supposed to do. In other words, maybe a check list in each case: how many times you saw your client; how many times you went to the jail, that kind of stuff.
278	J. Brown	Mr. Chair, I can't really think of a question, but it just grieves me intensely that, in the one and only opportunity I can imagine to ask Judge Norblad questions, I have to pass. Maybe Mr. Greenfield has one.
283	Judge Norblad	When I was a DA, I had a case involving a lady in Klamath Falls that I was prosecuting for assault and I had this brand new defense attorney and he just drove me nuts. Got the case continued and never did get it tried, and never get anything done. Do you remember that one, Wally?
289	Chair Ellis	Is this the lawyer in question?
291	Judge Norblad	I still remember that from the 1960's.
291	Chief Justice Carson	The one I remember is when an assault victim, a young woman, a teenager, her hair was dirty and she was in jeans and a t-shirt. Then she came in for a preliminary hearing and he actually had her in a gingham dress and her hair all done. She was just the personification of a young, pretty teenager.
301	M. Greenfield	I'm slowing down and am retired.
301	Chair Ellis	Thank you very much.
305	P. Ozanne	I don't see Judge Rhoades, so I assume her docket kept her away. I would like to turn next to a representative of the District Attorney's Office, Courtland Geyer. Courtland, can you come up please. Courtland is a senior member of the District Attorney's staff. He will, of course, convey, as I will, Walt Bigelow's apologies for his absence. He is quite appropriately at a District Attorneys' conference on the Coast. I met, as you know from my report, with

Courtland and his colleagues. I think you will find, as I did, that Courtland is an excellent representative of the District Attorney's Office to present a prosecutor's perspective.

317 C. Geyer

Good morning, Mr. Chair, and members of the Commission. I am honored to be here and thank you for this opportunity to give you some unique observations from our perspectives on the other side of the bar from defense counsel. I do want to extend my apologies for the District Attorney not being here, as explained by Mr. Ozanne. It is the District Attorney's conference over on the Coast right now and, with the conclusion of the legislature just occurring, it is important for him to meet with the other elected DAs and confer. All of the prepared remarks that I have today are from the District Attorney. Basically what I want to do is set out two areas of observations, which I want to list. First, are a number of acknowledgments of the positive things in our working relationship with the defense bar here. The other is a number of areas of concern that we see. Some of these observations have been discussed with the District Attorney through his management team. I have been here in Marion County for 12 years as a deputy district attorney. Since last fall, I have been managing the trial team that handles all of the child sexual abuse cases. Starting first with some of my observations, we do want to emphasis that we enjoy here in Marion County a very solid working relationship with the members of MCAD. It is sometimes very apparent when defense counsel comes in from out of county. There is not the degree of trust that has been built up from working cases together over the years. We enjoy good communication with the members of MCAD, in general. I have some examples that I want to list in a minute. The consortium also works well with our staff, whether it is as they make phone calls and try to find out who it is they need to talk to, or whether they are coming in and meeting our receptionist and picking up discovery. They know and respect the members of our staff and treat them with respect. Similarly, it has been our observation that, by and large, the defense bar here acknowledges and respects the rights of crime victims in the community. Some examples of good communication that I spoke of: the centerpiece that I think really is the shining example of that, is their collaboration with us on what we call the Early Disposition Program. This is something that has been instituted in the last couple of years and it looks at a select number of low level misdemeanors. There are also a few felonies that are listed in there. Basically in these cases, the early disposition attorney or EDP attorney of the day receives the police reports, discovery and the plea offer prior to the date of arraignment. They show up at the time of arraignment and have an opportunity to meet with the client there. The plea offer is substantially lower than what has been typical over the last decade. Most commonly, it is simply for a money judgment based upon the level of the offense, the person's criminal history, and any restitution there is. Our observation has been that it speeds up the process tremendously, it still produces a fair and just result and it saves the taxpayer money. We processed approximately 1,300 criminal cases in this fashion last year and what I want to say is that it is an example of the good communication that exists – it is a three-way partnership. There would be no way for us in the District Attorney's Office to institute this program unilaterally. It is a three-way partnership between the defense bar, the DA's office and the court. MCAD has been willing to work with us on this to engage in ongoing discussions as the process has been modified and to look at the program's expansion. That is really the primary example of communication that I have. But another example of good communications is MCAD as a partner at the table with us in meetings with the judge at the Court Annex, where probably 90 percent of the criminal cases are processed – where all of the initial arraignments are done with Judge Leggert, who you have heard from already and is currently the judge sitting out at the Court Annex. MCAD is also a partner at the table with us on the local Security Committee meetings occurring over the courthouse with representatives of the Sheriff's Office. They are partners at the table with us on Drug Court and its continued modification and expansion. And they also are partners with us in functions through the Marion County Bar Association. So I would echo some of the comments that I have heard earlier from Judge Guimond's prepared statements and throughout most of all his questioning. I do want to be a realistic, though, and offer some observations in areas of concern and need for improvement that we have seen. It sounds like I am simply echoing some of what you have already heard, but I hope I can maybe offer a fresh twist on this. The

first has to do with proficiency and case management. I would put this into two categories. This has already come up before you today. Judge Norblad was just offering a number of things that he looks at. I would put it into two broad categories – skill and judgment – because, without both, quality representation really is lacking. There are examples that we have seen of attorneys who maybe are too fresh or too green handling cases that are beyond their experience level and where they have not developed the skill to handle those cases. Other times, they may have substantial experience; they may even have incredible trial skills. But there is another part to what the most effective trial attorney does, which is a disservice to his client if he is are lacking in good judgment. There are examples of both. Judge Norblad was just speaking of knowing when to recognize that a case is triable and having the skills to take that and pursue a result positive for the client, as well as knowing when to emphasize the bad news to that client and bring the realization to the client that trial in the case is not in his interest. I wasn't prepared to give any numbers or any names, but the breakdown that I heard from Judge Guimond I would echo that in terms of where these are areas of concern. You have been talking about case assignments and the attorney of the day design. It sounds like you need no explanation of this. You recognize there has been discussion that this does not take into account the relative skill level or specialization of the attorney. There is no way to account for that factor in the attorney of the day design. I look back and I see defense attorneys that I have tried numbers of cases with. For example, I know that Mr. Krasik is very, very specialized and knowledgeable in the area of scientific evidence. Certainly, if a case came along that had that issue in it, a design other than the attorney of the day design might be able to emphasize his particular specialties in the area. Similarly, Mr. Gorham has substantial knowledge and expertise in the area of mental disease and defect. The attorney of the day design not only does not recognize that, but it does not account for the fluctuating volume of cases. One of my favorite sayings as a prosecutor, and this has progressed from the infant stages when I use to say "When it rains, it pours." Now I have modified that to say that "the law of averages is not a straight line, but rather a series of peaks and valleys that average to a straight line." In the attorney of the day design, you will often see days where there may be two, three, four case assignments – very low numbers. Then there is that one day where there are 26 felony case assignments, including many, many very serious Ballot Measure 11 offenses. It is just a practical impossibility for that lawyer, as skilled as they may be, to be ready to answer all of the questions by the relatively short time before the next appearance date. So that is one flaw in the attorney of the day design. I wish I had some sort of great alternative recommendation for you, but I do not. These are certainly areas of concerns that we have observed. The last thing that I want to mention is court calendaring. I don't want to sit here and say that my office is not immune from any of these problems that I am listing. We also have our own attorneys who have their growing pains. And I will raise my hand and say that I have blown being where I am supposed to be over my 12 year career. It is not something I am proud of, but it is a fact that it happens. At the same time, due to the structure of my office, we are better able to compensate for that. This week, I have covered numerous cases for my colleagues and gotten almost nothing done of my own work. What we see is that there is a common occurrence of defense attorneys who are scheduled to be in multiple places at the same time. And it is really just a product of survival, probably a byproduct of having been attorney of the day on one of those 26 felony days. It is where they have 1:30 status conferences set downtown and then 1:30 appearance in both of the jail courtrooms across town. This is something again that I don't want to say, "Bad boy for this." But it is a practical reality. Those are merely the areas that I wanted to comment on today. I hope that whatever I have had to say can be of some use for you in the job that you are doing. Again, I want to extend the apologies and thanks from the District Attorney for your work in this area.

534 Chair Ellis — Questions for Mr. Geyer?

535 C. Lazenby — Just a short one. You mentioned that there was some unevenness in the skill and judgment that you have observed, probably on both sides of the fence. To the extent that the attorney of the day assignment system doesn't take into account the skills or the particular fit of the lawyers, wouldn't that sort of feed on that? Doesn't the attorney of the day process sort of

feed into that, where you end up perhaps with lawyers that are mismatched with their clients in terms of skills? I am just asking if you have observed that.

548 C. Geyer — I would say that bad fits happen for all us, and they happen within my office. I think that I see it really as more of two issues. I think that if everyone out there were an outstanding lawyer, then the attorney of the day design wouldn't be a unique problem. But I suppose if your question is, is it compounded when you have maybe an attorney who is not ready for certain kinds of cases and they end up on one of those. You certainly have a snowball effect, if that was your question.

561 C. Lazenby — My concerns kind of go in different directions. One, I am familiar with public defender organizations where internally they can make those adjustments so that they get a good fit with a client. And it would also seem that, in the interest of justice, the attorney of the day system would result in a higher level of substitutions. Do you think that could be a byproduct of that system as well?

572 C. Geyer — I don't know. I would say that I see a relatively low level of substitutions when we look at the overall number of cases. Most of the substitutions I see have to do with an actual conflict – not a personality conflict, but a lawyer discovering after appointment that he has an actual ethical conflict because of prior representation.

584 J. Potter — Following up on Chip and listening to you talk about the attorney of the day, what are the practical problems with changing it so that it is not an attorney of the day but it is an intake attorney of the day. Basically the lawyer is there to take the case in and then assesses the case and be responsible for applying the case to the particular lawyer who might do the best job. Are there legal implications or practical implications here that we should be concerned about?

596 C. Geyer — I must defer and say that there are certain things where I lack qualifications to fully answer that because I have never been a criminal defense attorney and am not familiar with the dynamics. To some degree based on my comments, I think you could see that I would think that the alternative model you are discussing is more advantageous in the long run. I do know, and you have probably heard this, that defense attorneys in my experience do feel that there is a unique advantage from getting at the ground floor, if you will, and having that client contact at the earliest stage.

615 J. Potter — The judges mentioned that as well. This seems to be a vexing problem. Is there something that we could encourage the local folks to do to work with the DA's office, the judges, and MCAD in coming together to create a solution for getting these clients matched with an attorneys in a more appropriate fashion?

626 C. Geyer — Do I have a recommendation for you? No. What I can throw out are a couple of other barriers that you may run into, or at least have to address in coming up with a design. One is that, with the attorney of the day design, lawyers are often selected for a particular day weeks in advance. The kinds of cases that they may be getting, the felony in custody cases, are committed most likely within days or a day before their actual appearance in court. So the ability to see into the crystal ball – what is going to be there on that morning – is almost impossible. Furthermore, maybe that morning they might know numbers wise how many there are, but they certainly don't have the ability to see what kinds of charges are ultimately going to be coming out and what kinds of issues may be presented. Only after the fact of the appointment would that come up. So, for example, you mentioned, could there be a case manager who handles the appointments and then screen them at the earliest opportunity for those sorts of issues. – complexity of the case and specialization issues. That is a possibility, but again I must concede that I am not in a position to comment about what sort of a ripple effect that may have in the representation of the client because I am not privy to those kinds of things.

670 Chair Ellis How large is the DA's office?

671 C. Geyer I believe we have 26 criminal lawyers, but give me fudge factor of one or two.

676 Chair Ellis So the office as a whole is larger than that, but the 26 is your best estimate of what deputy district attorneys are focused on criminal prosecution. Then I had the impression from something you said that you specialize within the office, so you have a specialty?

685 C. Geyer That is correct.

[Tape 2; Side A]

001 C. Geyer We also handle all of the sexual assault cases. So, in short, we are often referred to as the sex team. There is another trial team that handles all drug cases, and also all cases stemming from the institutions or involving abuses of public office. Another trial team handles the specialty of domestic violence; and then, finally, another handles the growing problem of identity theft and property crime. There are a number of non-specialty cases that may be low level, like a driving under the influence case or relatively high level cases. The crime of murder is not particularly seen within our office to be a specialty, if you will. Though, if it is the murder of a child, it will be handled by me or one of my attorneys. If there is a murder in the prison, which we have had over the last 15 years, it would be handled by that team that is familiar with the organizational structure of the prisons in the area. So the lawyers do receive, not only specialized training, which they are sent to help them handle those specialty cases; but they have, and this is probably more important, the day-to-day knowledge that, forgive my butchering of the scientific term, is learning by osmosis by being around your colleagues and learning from experiences and learning from their mistakes, which are sometimes the hardest lessons. I think that knowledge is invaluable, and I think this has been a beneficial organizational structure for us.

026 Chair Ellis Let me stay on this point for a little bit longer. On the figure you give of the 26, does that include those who are engaged in supervision and training within the office?

027 C. Geyer Yes it does. I am a working manager and at times I have the highest caseload of anyone on my team, which is insane. But we are kind of driven much like the poor attorney of the day by what is coming in the door.

033 Chair Ellis I assume that group also has responsibility for reviewing cases that people decide not to bring.

034 C. Geyer Absolutely.

034 Chair Ellis In your mind, if we were to flip on the defense side, do you think, and I'll just use this as a FTE gauge, that you would expect a similar numbers of FTE's needed on the defense side, a larger number, or a smaller number?

040 C. Geyer That is a good question. I would say that they would have to be at least an equal number, but that is off the top of my head. I say that because of the number of different judges that we have who have an individual calendaring system. You would have to have at a minimum a number of people to be in any given place at the same time. So there are the number of judges that we have, plus the two courtrooms at the Annex; plus you would have to have an overflow to account for any other practice that might take them away from the criminal practice, or vacation, sick days, those sorts of inevitable examples of unavailability.

051 Chair Ellis Now you also commented, in a positive way, that you thought MCAD was helpful in communications, meeting with judges, meeting with system counterparts. Who from MCAD are you thinking of? Is it all Steve or is it others? Who is doing this broader communication?

058	C. Geyer	I most frequently see Mr. Gorham. I think if it is not him, it all goes through Steve. But, for example, in the Drug Court, I believe that Mr. Cowan has largely been at the table, together with another attorney who has left the county. I don't recall who the replacement is. By and large, it is Mr. Gorham or it has gone through him.
066	Chair Ellis	It is inevitable in law, particularly where you are going to be adversaries, that you will encounter defense lawyers that you are critical of from an ethics point of view or whatever.. When that happens where do you take your complaint?
069	C. Geyer	Well, Mr. Gorham would be the person to take that to. I know that colleagues of mine have taken it to him. And there are examples of where he has acted on that. I think two or three attorneys have been removed. I have had, however, a number of complaints, and this is probably my own fault because in my perception of Mr. Gorham's oversight ability: I have come to learn things now that I didn't know; but in my 12 years, I have seen defense counsel make severely bad judgments. I have seen them lie to me, though I don't want to say that this is widespread. This is a very, very small number. But I have had people be untruthful to me and I have never picked up the phone to call him. I think I might after I leave today; but Mr. Gorham would be the person to go to with that. It is my understanding that others in my office have, and that he has addressed those concerns.
084	Chair Ellis	I assume your office feels it is able to perform its job better with this formation of the four trial teams and the specialization?
085	C. Geyer	Yes.
086	Chair Ellis	On the other side of that, the defense lawyers you are adverse to, is are there any sign that you can see that there is any specialization going on, or cases being taken by people because they have particularly good qualifications, as opposed to their being the attorney of the day?
093	C. Geyer	Not from my vantage point. It seems to me to be nothing but random, which just happens to work on most occasions.
096	Chair Ellis	Other questions?
096	S. McCrea	So when a case is initiated, it is initiated by the DA office's filing charges?
098	C. Geyer	Yes.
098	S. McCrea	Are they typically filed by information or indictment at the outset, or does it depend on the case?
099	C. Meyer	It depends on the status of the case.
099	S. McCrea	So it could be either way by information or indictment. So is it only in custody cases that are handled at the Annex or is that out of custody cases as well?
102	C. Meyer	All first appearances are out at the Annex.
103	S. McCrea	So the cases are set when the DA's office lets the clerk's office know there is a case to be docketed?
104	C. Meyer	Basically, yes.
104	S. McCrea	Is the docket usually done the day before the appearance?

105 C. Meyer It depends on the case. It depends on how the case is arriving at the court. If there is a criminal citation that is issued out in the field, our preference is that it is about four weeks out. Sometimes we get them only within days; but most criminal citations – and that is the vast majority, probably 70% of the criminal cases – are out of custody cases, and usually two, three, four weeks out. The other ones are where there is a short turnaround time. Let's say tonight there is an event and there are arrests made from that. Two court days from now there will be an in custody appearance. So tomorrow the charging instrument, in this case, is a criminal information that would be filed. The third instance I can think of is where there has been a secret indictment, or a warrant request issued on a misdemeanor because a person could not be located at the time the investigation was complete. So those charges are filed, but are sitting there waiting for the apprehension of the defendant. Again, that is usually about a one day turnaround time.

123 S. McCrea But, in terms of the citations that are issued, things like Ballot Measure 11 cases, are probably not going to be citations?

125 C. Geyer They legally cannot be because they are all B felonies or above.

126 S. McCrea So you are going to know about those ahead of time, right?

127 C. Geyer I guess I don't understand the questions, sorry.

129 S. McCrea Here is what I am trying to figure out. It seems to me that the DA's office once, the person is charged or you have the person in custody or both, is going to let the clerk's office know that this is a case that needs to be on the docket for the next day or two days down the line or whatever. What I am wondering is, if you have a day where your 26 district attorneys are all filing charges and you have 26 cases, is there any reason why the DA's office couldn't work with MCAD and the court to get the docket to MCAD, or to a specialized person at MCAD, so they know what is coming down the pipeline? So if you have the attorney of the day, but you have got 26 cases coming, maybe MCAD could send another attorney of the day so you have two there. So you have more people who are maybe specialists or have experience in some of the kind of cases that are coming out.

142 C. Geyer Could there be joint communication between the number of in custody hearings and the charges that they represent? I think so, absolutely.

144 S. McCrea My other question is about your observation and your concern about the exercise of judgment. It is one of those things like knowing when to hold them and knowing when to fold them. If we had crystal balls, it would be a lot easier for all of us, but we don't. I guess in listening to Judge Norblad talk about the attorney who tried the dead bang loser murder case and got a hung jury.

150 C. Geyer Judge Guimond.

151 S. McCrea I'm sorry, Judge Guimond. That is an example where, maybe from the district attorney's standpoint, it was like "Why are we going to trial on this?" But the attorney actually did a service for the client, and I realize it is very hard to make a blanket observation about that, but I was concerned about your observation. My question is, how pervasive do you think that is in Marion County? Is that isolated or is that an everyday occurrence? And are cases that should absolutely not be going to trial going to trial, or the opposite?

158 C. Geyer Let me offer a qualification, a comment and then the answer. First, the qualification being that I do want to concede that I recognize that the ultimate decision of whether or not to go to trial on a case is the client's. Ultimately, whatever the defense attorney is telling that client, it is the client that drives that. There are instances where I know that it is not the advice that is being given by the attorney, but I am not always in a position to know one way or another.

167	S. McCrea	How do you know that that is not the advice that is being given?
168	C. Geyer	I didn't want to float this, but I will give you an example. One of our lawyers has had a conversation with an MCAD lawyers who has said exactly: "It is not in my financial interest to try to convince defendant X not to go to trial."
174	Chair Ellis	Because it is hourly?
175	C. Geyer	So that is an example of how I know.
176	S. McCrea	So does that person routinely take cases to trial then? Has that been your further observation?
176	C. Geyer	That person never pleads out. He is a very skilled trial attorney, but very lacking in judgment, in my opinion.
180	S. McCrea	So in your estimation, that is one person with MCAD. Do you seer have the perception with other members of the consortium as well?
182	C. Geyer	Not as extreme, but it exists. That attorney is not alone. The comment regarding the dead bang loser murder case that Judge Guimond talked about was not seen as dead bang loser by our office. There was clearly a level of communication between defense counsel and our office, and the offer that had been made earlier was, if not exactly what he ended up with, because I don't know the total time. But the offer had always been the charge that we ended up with. So the fact is that the trial didn't result in any greater benefit to the defendant than he could have achieved had the light gone on for him on his own. That was an example of what happens when it was being driven by the client. I did want to note that it may not have been known to the judge, but that case was not considered a dead bang loser by any means from our office. Then the answer to your question – I'm sorry the original question that we started off with.
209	S. McCrea	My question is, is this lack of skill and judgment pervasive or – and I think you have sort of answered this a little bit. Of course, we are on different sides of an adversarial system and maybe from the DA's standpoint a case looks a lot different than it does from the defense side. And, of course, the DA has what I would term the Ballot Measure 11 hammer of the mandatory minimum sentences. All of that being said, in Marion County, do you think there are too many cases going to trial, about the right amount – and I'm talking about MCAD attorneys – or not enough cases being tried?
218	C. Geyer	I would say about the right amount, but for the wrong reasons. Most of them are going to trial for the right reasons, but there is this fudge factor on both ends of cases. Many are pleading out that should not, and then other ones in the interest of the client really should be pled out and are not. Then going back to your original question, my short answer would be that the lack of skills is a larger number of people than this area of judgment that I was speaking of.
229	J. Potter	How do we address judgment issue? How do we train for judgment? The example that you are giving under the hourly system is that cases are going to trial because of the financial interest of the lawyer is enhanced by going to trial. We could switch to a different system, where you are doing it by a per case payment. At times, the client's interest may be set aside because the lawyer is going to get paid just to do the case, and they plea more often. My guess is going to be that we are going to have problems no matter what system we have. So how do we deal with judgment issues? Skill, we now what to do. We can do skill things, but what about judgment?

240 C. Geyer Well, judgment will present itself in a number of ways, so that over time it becomes difficult to cloak that judgment. I am sure the defense bar will point to examples within our office where they have raised this issue about a particular person over and over again, and that it took us too long to come to recognition of the problem. I guess I would say, since I dropped that bomb, that I do not want to be suggesting that there are large numbers of attorneys who are trying cases for the financial motive. Even with that one particular attorney, I don't think that is 100 percent why he is always trying cases. But that is one lawyer who I would specifically attribute that to. I think, in the other cases. it is just simply a lack of judgment. So your question of how do we account for that if it went to the opposite design of per-case pay: would they start "dump trucking'' the cases for money? I don't know the answer to that, but it seems like what both of those problems point to is the need for a management system that is open to outside input with the power to act by removal and maybe not having that particular lawyer try other cases.

266 J. Potter So to follow up, and Judge Norblad answered this as well, if you were to design the system in which you had better management, better oversight, more authority, what would you do?

270 C. Geyer I don't think that I am qualified by any means to answer that. But if I were to wave my wand right now, it would simply be to vest more authority in Mr. Gorham. I don't whether or not he has the power now, or how quickly any changes can be instituted. I know that, from a practical standpoint, in this world there are just limitations. My office is probably far more limited in our ability to implement any sort of quick change based on an outside complaint than the theoretical construct of MCAD is.

286 Chair Ellis In your prepared remarks, you had three topics, the third of which was calendaring. I think you may have been trying to be diplomatic because, looking at my notes, you said you yourself sometimes miss dates. The implication that I got was that you had a number of instances of defense lawyers missing dates, am I right?

294 C. Geyer That is correct. Again, it is short list and the violators are well known. There is one lawyer in particular that I am thinking of, and I guess I am amazed every time it happens that nothing gets done. We shouldn't take up all our time for one particular attorney, but he has been around for a long time. I refer to this attorney as the "Teflon attorney" because routinely he not only misses court appearances but does not call in advance, is not available when searched for by court staff, and is never available to court staff or by me by telephone. The only phone calls that I ever get from this particular attorney are when he wants to talk to me. That is one extreme example. There are other cases but, by and large though, when there are multiple places, it is my experience that the MCAD attorneys will call the court and let them know: "I am in this other place and I estimate that I will there to see you at this time." So we know where they are and what their situation is. That is the more common example.

318 Chair Ellis The attorney that misses a court appearance, that is a big deal.

319 C. Geyer I think so too.

319 Chair Ellis You have got your office resources there, you have judicial resources there, the jury may be there, and the defendant is not being represented. So the court has no choice but to take it off calendar and reset it. So there is a waste of resources and there is unfairness to a lot of people. So, if that is a recurring problem, I think we really want to know about it.

327 C. Geyer I agree with you, and it is much as I said. There is one violator that comes to mind. In fairness to MCAD as I said, I have never picked up the phone and called Mr. Gorham and said, "Attorney X is out of control."

332 Chair Ellis That is because you have perceived Mr. Gorham as being more of a coordinator but not a supervisor?

334 C. Geyer That may be my failure of perception.

336 Chair Ellis But it may be an accurate perception.

338 Chief Justice Carson If you were to list the things the court could do to make things run a little smoother, what might they be?

340 C. Geyer Maybe with the last comment that was made and missed court appearances, I have said that I have been guilty of that sin too, and I think I was exceedingly alarmed, ashamed and apologetic. I was not spanked by any means, but certainly when you become known as a repeat offender, there should be consequences. I know with Judge Norblad, if you miss a court date, he will replace you. That is one possible sanction. At least Judge Norblad is very attuned to the problems that it causes. Yet, at the same time, replacing the attorney still causes more work because the new attorney needs to come up to speed and he is going to have to be paid for relearning of the case. Missing court appearances, I would agree with the Chair, is a very, very serious event and there ought to repercussions of some kind.

363 J. Potter I am sitting next to the Chair and I can actually sense when his blood pressure is going up, and clearly missing an appearance sends everybody's blood pressure up. But I don't think that is the problem. If you are saying one person, one known offender, and you know who he is and that can be dealt with. What would you do to either change or modify the system, not to take care of this one problem, but to make the whole system work better? Maybe that is a take off on the Chief's question as well.

377 C. Geyer I have an answer to that. The larger problem of missed court appearances comes not from the cases where we never see the attorney, like the one individual that I was talking about; the practical reality is that the sole practitioners from MCAD are scattered by necessity for multiple appearances, all at the same time. What could perhaps be done at most of these appearances is fairly rote. They are not events of significance where lawyering is done, but really only where calendaring is done. I don't know to what degree they have associations. I know that many of their lawyers do have friends or colleagues that frequently appear on their behalf when they are in that position. But I don't see that happening with the frequency of, say, the juvenile consortium. They are smaller and tighter knit. I am not saying they need to be the same size, but certainly if there were more associations like that, and I don't know whether or not appearing for another consortium is encouraged or discouraged. But certainly, if these groups of attorneys were associating with others who could make those appearances for other people, it would be a non-issue when the attorneys are spread out for appearances at the same time. "We go and make these appearances for each other." So I think that this kind of association could eliminate what really is the vast majority of the problems in this area.

411 Chair Ellis When you gave us that number of 26 deputies, does a portion of them deal with juvenile cases where the juvenile consortium would appear as your adversary?

415 C. Geyer Yes.

415 Chair Ellis Could you give me a sense of how many?

416 C. Geyer There are two who deal with the juvenile consortium full-time. We have had the attorney who hired me as a law clerk back in 1992, Bill Howell. He has been out at juvenile court that entire time. We have another young attorney who has been out there for a little over a year. So there are two full-time attorney who work exclusively with the juvenile consortium and with any retained attorneys who come into the juvenile court – and then myself and the other attorneys who work with me, because of the fact that a number of criminal prosecutions of adults also have dependency cases. The seven attorneys on my team also work infrequently

with the juvenile consortium. I have been invited to and enjoyed lunching with them to discuss legal issues and our working relationship and I know that others from my team have done the same.

441 Chair Ellis — Maybe the equivalent of one more FTE?

442 C. Geyer — Let's say 1.5 FTE, so maybe a total of 3 or 3.5.

448 Chief Justice Carson — If I recall correctly, Judge Guimond pointed to part of the problem of having Rule 7 or call or readiness reports and that two of them, he and Judge Wilson, hold them on the same day. The other judges, although the subject has been discussed spread them around. He perceived, as I understand it, to be a problem. Do you have a take on that? Would your office prefer to have all the judges do it on Friday morning? I can see a problem with that because you can't be 14 places at the same time, unless we go to your team approach.

454 C. Geyer — Mr. Chief Justice, I will stick my neck further out. My preference and I think the preference of many of the attorneys in my office, although I don't know if this would be the official position of the district attorney, would be to return to the time when a small number of judges handled the criminal court docket. This was in the days of the district court/circuit court division. Then after the district court was done away with and they were all circuit judges, we had in our county a team of five judges that handled virtually all of the criminal cases, the exception being what we called a complex case. So murder cases immediately went to one of the other judges, who enjoyed an individual calendaring system. What this meant was that there was one place to go and one time only for status conferences. Then we were just spread out in the limited number of places where a trial would occur. Typically, most criminal trials were done by those five judges, with the limited exception of the big complex cases. That system worked incredibly well for us and I think worked very well for the defense bar because it was a known day and time every week where you would go for these appearances. Since going to the individual calendaring system, coverage has been more difficult because of the fact that it is basically on any given day, any given place, any given time type of situation. It is just mathematically far more difficult to provide coverage. I think that the construct of the individually calendaring system is understandably preferred by the judges because they can then manage and control their own docket. With the criminal calendaring docket, one of those five judges would not know what they were doing on any given week. So whether it is limiting and narrowing the days and scattering of appearances of the individual calendaring system, or if it were a return to the criminal calendaring system that we used to have, whatever could be done to reduce this scatter effect I think would be helpful.

516 Chair Ellis — Thank you very much.

[Break from 11:09 to 11:20 a.m.]

[Tape 2; Side B]

124 Chair Ellis — I see that the two gentlemen from MCAD are here. Do the two of you want to pick up where we left off last time. You have had a chance I know to visit with Peter, and you have seen the interim draft report. So any comments you would have would be helpful. You have been present throughout the day and have had a chance to listen to testimony.

132 D. Cowan — Thank you, Mr. Chair and Commission members. As you know, I am Dick Cowan and I am the Chair of the MCAD Board. I am going to share some prepared remarks. I originally thought that we would be first out of the gate and I would like to get those prepared remarks out. MCAD provides quality legal services to the indigent defense in Marion County. The second draft of the OPDS service plan for Marion County speaks well of MCAD in our overall client representation. Our goal is of course to provide the best legal services to our

clients. Our organization strives to do better. Steve and I were shocked by some of what you were told at the last PDSC meeting. The upside of that is that it served as a wake up call for us to continue striving to improve the provision and management of indigent defense services in Marion County, along with the perception of those services. MCAD was created with the collaboration of the judicial system, the lawyers in Marion County, and the then statewide indigent defense division. While it is true that we have recently been defensive in certain areas, we are not resistant to the prospect of change. Nor are we resistant to the Commission's oversight. If we have not said this to you strongly enough, we welcome and encourage the Commission's help in improving MCAD in any way. We need your help to accomplish our goal of providing the best possible indigent defense services here in Marion County. In the past, our mentoring system and other pieces of our system have been created as the direct result of the interaction of MCAD and the then statewide indigent defense division. We do truly welcome your help and oversight. It is true as the discussion in the second report of the Marion County report that MCAD was not exactly clear regarding what the service delivery plan is. That was our fault for not getting a clear understanding and we were defensive. I don't think that was effective for us or for you. Some of MCAD's written policies and procedures, like PDSC's policies and procedures, need to be physically updated. The written policies and procedures need to be updated and integrated to make sure they reflect current policy and procedure. That is an ongoing process within every organization. MCAD is committed to accomplishing this by the Commission's September retreat. Neither MCAD nor its Executive Director takes the position that the quality of an attorney's performance is impossible to determine. In spite of how it may have appeared and the words that got exchanged at our last meeting, it isn't impossible. It is a necessity and we will get it done. MCAD agrees with OPDS that the practice of law requires recognized professional standards and practices. MCAD's attorneys meet the professional standards of the Bar and OPDS in representing their criminal clients. What is difficult for MCAD to determine is how to manage the professional who underperforms once these standards have initially been met. In the past, we have handled these matters with a combination of both formal and informal processes. MCAD have removed three underperforming members from membership using the then quality assurance process or the threat of that quality assurance process. This most recently occurred within the last six months. You will recall that mentoring case spoken about, and that resulted in the attorney's removal without ever using the process. The threat of the process was sufficient, with the Board backing Steve.

187 Chair Ellis When were the other two?

188 S. Gorham One was about I think two or three years ago and the other was about five years ago.

190 D. Cowan The Executive Director in the past month has asked a member to step aside in a case where it appeared a different member would better represent the defendant based on feedback from the court and the District Attorney's Office. The MCAD Board in the last year has given the Executive Director both more direct authority and direction to handle quality complaints in a more expeditious and direct manner. In other words, we do have the process in place that we have created. But a number of the issues can be dealt with on a right now basis. They don't need to rise to the level of formal discipline. But there have been times in the past when the Board's resolution or resolve behind the Executive Director's exercise of that authority wasn't there. Based on a complaint of a member of the judiciary, the Executive Director recently suspended a member solely based on that complaint because of the nature of it, and immediately started the process until the complainant withdrew the complaint and apologized for the complaint. I am not looking for an antagonistic piece, but there is some cumbersome pieces to the process. We responded to a judge who called and said, "I have got a definite problem with X and here is the situation, and I have got backing of the rest of the bench will you do something." We started to do something and the only part missing was the backing of the rest of the bench. MCAD welcomes any input by any source, and especially the Commission or OPDS, to improve its quality assurance program, including what is described in the report as the establishment of a middle ground involving a more workable sanction in

the removal process for our core group of members. Based on the feedback at the last Commission meeting, MCAD started the process of identifying underperforming members. The first step in the process has been a survey of the Marion County judiciary to get their input on which members are performing adequately and which ones are not. That is part of the list that Judge Guimond referred to. We have not completed that survey for the simple reason that not all the 14 Marion County judges are here. So are we are continuing to gather all of those. We actually have in hand at last count I think 11 of them. This survey examines which members are able from the judiciary's perspective to improve performance and which are not. The next step will be developing and implementing an efficient system to improve the performance of those underperforming folks who can be helped along and eliminating those who can't be. OPDS states in its second draft that it did not detect much enthusiasm on MCAD's part for changes in its long-established organizational structure and operations. Under our current structure, the bylaws of the organization can only be changed by the membership. The MCAD Board will propose to the membership that outside board members be established. I have personally begun seeking qualified professionals willing to serve on the Board. I know earlier that discussion was had to some extent. It is doable. I spoke with a major accounting firm here locally that we were looking for some outside input, some fresh eyes, and I asked, "Would you be interested in being on the Board?" and asked if they would also circulate this request among the firm. The MCAD Board members now serve three-year terms. Each year, three members' terms expire. There are nine members on the Board. The Board has consistently had new membership, and it is not the same at all as when MCAD began. Of the current nine board members, four began board service in or after 2003. We have had 23 different members serve on the Board since its creation. The second draft requests MCAD to provide much statistical information. We do provide information regularly to OPDS and it would seem logical that OPDS assign a representative of its staff to meet with the Executive Director for purposes of getting that stuff in a consistent and clarified way. That person should have authority to determine the statistical needs of OPDS. For example, OPDS requests a written inventory of active members and their caseload, including the number of hours each billed for work performed for MCAD during the last 12 months. The active membership list has been prepared and the payment statistics (inaudible). I also wanted to comment on a few of the issues that the Chair asked last week, and that were captured in the draft. The assignment of cases based on skill and experience. Steve and I touched on this in our last meeting. As you know, we currently have misdemeanor, felony, Spanish speaking, EDP and SED attorneys for attorneys of the day. SED doesn't occur everyday but, when it does, we have folks there to do that work. We also have two Drug Court attorneys. This differentiation helps in making assignments. It isn't perfect and you have heard some comments about that today. But one thing that a person has to bear in mind in wrestling with this is a couple of things that are real critical. One, all of the folks do meet the state's established criteria to perform indigent defense. That doesn't ensure quality and I understand that. Folks with Bar cards commit bad things and get removed from the Bar. But they had to get a Bar card to get in, so there is some entry level requirement and it is fairly direct. There are a series of criteria involved in being able to be qualified to handle misdemeanors, felonies, major felonies, and homicides. Those criteria are signed off on every year. In the past, we have split the attorney of the day to allow minor and major felony qualified attorneys of the day. We try not to assign attorneys unless they are qualified. We don't assign them unless they are qualified under the current indigent defense qualifications, which of course is more of the rub. If you have gone to school you have a degree, you have been admitted to the Bar and you are capable of doing this stuff. We talked in the past and today that we have had some information exchange, and judges have done the same based on input from different components of the system. The ideal is to make it smooth and to make it a better match across the board; and not have to do the after the fact workup. We also utilize murder and aggravated murder-qualified lists to assist the court in appointing counsel for those cases. Operational change in the case assignment is a bit more difficult to accomplish and you have heard about that. It requires input from the other components of the criminal justice system. The second draft of OPDS's report identifies two issues concerning our present assignment system: the number of cases an attorney might be assigned to handle on

their day; and the matching of attorneys with cases assigned. There are conflicting views on these issues. Change to either of these characteristics would be hard to accomplish, but not undoable. If the judiciary, DA's office and OPDS are convinced that change is necessary, we are more than willing to work with them and to be a part of the process to accomplish that. We can't accomplish it alone. The second draft notes that none of the components of the criminal justice system can consistently decide (inaudible). That's what makes the change hard to accomplish. It would not be hard for MCAD to develop a system to match attorneys to cases and do an equal distribution, once we get a sense of where everybody else is and how the interplay will occur. In this particular area, we welcome OPDS's and the Commission's help in structuring a way to accomplish that. We are not resistant to these changes, or resistant to seeking the help of outside counsel. MCAD has monthly membership meetings at which time updates of the law, breaking things like Blakely and Crawford when they came across the wire as well as Marion County procedures, are discussed. MCAD distributes by e-mail and prints periodic memorandums discussing these same issues. Since 2002, MCAD has presented 11 Bar-certified CLEs. Those are Criminal Asset Forfeiture, Female Sexual Offenders, Sentencing for Sophomores, Forensic Issues in Criminal Cases, [inaudible] in the Courts, Drug and Alcohol Issues in Criminal Cases, Forensics, Immigration of the Court, Legislative Change, DUII Diversion, Immigrants in the Court, and Child Abuse Reporting. MCAD has an education committee responsible for scheduling these CLEs. Additionally, MCAD has paid for all or part of the tuition for members at various OCDLA functions. We have training money and we use it sparingly. Also, examine the bi-monthly newsletter which was attached to our handout at the last meeting. That is a continuing legal education tool that is printed and sent to every MCAD member. The next issue, Mr. Chair, was training. MCAD does not have a traditional training program and, by traditional, I am talking about top down, get the troops together. We would like OPDS's help in establishing something that fits the practicalities of where and what we are. We do a lot of training in connection with continuing legal education. I have had a multitude of lunches in my terms as the Chair wherein Steve or others have called my attention to the fact that attorney X needs a word about this or that. I have done some alone and I have done a great number of them with Steve. As for supervision, the last of those four pieces that were captured, as with training, we do have a traditional supervisory program in place. We manage our individuals using a variety of tools, many of which have already been discussed in describing the continuing legal education and quality control program. E-mail, phone, fax, print and meetings are utilized extensively to "supervise and communicate." We have a monthly membership meeting and we conduct special meetings whenever circumstances dictate that. We also regularly invite persons to come and appear at our board meetings and we always have an open board meeting, meaning anybody is entitled to come as a member and participant, just as in any other public process. Finally, I want to say that MCAD welcomes your help in improving any of other systems. Thank you for the opportunity to convey our methods. If I might just touch very briefly, one of the things that was mentioned about MCAD's participation in other parts of the process – being at the table. One of the key components that was neglected was Marion County Public Safety Board, on which I have sat for several years. For the longest time, folks skipped the defense bar in the planning process. Part of what we see today allows [inaudible]. Part of what you see is the systemic issues coming from the non-inclusion of the defense as a stake holder when the process was created. [Inaudible] There are a number of ways of accomplishing the attorney of the day process within MCAD. We had a healthy discussion and disagreement about the one to utilize. Polk and Yamhill use systems. In Lane, the judiciary runs the appointment by virtue of the way the process has been set up. Just from the bench, they have certain days for certain folks. Linn is another where they just do this assigning. You can spend hours or days on the process: is that good or bad, is there an ethical issue? [Inaudible] The concept and discussion around the specialization piece, I hope you heard clearly what Courtland was saying in holding up their model. They do have these trial teams that give them some expertise in given areas, but they are not exclusive. They still have general caseloads. There have been proposals in the past to boutique-out different pieces of this system. Some of the other pieces that I think bear a quick touch are the number of deputy district attorneys.

523 Chair Ellis It actually came down to 22.5

524 D. Cowan Well that is one way to look at it. There is another way or two to look at it. I think you did not get the number of law clerks utilized in the juvenile process, and you did not get the AG's. All of the terminations are done by the AG's office. You have to factor those folks in. That adds to that equation.

536 Chair Ellis Help me understand. The number I was kind of looking for was the number of deputy district attorneys who are handling basic criminal cases and the caseload that MCAD is handling on the defense side. The number I thought I heard from him came down to 22.5.

542 D. Cowan That is probably pretty close and probably not too far different from ours, which I think is 31 of our 56-member group. We have some breakdowns done about what 56 means. The day to day workers in the trenches of the criminal justice system, if you will, is essentially 31 attorneys. So it is near parity with the DA's Office in the numerical outlook, if you will.

560 Chair Ellis So why are the other 25 on the list?

560 D. Cowan Well, they are there for a number of reasons. Among those other members, five of them are PCR/habeas corpus exclusive. They do nothing for MCAD but PCR/HC. That is another one of those areas that we have talked about and, historically, would be an easy component to remove and in fact probably wouldn't create a great deal of disagreement with MCAD. I don't speak for the organization because they haven't voted on it recently, but I am tuned in to how the members feel and think, generally. That is something we could see boutiqued-out and not lose a moment's sleep. It is onerous work; it is very onerous work. We have had a number of times where we have had to draft people to get sufficient coverage. But five of those folks do only that. There are some other folks who also do PCR/HC. and that is eight who are on the long list, but don't necessarily appear on the day to day list.

593 S. Gorham Mr. Chair, if you will, the reason these extra people are on the list is to get some of the more experienced attorneys who don't want to do the everyday work, but are there to take the hard cases, if you will. So we have an aggravated murder and a murder list that has people who occasionally do those cases. So that is why we have these additional people on because, when we need them, they are there. That is the answer.

605 D. Cowan In terms of prepared remarks, I am done.

606 Chair Ellis I am just trying to get a sense of what the right size is. People that do murder cases and aggravated murder cases obviously are the counterparts of the significant part of the DA's office. So I don't think you can have it both ways and say, "The 31, that matches the DA and other -

616 S. Gorham If you want to design a system that has whatever number of people, I am sure there are a lot of people who could figure out what the correct number is. If you want our help in doing that, we are more than willing to help do that. But I don't think it is very productive to sit here and count numbers, which is what you seem to want to do.

622 Chair Ellis It was the impression I had last time and I will say I still have it, that the number of lawyers being involved is too many and the result is you dilute whatever CLE potential there is and you end up with a lot of attorneys on that list who are part-timers, and that is a problem.

640 S. Gorham We may have given you that impression, but I think it is an inaccurate impression. I don't think of the 31 who are doing the bulk of the work are part-timers. They are not doing 100 percent MCAD work necessarily, but they are doing 80 or 90 percent MCAD work. So they

may be getting a private case here or there, and primarily those cases are in the criminal area. So I would say that, of those 31, they are primarily criminal defense attorneys.

661 S. McCrea — Of the 31, are there any who only handle misdemeanors? Can you give us a breakdown of how many?

664 S. Gorham — I would rather do that at another time.

667 S. McCrea — What about new attorneys? Are some of them new attorneys?

669 S. Gorham — We have one new attorney.

[Tape 3; Side A]

003 Chair Ellis — Did you finish your remarks?

003 D. Cowan — I did.

003 Chair Ellis — Steve?

004 S. Gorham — I really just want to answer your questions, and then I have a couple of comments. I think it is clear now that we do have an EDP attorney of the day. That was one Mr. Geyer didn't mention when he was listing the attorneys of the day. I think our Board does believe that an outside board member should come on board, and we would welcome your help in deciding, if necessary, who that person is. Certainly, we are in Marion County, the seat of Government, and it might be important for the indigent defense system as a whole to have a qualified board member in Marion County who could help in statewide indigent issues, as well as in Marion County. We are more than open to any suggestions that you all may have or whomever to add to the Board in Marion County.

018 Chair Ellis — What is your observation on the subject that Judge Leggert and the DA's representative today talked about with regard to some of the MCAD attorneys – and I say some and it may be just one, but it sure sounded like a broader issue – who simply are unreachable. They don't have an office or voice mail or, if they have it, it is overloaded. So there is just no communication.

025 S. Gorham — My reaction is that it is a minor portion of the people that do indigent defense work. First of all, they all have offices. They may not have traditional offices where there is a secretary there all the time, but they all have offices. That is a requirement. You could physically go to everyone of their offices if that is what people wanted to do. But I admit there are some problems.

030 Chair Ellis — Do you think Judge Leggert was just wrong when she brought that up?

031 S. Gorham — No, and I don't think Courtland Geyer was wrong. I think that it is a problem for a minor portion of people out of 31. You may be talking about five. When that problem is addressed to me I always contact the individual and I think what you are going to see in the next month is that MCAD will require – and I think that Judge Leggert's suggestion was a good one – that there is some interactive system such as a voice mail system that everyday gets upgraded, so that if someone calls and you have a voice mail system you call it and say "Hi this is so and so I'm in trial, I will get back to you tomorrow." That is a system that a lot of people do use and I think MCAD is going to require some system. We may not require that each individual has to have the exact same system, but I think we are going to require people to have some system. I do agree with Mr. Geyer that missing a court appearance is a very serious matter. I want you to understand that some of these court appearances, most of the court appearances that he is talking about, are status conferences. They are as he described scheduling matters. So if it is missed it is important and it is serious, but the lawyer is informed that they missed it

and communicates with the court and tells them, "I'm sorry I missed it." Most of these are scheduling court appearances. Frankly, I am unaware that anybody has actually missed a court appearance where – well I am aware of occasionally somebody missing a court appearance because they had missed calendared. Who of us hasn't done that; put down the 12th instead of 11th.

058 Chair Ellis — It sounded a little bit more than just the occasionally inadvertent –

059 S. Gorham — Well, I disagree.

060 Chair Ellis — Other questions? Dick, about your own practice, you are Chair of the Board?

064 D. Cowan — I am. The only indigent work I presently do is on the Drug Court side. (inaudible)

071 Chair Ellis — You would count yourself as part of the 31 or the 25?

072 D. Cowan — I am not part of the 31.

073 Chair Ellis — One impression I got last meeting was that some of the best lawyers aren't taking cases anymore. Is that true?

077 D. Cowan — I think that is true. The reason is that, as a practical matter, they have 20 or 25 years of experience and they have developed a practice. They have lightened their load over time and redirected and refocused their interests. That is what happens to a lot of folks. But these folks that Judge Guimond mentioned want to keep their hand in because they care and do the responsive thing as the judge mentioned.

091 S. Gorham — I think what we are really talking about is what Commissioner Potter said, the graying of the defense bar and that is an issue that you all have to deal with no matter what structure. It is an issue when you talk about PD's and it is an issue when you talk about us.

102 Chair Ellis — Steve, you yourself do both the management of MCAD and take cases?

104 S. Gorham — Correct, certain cases.

105 Chair Ellis — Give me a sense of how your time is allocated?

107 S. Gorham — I am contracted to do 70 percent of my time to do MCAD. I probably average a typical day at least 10 hours a day almost everyday. So sometimes all of that day is spent on MCAD and sometimes it is not. I would say part of the day everyday is spent on MCAD work. I am down to one criminal case, one PCR murder case, and a few appeals. The rest of my time is spent on MCAD. Primarily, that is dependent on how much you all willing to contract through MCAD for my time.

122 Chair Ellis — I have had the impression that you function more as a coordinator than a manager, if I can use those terms. Do you feel that you have enough authority to be effective, or do you feel there should be a restructuring that would give you more authority?

128 S. Gorham — I guess I would say that I feel I have been both a coordinator and a manager. I think, as Dick said, it was a wake-up call for all of us to hear criticism of our management by Judge Leggert, in particular, at the last meeting. I think it doesn't need restructuring, but a different balance, if you will, in MCAD. So it is clear that I have the authority to do some of things that need to be done.

139 Chair Ellis — In the interim report at page 28, there are several topics that we try to get further information and clarification from you. Maybe we can just go through some of this. The first bullet asks

you to describe specifically the current allocation of management authority and responsibility among MCAD's Board of Directors, Executive Director and members, including decisions to (a) add and remove members, (b) establish and implement qualification standards and practice requirements for MCAD's members, and (c) sanction members for substandard performance or misconduct?

151 S. Gorham — What I would like to take is footnote 51. This document, the second draft, was just prepared two days ago, so what I would like to do is to take the opportunity – and I think it is 51, but maybe it is 52 – to give you these either in writing over next month or both in writing and testimony.

161 Chair Ellis — I certainly wouldn't preclude that. But is there anything you can share with us today while we are here and interacting.

164 S. Gorham — I would prefer not to. If you want to be specific, sure.

166 Chair Ellis — I just read it to you and that is as specific as I can get.

168 S. Gorham — I think what Dick said in regard to a wake-up call. At the time it was fortuitous maybe. We had a board meeting right after your meeting and the Board, with my help, decided that we were going survey the judges regarding our attorneys. I think what will come out of that is that some of our underperforming members, we will probably have a training program for them and some will no longer be members of MCAD. So I think we are listening to what you have to say. We are listening to the judiciary and are trying to respond to that.

181 Chair Ellis — Let me make a comment, but this is just me and I don't speak for the others here. But, in general, particularly with a large county like Marion County, I have a belief that any system where we are a 100 percent dependent on a single provider is not in PDSC's best interest. So assume for the moment that at least one member of the Commission feels that way and wants to see some diversity in providers. What suggestions would you have as to how we should proceed on that?

193 S. Gorham — Well, I think you have diversity in Marion County, if you are talking about Marion County, in particular. MCAD itself is diverse.

197 Chair Ellis — But our contract with you is 100 percent.

198 S. Gorham — I guess I would say that is not entirely accurate with regard to every criminal matter. But I think, frankly, the give and take with a central office has been important and it is important. When we don't have a member that is able to do a particular case, we call on the central office and get help from some member of the criminal defense bar elsewhere. We have a give and take system. I don't think that is a problem. But to answer your question directly, you have the juvenile contractor here, you have a civil commitment contractor here, you have us here. Again, as we have told you, if you wish to have a public defender or some other type of structure to do PCRs and those kinds of things, I don't think there would be many of us that would have a problem with that.

214 Chair Ellis — Why would you limit it to the PCRs?

215 S. Gorham — It is a very hard practice. I am not saying I would necessarily limit it to that. I guess maybe I would limit it to that because you are asking the head of an organization who thinks they do a pretty darn good job: so we don't see the need to have another contractor. I made one suggestion and I think in the next month we will have other suggestions as to how to improve MCAD.

226 J. Potter Maybe I can approach this in a little different way. One of the difficulties that people like you and me have is that we have been doing what we have been doing a long time. I have been doing what I have been doing for 26 years, and I work for a Board of Directors. I am constantly challenged and questioned about why we do what we do, and we have to make adjustments and adjust to the current climate. What I see happening here is the spotlight happens to be on Marion County – on a system that is doing what it has been doing for a long time. While defending the system is a laudable goal, and you have done a good job of defending the system, what would be helpful for me in order to do a sort of the devil's advocate kind of planning, in which we are saying, "Okay, this is our current system and we know that system. Based on what we have heard, this is how we would modify that system to make it better." Based further on what we have heard, including the Chair's comments saying that at least there is one Commission member who might be interested in a different system, not just a modified system, can you help us put together a scenario that takes us one step further than PCRs and says, "This is what it would look like if we did it differently. If you want a public defender system, this is what it would do." What that does then for you and your Board is that it helps focus this process. But it also helps us understand the local situation better. I would like to look at three or four models, without necessarily looking at you and saying, "You have to defend your system all the time." And it forces you out of the box of defending your system in order to come up with some other model.

253 S. Gorham I think what you are asking us to do here is not appropriate for us to do right here in this forum. I think it is appropriate in the other planning forums that Peter runs and we could talk about those variations there. I certainly hope it is clear that any of my members including myself are more than willing to be part of those forums to do that, and I think we have been. I personally try to go to all the meetings I can of the contractor group and all the groups that are open. So I think that is the best way to answer that particular question.

263 J. Potter At some point, Steve, doesn't it come back to this group? At some point, we are going to have a discussion in a forum similar to this, whether it is here or at planning retreat. At some point, it is going to come back to this Commission. I think that getting the contractors together and discussing this in a planning format would be a great way to bounce ideas off of, experienced contractors, but at some point it still comes back here. We have to have some dialogue at some point. Otherwise, this group of folks is going to say, "We have heard what we have heard and here it is what we are going to do."

272 S. Gorham I agree and I think I have tried to do that as specifically as I can at the last meeting. And I have tried to do it here. But I don't know how productive it is for me to agree with things that, quite frankly, I don't agree with. I have told you that MCAD provides an economical system of providing indigent defense in Marion County and, apparently, that is an issue that you all don't seem to want to discuss.

284 J. Potter I think it absolutely a valid point. If we have this discussion, at least in my mind, we will have a matrix of ideas or options, and economics is certainly going to be one of the considerations in evaluating the various options that are available to us. You don't have to agree with any of the options. When I present things to my board, I am often asked to present ideas that I don't personally agree with. But I have to think them out and come up with a list of the pros and cons and that would be helpful to me here to know that. The judges have a list of pros and cons, and we have heard judges today that we don't agree having a public defender. They have got their reasons for that and we like to know what their reasons are. They will all go in this matrix, and some of them we are going to be able to address and some of them we are not. But at some point we are going to make a decision.

296 S. Gorham Hopefully, cost will be one factor in those matrixes. I think if you want to talk about changing the MCAD system in regard to certain of the organizational things – changing the attorney of the day as Dick said, changing specialization, if you will – that is not necessarily a bad idea. We cannot do it alone. It is something that some judges think should be done. That

is something we are certainly open to doing. But you don't have to change MCAD to do that. We just have to restructure little things. (Inaudible). I am trying to answer your questions the best I can. I could sit here for days and talk about things, but you don't want that.

315 J. Potter — I think most of us in this room can do that, but having some plan or multiple plans is what I'm advocating for – saying, "Here is the current system and here are the pluses and minuses of it; here is a modified system and this is why we would modify it; here are the impediments to do so, but you would need the cooperation of the courts, you would need the cooperation of the DA, you would need better calendaring; here a system that extends it further and proposes a PD office in Marion County to just handle PCR and habeas cases and this is what it would look like in our view; and if you went further than that and made a trial court public defender system, this is how it would work with MCAD's role in conjunction with it." I am just suggesting to you that having some input by you and MCAD into this process helps us, and hopefully helps Marion County, and doesn't leave you feeling like something was jammed down your throat.

330 S. Gorham — I don't disagree. But, again, I don't think this is the correct forum to do that.

333 Chair Ellis — What forum do you suggest?

334 S. Gorham — Well, I think that the things that Peter is doing with the contractor group; I would hope that maybe a subcommittee would get together with us and do those kinds of things. When problems have occurred, say in Multnomah County with conflict issues, that is what happened. This is the kind of forum that I think would be helpful. Some form other than me sitting here and describing these things. Yes, I think you need our expertise, absolutely. But sitting here and telling you that it is going to cost X amount of dollars more, what does that solve? It doesn't get a plan done.

349 Chair Ellis — Other questions?

350 C. Lazenby — Just a comment, Steve. I just want to echo what John was saying. I think as MCAD goes through this process there needs to be a certain concession to deconstruction as you think through this process. That is it not about defending or preserving what exists. But in order to improve the system, you have to be open to the possibility of deconstructing all pieces of it to see what you can really salvage and what is valuable moving forward. I appreciate the pressure and focus of this process. I think John's point is that there is an opportunity here to move away from just defending MCAD in its current state and doing some real system improvement. But to do that, the approach really has to be open to deconstructing all pieces of the system. I think that is what John is trying say in order to get us all off of the focus on MCAD and on system improvement. But to do that effectively, I think you have to be willing to take the whole thing apart and look at the pieces.

367 S. Gorham — I certainly don't have a problem doing that. I just don't think this is the forum to do that.

370 C. Lazenby — It eventually will be though. I think whatever process gets us to the point where there are proposals for improvement of the system, it will come back to this forum. So, as we look at those pieces, all of us together, it is the approach John described that makes it productive in the end. So I agree with footnote 52. These pieces came out and you guys haven't had a chance to prepare written responses to all these things and there is more time. But eventually, this is the forum in which determinations of what the structure could or should look like, as a matter of a policy, are going to be discussed.

382 S. Gorham — I hope to be here to help you with that discussion. But, frankly, I think it is a little bit premature to do it today.

386 Chair Ellis — I do want to thank both of you and the input was constructive. Are there other witnesses on Marion County?

390 J. Brown — I was just going to add a gratuitous comment. Dick and Steve, I appreciate the openness and introspection and that this is not an easy task. I think you all have helped push the discussion along. I think it has been very useful and I have learned new things. I appreciated Judge Norblad's remarks, in particular, as well as Judge Guimond's. So I don't want to end this occasion without expressing appreciation for what I heard as new, genuine and useful introspection.

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[Tape 3; Side B]

280 Chair Ellis — Following up on John's comments to Steve, I would really like to see some outline of the proposed scenarios that we could look at because Steve has certainly made a valid point about cost as a factor that we have to consider. One scenario I would like to get a sense of is what we think the cost might be to establish a PD office in Marion County at, say, the six or seven lawyer level. We can discuss what segment of caseload would go to that office, but I want to get a handle on what our likely start up costs would be, and what our likely ongoing costs would be. Of course, you need to subtract out of that the portion that is now going now MCAD to get a sense of the economics of it.

297 P. Ozanne — Very much so, and that is the approach I favor too. If there were any changes, and I think even MCAD would welcome some changes, then you have to deconstruct the current system, perhaps including consideration of a relatively small start-up public defense office. I don't think we could manage or start-up overnight a 30-person public defender office.

303 Chair Ellis — I don't see us going in that direction, even if we could.

304 P. Ozanne — That option is certainly something worth talking about it, in my opinion.

310 K. Aylward — I did have someone in my office pull together some estimates. We started by at looking at an office that was comprised of six attorneys, two legal assistants, a full-time investigator and office essentials. So we were thinking of 10 people. You also need 10 desks, 10 computers, and we factored in the costs that you have to incur before you can actually start working, such as signing a lease with first and last months rent. For an office that size, we estimate between $70,000 and $100,000 for startup costs. As far as the ongoing costs, Mr. Gorham has testified that he figures $300,000 a year is how much cheaper MCAD is than other contractors. If those figures are correct – in the coming weeks he will be providing our office with more details on how MCAD arrived at those figures – but let's assume for now that his figures are correct; then the cost for that six attorney office would be about $67,000 a year more than we are paying now to have those cases handled by MCAD. That is a rough estimate, but I think you are talking $160,000 the first year. That is assuming expenses along the lines of the Lane County Public Defenders Office.

336 Chair Ellis — Any other research subjects?

337 J. Brown — Perhaps this has already been cranked in somewhere. I was hearing from Judge Norblad's comments and others about the role of additional funding in some manner for MCAD staffing. I am not sure what kind of position that would be or what kind of level of personnel expense would be involved, but I think this is an occasion to crank that information in as well.

348 P. Ozanne — Mr. Chair, Jim, yes, we are happy to collaborate with MCAD in the next month or so to come up with numbers. There has been discussion about MCAD wanting $300,000 more or $100,000. But in the context of adding a trainer, it does seem to me to be worth exploring

again in this preliminary way. In my view, I haven't heard enough to say it would be full-time trainer. I think we have to ask ourselves how much training do you want to put into a group of presumably experienced lawyers and what proportion will be used to train new people. Finding out how much FTE is currently being devoted to training by MCAD now and whether some of that current funding could be reallocated to a trainer, or whether this would take some new money, is important. I'm calling the position a trainer. It would certainly be someone who would mentor these lawyers and perhaps be the bad cop that takes action in cases of underperformance. Many DA's office have a second-in-command, who is never going to be elected district attorney, to fill this role – someone who goes around and says, "Mr. Brown, you really seem to be floundering here in the last year or so, what can I do to help you?" That would be something we might add to the existing structure at MCAD, which might involve some new money. But, first, we need an inventory by MCAD of what is going on now and how many FTE resources are currently devoted to training and supervision.

381 Chair Ellis — Steve, when do you think you can get us the written responses to footnote 52?

382 S. Gorham — I think it depends on the interaction between us all. I have time and would certainly want to do that. My hope is that Kathryn and I are going to be able to sit down and set parameters, so I would be able to answer a little bit more specifically. Certainly, by the Klamath Falls meeting in September, I will have that information for you.

396 Chair Ellis — Can we include in the Retreat some time to address Marion County?

398 P. Ozanne — Sure, as long as it is consistent with a Retreat and isn't formal decision making. I think there is time to do that. You can discuss the options, but not decide anything until a later meeting.

403 Chair Ellis — That is what I was thinking. I know, according to our plans, that we have two or three meetings to discuss this. Are there any other questions?

409 Chief Justice Carson — I have a point of clarification, Mr. Chair. Are we talking about PCRs, as Dick referred to it, in terms of trial or trial and appellate?

414 P. Ozanne — Right now, I am having trouble understanding why we can't talk about this, whether a new office would be a trial office, an appellate office for PCRs, or something else for the purposes of this planning process. I would certainly want input from Mr. Gorham and Mr. Cowan regarding appropriate areas of practice. I would think, whether there are six or seven lawyers, only time would tell whether that office is working well and whether we might want to expand its caseload. I understand that there might be some role for misdemeanors along with PCRs, which might be a way to recruit new lawyers with the expectation that most wouldn't stay for more than three to five years, and which might be a place to train new lawyers for entry into Marion County practice. At this point, I suggest that we need to discuss these issues further among Commission members.

437 Chief Justice Carson — On one hand, I know that MCAD provides quite a bit of resources at the appellate level, and I assume at the trial level, on habeas corpus and post-conviction cases. If you put them all together and I think you have a problem with conflicts.

[The meeting was adjourned at 1:10 p.m.]

Attachment 4

OPDS's Report to the Public Defense Services Commission on Service Delivery in Klamath County

(October 12, 2005)

Introduction

Since developing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense service and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 and the first half of 2005, the Commission completed evaluations of the local delivery systems in Benton, Lane, Lincoln, Linn, Multnomah and Marion Counties and developed Service Delivery Plans in those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report presents the results of OPDS's initial examination and preliminary investigation of conditions in Klamath County's public defense delivery system. It also represents the first step in PDSC's service delivery planning process.

PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they provide in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services.

Second, starting with preliminary investigations by OPDS and a report such as this, the Commission will review the condition and operation of local public defense delivery systems and services in each region by holding public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services.

In either event, the Commission's Service Delivery Plans will (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts.

Finally, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region. Any Service Delivery Plan that PDSC develops will not be the last word on the service delivery system in that region, or on the quality and cost-efficiency of the region's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region. PDSC's planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to address pressing problems in those regions.

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management, widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

A range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies PDSC has undertaken to promote quality and cost-efficiency in the delivery of public defense services. However, it is not the only one.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of experienced public defense contractors from across the state. That group advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review process and technical assistance projects for contractors and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the Quality Assurance Task Force is planning site visits of the largest contractors in counties across the state, including Columbia, Jackson, Klamath, Multnomah and Umatilla Counties.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers.

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the behavior and performance of public defense contractors and individual attorneys. The Commission is also concerned about the "graying" of the public defense bar in Oregon and a potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

<u>"Structure" versus "performance" in the delivery of public defense services</u>. Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission's service delivery planning process. That process is aimed primarily at reviewing and improving the "structure" for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into "best practices,"

recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.[1] A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

Most of PDSC's other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the "performance" of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time-to-time in the course of the Commission's service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractors Advisory Group and others, is usually in the best position to address performance issues.

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

Organizations currently operating within the structure of Oregon's public defense delivery systems. The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for "public" defenders and the advocates for "private" defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the state from among those types of organizations that have already been established and tested over decades in Oregon.

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state. The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions,

[1] Debates over the relative effectiveness of the structure of public defender offices versus the structure of private appointment processes have persisted in this country for decades. See, e.g., Spangenberg and Beeman, "Indigent Defense Systems in the United States," 58 Law and Contemporary Problems 31-49 (1995).

resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide services in each region of the state.

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of their relative advantages and disadvantages.
This discussion is by no means exhaustive. It is intended to highlight the kinds of considerations the Commission is likely to make in reviewing the structure of any local service delivery system.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

- Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.[2] Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

  While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

  Because of the professional management structure and staff in most public defender offices, PDSC looks to the administrators of these offices, in particular, to advise and assist the Commission and OPDS. Boards of directors of public defender offices, with management responsibilities and fiduciary duties required by Oregon law, also offer PDSC an effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through the expertise on the boards and (c) ensure the professional quality and cost-efficiency of the services provided by their offices.

  Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.[3] As a result, PDSC expects public defender offices to share their

[2] Spangenberg and Beeman, *supra* note 2, at 36.
[3] *Id.*

management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

- Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

  Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

  In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar's "firm unit" rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium's administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to

communicate with local communities and gain access to additional management expertise.

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium's administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law firm's portion of the consortium's workload among attorneys in a law firm may not be evident to the consortium's administrator and OPDS or within their ability to track and influence.

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receiving court appointments.

- Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

  The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

  Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

- Individual attorneys under contract. Individual attorneys provide a variety of public defense services under contract with PDSC, including in specialty areas of practice like the defense in aggravated murder cases and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

  This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Klamath County

The primary objectives of OPDS's investigations of local public defense delivery systems throughout the state are (1) to provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system's structure or operation and (2) to identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC's assessment of the strengths and weaknesses of a local public defense delivery system begins with its review of an OPDS report like this.

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has

discovered that "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, creates momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC's investigations of public defense delivery systems can correct some of these local misperceptions.

On September 14, 2005, PDSC held a public meeting in Klamath County to (a) consider the results of OPDS's investigation in the county as reported in a preliminary draft of this report, (b) receive testimony and comments from the Commission's local contractors, prosecutors, judges and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Klamath County.

The preliminary draft of this report was intended to provide a framework to guide the Commission's discussions about the condition of Klamath County's public defense system and services, and the range of policy options available to the Commission — from concluding that no changes are needed in the county to significantly restructuring the county's delivery system. The preliminary draft also offered guidance to PDSC's invited guests at its meeting in the county and the Commission's contractors, public officials, justice professionals and other citizens interested in Klamath County's criminal and juvenile justice systems about the kind of information and advice that would assist the Commission in improving the county's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Klamath County's justice system may be the single most important factor contributing to the quality of the final version of this report and the Commission's Service Delivery Plan for Klamath County. OPDS welcomes written comments from any interested public official or private citizen, which should be mailed no later than October 14, 2005, to:

Peter Ozanne
Executive Director
Public Defense Services Commission
1320 Capital Street N.E., Suite 200
Salem, Oregon 97303

or e-mailed no later than October 17, 2005, to:

Peter.A.Ozanne@opds.state.or.us

A Demographic Snapshot of Klamath County [4]

Klamath County is located in south-central Oregon's high desert country east of the Cascades mountain range. The county is bounded on the south by California, on the east by Lake County, on the north by Deschutes County, and on the west by Jackson and Douglas Counties. Home of Crater Lake National Park, with a population of 70,000, Klamath County's land mass of 6,135 square miles makes it Oregon's fourth largest county. Klamath Falls is the county seat, with a population of 21,000 and a greater metropolitan area of 40,000 residents.

Created in1882 from the western part of Lake County, Klamath County was named after the "Clammit" tribe of Indians. At the time, the Oregon Legislature designated Linkville as the county seat, which was renamed Klamath Falls in 1893.

Since the arrival of the railroad in the early 1900s and the start of the "Klamath Project," a federal reclamation project that drained the 128 square mile Lower Klamath Lake to provide 188,000 acres of irrigable land, Klamath County's economy was largely based on agriculture. Until recently, farming was a thriving industry in the county, in spite of the altitude, short growing season, low rainfall, and cold winters. Timber has also played a major role in the county's economy. Three-fourths of the county is forested and over half of it is publicly owned. Recognized for its diverse landscape, outdoor recreation and abundant wildlife, the county has geothermal wells that heat homes, businesses and the campus of Oregon Institute of Technology. As the county's agriculture and timber industries have declined, recreation has become the county's main attraction, holding the promise for the county's future prosperity.

The Klamath Indian Tribe and Reservation have also played major roles in the county's history. The Klamath Reservation was established in 1864 by treaty, covering fifty square miles east of Klamath Falls. A federal policy of termination and assimilation resulted in the tribe's demise in 1961. In 1975, a fully functioning tribal government was reestablished, and the Klamath Tribe was recognized by the federal government in 1986. The 1990 census reported a tribe consisting of 2,370 members.

In 2002, the per capita personal income in Klamath County was $23,002, which represented an increase of 18.5 percent from 1997. This 2002 figure was 74 percent of the national per capita income of $30,906.

Although Klamath County is the home of the Oregon Institute of Technology and Klamath Community College, the education level of its residents is relatively low,

[4] The following information was taken from Klamath County's official website and from data compiled by Southern Oregon University's Southern Oregon Regional Services Institute, which is contained in the Institute's Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

with only 10.6 percent of its adult population holding a Bachelor's Degree and 5.4 percent with a post-graduate degree (compared to respective statewide averages of 16.4 percent and 8.7 percent). The county also has a relatively small proportion of professionals, scientists and managers in its workforce (4.5 percent in 2000, compared to a state average of 8.9 percent). Seventy-five percent of the county's population of adults (25 years old or older) completed high school or received a GED, however, compared to 78.6 percent of all Oregonians.

In 2000, Klamath County had an unemployment rate of 8.1 percent compared to the statewide rate of 4.9 percent and ranked 27th in per capita income among Oregon's 36 counties. The percentage of Klamath County's residents living in poverty is the second highest in the state at 16.8, compared to 11.6 percent in Oregon and 12.4 percent in the United States. Klamath County has a teen pregnancy rate of 18.7 percent, compared to a statewide average of 16.7 percent.

The diversity of Klamath County's population is about average. Its non-white and Hispanic residents make up 15.9 percent of the county's population, compared to 16.5 percent for Oregon as a whole. With juveniles (18 years old or younger) making up 25.8 percent of its total population, the county's "at risk" population (which tends to commit more criminal and juvenile offenses) is only slightly larger than the entire state's at-risk population of 24.7 percent.

Despite some socio-economic factors that might suggest crime problems, Klamath County has relatively low crime rates. Its rate for serious crime is 31.7 "index crimes" per 1,000 residents, compared to a statewide index crime rate of 49.2.[5] The public defense caseload in Klamath County is approximately four percent of Oregon's total caseload.

OPDS's Initial Findings in Klamath County

Public defense services, including defense services in criminal, juvenile and civil commitment cases are provided by one consortium of attorneys in Klamath County.[6] Klamath Defender Services (KDS) is a consortium of 12 attorneys first established in 1984.[7] Four of its founding members serve on KDS's Board of

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[5] "Index crimes" are those crimes reported by the Oregon State Police in the Oregon Uniform Crime Reports, including murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft and arson. Oregon: A Statistical Overview at p. 122.

Crime rates in Klamath County have been dropping faster than the state as a whole. For example, from 1990 to 2000 the index crime rate in Klamath County dropped by 34 percent, while dropping just 14 percent across the state. Over the same time period, the county's crime rate for offenses against persons decreased by 31 percent, compared to a statewide decrease of 24.5 percent.

[6] The same consortium provides those public defense services in Lake County.

[7] For more detailed information about the consortium, see KDS's response to OPDS's Questionnaire for Consortium Administrators and Boards, which was developed by OPDS's Quality Assurance Task Force for use in its contractor site visit process, attached as Appendix A.

Directors. Richard Garbutt, who is one of KDS's founding members, serves as the consortium's "authorized representative" for the purposes of fielding complaints and representing KDS in the legal community. Dee Edson, who is not a lawyer, has served as KDS's Executive Director since its founding. She is responsible for the administrative and business operations of KDS, as well as functions frequently assigned to lawyer administrators in other consortia, such as overseeing the assignment of most cases to KDS's attorneys, the coordination of those attorneys' case assignments, and the consortium's administrative dealings with the Circuit Court, the District Attorneys Office and other justice agencies in the county.[8] KDS also employs Adrienne Sheridan as its case coordinator and Kathy Eck as its receptionist and data entry clerk.

John Potter, a member of PDSC and Executive Director of the Oregon Criminal Defense Lawyers Association (OCDLA), and Peter Ozanne, Executive Director of OPDS, visited Klamath Falls on August 17, 18 and 19, 2005. They met with the management and members of KDS and numerous justice officials, including all of the judges of the Circuit Court, the District Attorney, Community Corrections managers and the staff and members of the local Citizens Review Boards (CRBs).[9] They also attended two court proceedings in criminal and juvenile court.

Based upon this visit and consultations with OPDS's staff in its Contract and Business Services Division (CBS), OPDS in its Preliminary Draft of this report concluded, in general, that (a) Klamath County's service delivery system is operating effectively and cost-efficiently, (b) virtually all of the key justice officials and most stakeholders in the county are very satisfied with the services it delivers, (c) KDS is a generally well-managed group of experienced attorneys who are dedicated to the delivery of quality, cost-efficient services and who appear willing to consider changes and innovations that will continue to improve those services and (d) due in large part to the contributions and attitudes of KDS's lawyers, as well as the county's key justice officials, Klamath County enjoys unusually cooperative and functional relationships among its justice agencies and professionals.

The following reported perspectives on public defense service delivery in Klamath County and on the services provided by KDS are, except where

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[8] Several of KDS's lawyers commented to OPDS that "Dee really runs the place." They attribute much of consortium's success and effective administrative operations to Ms. Edson's skills and commitment. OPDS is also pleased with the quality of KDS's administrative services relating to its contract with PDSC. OPDS recommends that other consortia consider such an assignment of administrative and management responsibilities to a skilled, non-lawyer executive director, just as an increasing number of law firms are assigning such duties to professional, non-lawyer "firm administrators" or "administrative partners."

[9] Because of other commitments, Mr. Potter was unable to join OPDS for its last meeting with KDS's management and some of its members on August 19. Peter Ozanne also spoke at length over the telephone in August with the head of the local office of the state Department of Human Services regarding KDS's services in juvenile dependency cases.

otherwise noted, based on OPDS's visit to Klamath Falls on August 16, 17 and 18. The full transcript of the public comments and discussions of the same subjects at PDSC's September 14 meeting in Klamath Falls is attached as Appendix B.

The Judicial Perspective. OPDS met with four of Klamath County's five Circuit Court Judges on August 16, and met with the fifth judge on August 18. All of the county's judges were very complimentary of KDS and its lawyers for their skill and experience and their willingness to cooperate with the Court and all other justice agencies in the county.

The county's judges expressed the belief that the unusually cooperative relationship between KDS and the District Attorney's Office, along with jail population pressures, has led to reasonable and timely dispositions in most cases and innovative approaches to the administration of justice like Drug Court. They singled out for particular praise the KDS's lawyers who handle Drug Court, as well as those attorneys in the consortium who regularly perform additional, uncompensated *pro bono* work for their clients and other individuals caught up in the justice system. The judges also seemed pleased with KDS's system of assigning specific attorneys to particular courtrooms, as well as the consortium's case assignment system at criminal arraignments and juvenile hearings that is administered by Dee Edson and Adrienne Sheridan.

Several judges expressed concern over the next generation of criminal defense lawyers and the likelihood that they will lack the necessary trial skills to litigate serious cases. From their perspective, Ballot Measure 11's threats of draconian sentences together with the county's efficient plea bargaining system have led to very few court or jury trials in Klamath County. They clearly felt that PDSC and OCDLA would be called upon to provide more "basic training" for new lawyers over the coming years.

All of the judges agreed that Klamath County's caseload includes an unusually high percentage of Failure to Appear cases, which could be due to the District Attorney's charging policies, the high number of hearings set by the Circuit Court, or a combination of these two factors. One judge estimated that Failure to Appear cases made up as much as 20 percent of the county's caseload.[10] None of the judges could identify a cause or circumstance outside the justice system in Klamath County, such as culture or language barriers, that might explain this phenomenon.

The judges handling juvenile cases in the county noted that their process is much less adversarial than the processes in many other counties of the state. They complimented KDS's juvenile attorneys on their cooperation and reasonableness

[10] Since OPDS interviewed the county's Circuit Court judges on August 18, KDS analyzed its public defense caseload over the preceding three months and found that Failure to Appear cases made up 15 percent of its caseload during that time.

and, in particular, on their ability to help parents see the "big picture," thereby producing actions and changes that serve their children's interests as well as their own. These juvenile judges recognized that their calendaring systems and the unusual high number of review hearings they set cause problems for KDS's lawyers, particularly with regard to attending CRB hearings. They emphasized, however, that they take the CRB reviews very seriously and are willing to cooperate in any practical way to facilitate attorneys' attendance at CRB hearings.[11] One judge requested OPDS to provide the Court with feedback about the impact on PDSC's budget of the Court's relatively high rate of juvenile review hearings. The judges handling juvenile matters also wondered whether KDS could assign the same attorney to clients who have pending juvenile and criminal cases.[12]

The District Attorney's Perspective. In his August 17 meeting with OPDS, District Attorney Ed Caleb was equally complimentary of KDS and its attorneys in terms of their overall skill, experience, dedication to their clients' interests and cooperation with his office. Mr. Caleb was particularly proud of the plea bargaining process that he developed in cooperation with KDS. He expressed the view that, in most cases, a just and appropriate result was more likely through this negotiation and settlement process than through the formal adversarial process in the courtroom. He also indicated that he makes himself available to any defense attorney who questions an initial plea offer by his office, sitting down with the attorney and his deputy assigned to the case to explore feasible options.

Acknowledging that anything he reports to OPDS or KDS should be weighed in light of his perspective as KDS's courtroom adversary, he expressed concern about one KDS attorney's approach to representing the consortium's clients. From his perspective, this attorney's approach sometimes prejudices the interests of the consortium's clients. Although he has reported this concern to KDS's management on a number of occasions, Mr. Caleb believes that KDS is unwilling or unable to initiate any remedial action against a colleague in the consortium.

Mr. Caleb indicated that he understands why individual judges, as a personal matter, prefer the kind of separate docketing and calendaring systems that prevail in Klamath County. Nevertheless, he believes that some kind of centralized docketing system would increase the efficiency of the county's criminal and juvenile justice systems and reduce public defense costs, especially in light of the large number of court hearings that judges set in Klamath County.

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[11] Because a CRB's findings at its hearings are apparently binding on the juvenile court as a matter of statute, one judge wondered whether the failure of KDS's attorneys to attend CRB hearings and object to findings adverse to their clients prejudiced those clients' interests.
[12] KDS reports that it has tried this approach in the past and found it infeasible.

A Citizens' Perspective. OPDS also met with the staff and three members of Klamath County's CRBs on August 17. Two of those CRB members were adamant that KSD's juvenile attorneys were not earning the money they receive from the State of Oregon due to their failure to attend almost all of the CRB hearings in the county. They questioned OPDS about how these lawyers are paid and what systems are in place to hold them accountable for the work they do and for their failure to serve their clients.

All three CRB members and the staff person at the meeting emphasized how helpful it is to the CRBs when KSD's attorneys do attend CRB hearings. Those attorneys effectively challenge the positions taken by the Department of Human Services (DHS) and the testimony of witnesses at the hearings, explain the circumstances and positions of their clients to Board members, and thereby help the CRBs make accurate findings and useful recommendations in the cases before them.

One of the CRB members present at the meeting with OPDS, who had met with representatives of the Circuit Court and KDS on this subject, was more understanding about the time pressures and scheduling conflicts that prevent the consortium's juvenile lawyers from attending CRB hearings.[13] However, he and the other two CRB members are convinced that KDS's attorneys frequently do not contact or communicate with their clients before CRB hearings or juvenile court proceedings. While they recognized that the statements of unrepresented clients who appear before the CRB cannot always be trusted, these CRB members have seen enough instances where credible clients report that they have never seen their attorneys to believe there is a serious problem. On the other hand, they did compliment KDS on its recent efforts to assign a paralegal to contact juvenile dependency clients and attend CRB hearings, even though it is a less desirable alternative to the presence of prepared and engaged attorneys.

Community Corrections' Perspective. On August 18, OPDS met with two experienced managers in Klamath County's Community Corrections Department. They indicated that they had surveyed the Department's parole and probation officers and other line staff regarding the county's public defense system and services in preparation for this meeting.

These county corrections managers and staff echoed the comments of the other justice officials in Klamath County. They reported that KDS's attorneys are skilled, experienced and cooperative and have developed effective working relationships with the county's Community Corrections staff, even though defense attorneys and parole and probation officers frequently take adverse positions in individual cases. Although the level of knowledge and commitment regarding sentencing and corrections issues varies among the consortium's

[13] This CRB member expressed his opinion that, given the time pressures and workload of KDS's juvenile attorneys, the requirement in PDSC's contracts to contact clients within 72 hours may not be realistic, and that PDSC should consider changing it.

individual attorneys, all of KDS's attorneys appear willing to inform themselves of "evidenced-based" best practices in sentencing, corrections and treatment, and to work with the Community Corrections Department to further the interests of the vast majority of clients who face sentencing after conviction. Because Klamath County has very effective drug and alcohol and sex offender treatment programs, in particular, KDS's clients benefit from such knowledgeable legal representation during the sentencing phase of their cases.

Despite this generally positive assessment of KDS's attorneys, the Community Corrections Department's managers and staff also reported that the hostile approach of one of KDS's attorneys makes it difficult, if not impossible, to work with him in the course of trying to develop and negotiate dispositional alternatives. Such alternatives are often more likely to produce advantageous results for a defense attorney's clients than contested probation violation or sentencing hearings. The approach of this KDS attorney to the investigation, negotiation and litigation of cases is apparently so personal and antagonistic that Community Corrections Department's staff have restricted or terminated their communications with him. The Department apparently feels so strongly about the matter that its Director intends to file a formal complaint with the Oregon State Bar when the next hostile encounter occurs between this attorney and a member of his staff. According to the Director, his complaints to KDS regarding the matter have had no effect.

KDS's Perspective. OPDS met with KDS's management on one occasion and with four of KDS's members and Executive Director on another. During both meetings, KDS's representatives expressed pride in (a) the quality of their legal services, (b) the skill, experience, long-term commitment and collegiality of its members (c) the methods the consortium has developed over the years to operate its business, assign cases to its members, coordinate its members schedules and workloads and work with the Circuit Court and the District Attorney's Office to resolve cases fairly and expeditiously,[14] and (d) the assignment of responsibility for managing most of its business and administrative operations to a full-time Executive Director with management skills and experience rather than a law degree. After being informed of the organization and methods KDS employs to manage conflicts of interest, assign cases and courtrooms to its attorneys and otherwise manage its caseload,[15] OPDS concluded that other consortia in the state should consider adopting these or similar organizational structures and methods, recognizing that local conditions and circumstances will require adjustments and modifications.

In response to OPDS's contractor site visit questionnaire, KDS indicated that it does not have a formal evaluation system in place for its attorneys and relies upon the courts and other criminal justice agencies to comment on the quality of

[14] See Appendix A, response to Question 29.
[15] Id. at Questions 13-16, 20

the consortium's services and its problem-solving techniques.[16] The consortium's Board of Directors addresses complaints and any problems with the performance or conduct of its attorneys at weekly board meetings.[17] KDS does not have a formal mentoring system because the consortium "is small enough that if any newer attorney has a question, several attorneys are available [to] answer questions and give advice."[18] It has a mix of highly experienced and relatively inexperienced attorneys, and prefers "FTE attorneys."[19]

During its meetings with OPDS as well as on other occasions, KDS indicated to OPDS that it has pursued a business strategy of striving to be one of the lowest cost public defense service providers in Oregon. The staff at CBS who have worked with KDS over the years are generally pleased with the quality of their business and administrative dealings with the consortium. They have not, however, detected such a strategy in the course of their contract negotiations with KDS or during the administration of the consortium's contracts. In any event, as OPDS observes below, KDS's operations and workload and the court practices, prosecutorial charging policies and juvenile and criminal caseloads in Klamath County may call for the Commission's review of KDS's rate structure and caseloads as part of its Service Delivery Plan for Klamath County.

KDS's representatives noted that four of the five members on its Board of Director are founding members of the consortium, and that the other Board member is also a consortium attorney. KDS initially had reservations about the appointment of an independent member to its Board on the grounds that no one in the outside community possesses the requisite skill and experience to help manage the consortium or the knowledge and interest to engage in the oversight of a legal service provider like KDS. Since OPDS's August visit to Klamath County, however, the consortium has taken steps to add an outside member to its Board who appears to possess this requisite skill, experience and interest.[20]

The representatives of KDS appear to be committed to hiring new attorneys when the consortium's workload requires it and to developing a "succession plan" for the management and operation of the consortium. One of KDS's members, with support from the consortium, is currently recruiting an associate. He reported that he has identified six possible candidates for that position. Thus, it appears that current conditions in Klamath County do not call for the use of the strategies that PDSC has developed to attract new attorneys to "underserved" areas of the state.

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[16] Id. at Question 3.
[17] Id. at Questions 22, 25.
[18] Id. at Question 12; see also Question 21.
[19] Id. at Question 6.
[20] Id. at Question 2.

KDS also appears committed to maintaining reliable methods of communicating with the Circuit Court, other justice agencies and its members and clients. The consortium employs a receptionist who answers all calls to its management and keeps a record of all calls, as well as the nature of important inquiries and complaints. KDS opposes the idea of replacing a live receptionist with an answering machine.

The members of KDS with whom OPDS spoke did not appear surprised over complaints about the approach to legal representation of one of its members. Apparently, because they regarded him as a skilled and experienced trial lawyer, they did not think that his attitude or conduct affected the interests of the consortium's clients. They also noted the difficulty of managing or sanctioning the conduct of a professional colleague and peer, as well as the apparent limitation of such actions in KDS's bylaws to instances when an attorney's professional conduct or personal behavior brings "disrepute" to the consortium and its members.

A Proposed Service Delivery Plan for Klamath County

Based upon the foregoing reports of perspectives on the delivery of public defense services in Klamath County and the performance of KDS, OPDS initially concluded in a preliminary draft of this report that, in general, Klamath County's public defense delivery system is operating effectively and that KDS is providing quality, cost-efficient legal services. As a result, OPDS initially recommended just four possible changes for consideration by the Commission.

In light of the comments and discussions at PDSC's September 14 meeting in Klamath Falls,[21] which largely confirmed the OPDS's reports on its August visit to Klamath County, OPDS's overall conclusion and specific recommendations remain essentially the same, with one exception. Based upon the comments of two Circuit Court judges and directions from the Commission at PDSC's September 14 meeting, OPDS has amended this report to delete details of reports concerning the alleged conduct of one of KDS's attorneys. This change serves to emphasize the fact that OPDS and the Commission are not in a position to evaluate or address the specific conduct or performance of individual attorneys. Instead, PDSC and OPDS are concerned with the existence of policies, procedures and practices that enable a contractor to evaluate and address the conduct and performance of its individual attorneys and, as a result, ensure the quality and cost-efficiency of its legal services.

Accordingly, OPDS recommends that PDSC adopt the following four components of a Service Delivery Plan for Klamath County:

[21] See Appendix B.

1. KDS has for some time apparently made it the consortium's goal to be one of lowest cost public defense service providers in Oregon. CBS and its predecessor agency, the Indigent Defense Services Division, in contrast, have not perceived that to be a goal of KDS as a result of their contract negotiations with the consortium over the years. In any event, such a goal may lead to excessive caseloads for too few attorneys in their attempt to maintain a "living wage" with a high volume law practice. That goal may also increase incentives already inherent in PDSC's contract rate structure and prevalent in many county justice systems, including Klamath County's, to plea bargain cases and thereby increase the risk that some cases will not be fully litigated when they should be.

On the other hand, there appear to be other circumstances in Klamath County that tend to produce excessive caseloads for KDS's attorneys. For example, as reported above, the Circuit Court perceives that charges for Failure to Appear may constitute as much as 20 percent of Klamath County's, which may be due to the District Attorney's policy to file such charges whenever possible, a higher incidence of judicial hearings in the county, or both. Furthermore, the Court recognizes that its higher incidence of hearings in both criminal and juvenile cases increases public defense caseloads and costs.

In light of these circumstances, CBS has undertaken to evaluate KDS's contract rate structure and caseloads with the following three factors in mind: (a) how KDS's contract rates compare with other, similarly situated contractors, (b) whether KDS's rates tend to produce imbalances between the size of the consortium's caseload and the number of attorneys willing and able to handle it and (c) whether local court practices and charging decisions have generated inflated caseloads that may be contributing to larger public defense caseloads and costs in Klamath County. In its Service Delivery Plan for Klamath County, the Commission should simply affirm these administrative strategies as consistent with its general directions to CBS to establish rational and fair contract rates across the state and with its support for manageable public defense caseloads that ensure quality, cost-efficient legal services.

2. As KDS's members acknowledged in their conversations with OPDS during its visit to Klamath County in August, perceptions of public defense services in less populous areas of the state like Klamath County can have a significant and sometimes disproportionate impact on the state's public defense system for at least two reasons: (a) problems and the perception of problems in the delivery of public defense services tend to be more apparent to outside observers in these areas of the state and (b) those outside observers may include local legislators and other public officials who tend to have a significant influence over the state budget and policies that directly affect Oregon's public defense system. Therefore, OPDS submits that all of PDSC's contractors, and particularly contractors in less populous areas of the state like KDS, can assist the Commission in accomplishing its mission, as well as furthering their own interests, by addressing both realities and local perceptions regarding the quality

of their public defense operations and services. In the case of the Service Delivery Plan for Klamath County, OPDS proposes two potential strategies for the Commission's consideration and recommendation:

(A) that KDS add an outside member to its Board of Directors who has the skill, experience and personal contacts to explain KDS's mission, operations and services and advance the consortium's interests within the local community;[22] and

(B) that KDS increase its efforts to communicate regularly with justice constituencies like the CRB, policy-making groups like the Local Public Safety Coordinating Council and citizens organizations like private service clubs and business groups about its roles and operations.

3. There appears to be a misperception on the part of the members and staff of Klamath County's CRBs that KDS's juvenile lawyers frequently do not contact or communicate with their clients before juvenile court proceedings or CRB hearings. Such perceptions are not unique to Klamath County. In part, they arise from the large caseloads and scheduling and workload pressures frequently associated with juvenile law practice across the state. Nevertheless, these perceptions, whether accurate or not, raise serious ethical issues and negative impressions about the quality of public defense services provided by the Commission,[23] both of which should be addressed by PDSC's contractors in the

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[22] But see text accompanying note 20, above.

[23] After noting these same perceptions in another county, one of OPDS site visit teams outlined the ethical issues, in relevant part, as follows:

> Visitation with child clients is essential to proper representation. Whether a child is verbal or not an attorney should be familiar with the child's physical condition, living situation, and general circumstances. For young children it is important for the attorney to work closely with the foster parents and the CASA to advocate for each child's special needs and for an outcome that meets those needs. For older children, the attorney has the obligation to carefully determine for each important decision in the case, the extent to which the client is capable of considered judgment. Such a determination cannot be made without a well-established attorney-client relationship. State Bar Performance Standards require that attorneys in dependency cases conduct an initial "interview" of the client within 72 hours of appointment and maintain regular contact with the client throughout the case (Standard 3.5). There is no exception for child clients. The PDSC contract requires that the contractor contact out-of-custody clients within 72 hours of appointment. [continued]
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> Parent clients also need to be seen promptly. They need to be seen [as soon as possible] in order that issues that were not raised at the initial shelter hearing relating to probable cause, removal and placement can be addressed immediately; in order that conflicts can be identified as soon as possible and new counsel appointed; and in order for the attorney to be prepared to advise the client as to how to proceed . . . . PDSC contracts require contact within 72 hours of appointment. The new Oregon Rules of Professional Conduct require that lawyers keep clients reasonably informed about the status of cases and that they explain matters to the extent necessary to permit the client to make informed decisions. . . .

first instance. In KDS's case, the consortium is currently attempting to address these issues by assigning a paralegal to contact its juvenile law clients on behalf of the consortium's attorneys and report to the CRBs at their hearings in an attorney's absence. OPDS proposes that the Commission direct KDS to report to OPDS no later than June 1, 2006 on its progress in implementing this strategy and the extent to which the strategy satisfies applicable state law and rules of professional responsibility.

4. OPDS proposes that the Commission direct KDS to establish more formal and systematic procedures and practices to evaluate the performance of its attorneys on a regular basis and to address alleged or apparent problems with their performance or conduct. In response to reports to OPDS regarding the conduct of one of KDS's members, the consortium's managers and members expressed the view that they were constrained from taking remedial action against any member by a limitation in KDS's bylaws, which apparently permits such action only in instances that bring "disrepute" to KDS. OPDS believes that such a vague and elastic standard is an insufficient basis for the kinds of systematic procedures and practices necessary to ensure the continuing quality and cost-efficiency of KDS's legal services. Therefore, OPDS recommends that the Commission also direct KDS to develop new policies or bylaws governing the conduct and performance of its attorneys, in conjunction with its development of more formal and systematic quality assurance procedures and practices, and to report back to PDSC on its progress in implementing its new quality assurance policies, procedures and practices no later than June 1, 2006.

The Oregon Rules of Professional Conduct are also clearer on this issue than the former rules of professional responsibility. The old rules merely inferred a duty to communicate. The new rule (1.4) provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Both of these rules obviously apply to representation of adults and children.

Finally, during PDSC's development of a statewide service delivery plan in 2006, the Commission should consider adopting as a "best practice" the attendance of public defense attorneys at shelter hearings in dependency cases. Attorneys' presence at these hearings solves a number of problems. Attorneys will meet with their parent clients at the earliest opportunity. Although children are rarely present for shelter hearings, attorneys for children nevertheless will be appointed at the earliest opportunity, have information on the case even before formal discovery is received, meet with the caseworker and obtain contact information about their clients. Beyond those advantages, however, is the more important benefit of having parties represented at this critically important hearing.

APPENDIX A

QUESTIONNAIRE FOR CONSORTIA ADMINISTRATORS AND BOARDS

1. Does your consortium have formal by-laws and a set of written operating policies and procedures? If so, please provide.

Yes, KDS has formal by-laws. We have an independent Attorney Agreement with each attorney and that redacted contract is enclosed.

2. Does the consortium have a board of directors? If so describe the role that your board plays. Who are the members? How often does it meet? What kinds of issues are directed to the board? Are there limits on how long a board member can serve or how long one member can chair the board? Are there seats designated for "lay" or "community" board members?

Yes, KDS has a board of directors made up of four of the contracting attorneys. These attorneys are Phil Studenberg (President), Thomas F. Della-Rose (Sec-Treasurer), Richard L. Garbutt (Authorized Representative), and Myron Gitnes. The board meets every Tuesday unless more than one member is not able to attend. All issues concerning KDS including service delivery, complaints, financial information, etc. is discussed by the board. There is no limit as to how long a board member will serve on the board. KDS currently does not have a "lay" person on the board, however, in the last two weeks we have recruited such a member. This member is Jeff Ball, retired city attorney for Klamath Falls , and current city manager.

3. How is the administrator of your consortium selected? Compensated? Evaluated? Are there formal qualifications to be the administrator? Does the consortium or its board of directors have a "plan for succession" to insure an orderly transition from one administrator to the next?

The KDS Administrator was selected as a non-attorney administrator because KDS believed that attorneys would better utilize their time in court representing clients. Dee Edson was selected because she was familiar with the legal system as she had worked as the administrative secretary in the District Attorney's Office, and had worked as a legal assistant for a private attorney for many years. Dee is an employee of KDS, as is our receptionist/data entry clerk, Kathy Eck, and our case coordinator, Adrienne Sheridan. KDS does not have a formal evaluation system in place and relies upon the courts and other criminal justice agencies to comment on our service delivery and problem solving techniques. Mrs. Edson will be employed as the administrator for at least another ten years. The board has discussed a transition period and the qualifications necessary and we would anticipate that a new administrator would preferably be trained as part of our organization for quite some time before stepping into the administrator position. We would require a new administrator to have accounting and business education and would also have experience working with the criminal justice system.

4. What percentage of the administrator's overall workload is related to consortium matters? Is there a formal limit to the percentage?

The administrator is an employee of KDS and therefore 100% of the work day is dedicated to KDS business. This includes administrative duties, such as financial planning and administration, case counting and reporting, HR issues, public relations with other criminal justice agencies, etc. Other duties include assignment of attorneys and coordinating dependency and delinquency juvenile cases, and attending court proceedings for those matters.

5. How are administrative problems and demands met when the administrator is in trial or otherwise unavailable? Is there a formal or informal back-up administrator?

This does not apply to KDS as Mrs. Edson is not an attorney.

6. What are the requirements for membership in the consortium?

Contract attorneys with KDS are expected (as set forth in the enclosed contract) to put forth their best efforts with regard to defense of their clients. We prefer FTE attorneys.

7. What is the process for membership in the consortium?

KDS has recruited newer attorneys as our budget allows. One of our contract attorneys is in the process of recruiting a new bar admittee to become an associate of his and participate as a contract attorney with KDS as well. KDS does not have a waiting list.

8. How long has each of the attorneys been a part of the consortium?

Phil Studenberg	**21 years**
Thomas F. Della-Rose	**21 years**
Richard L. Garbutt	**21 years**
Myron Gitnes	**20 years**
Robert Foltyn	**17 years**
Robert F. Nichols, Jr.	**15 years**
Peter J. Richard	**13 years**
EveLyn Merritt	**7 years**
Scott D. MacArthur	**7 years**
Ronald D. Howen	**1 year**
Stephen Hedlund	**1 year**
Bonnie Lam	**1 year**

9. To what extent do consortium attorneys specialize in criminal and juvenile defense? In public defense? Is there a limit on the percentage of an attorney's practice that can be consortium related?

Richard Garbutt, Myron Gitnes, Robert Foltyn and Bonnie Lam specialize in juvenile defense. All other contract attorneys specialize in criminal defense.

10. How do you insure that new attorneys can become part of the consortium?

A s our budget allows, we always encourage new attorneys to apply with the consortium. In the past, we have posted openings with the Oregon law schools.

11. What materials and orientation are provided to new consortium members?

KDS attempts to provide any new contract attorney with current publications, such as "A Practical Guide to Oregon Criminal Procedure & Practice" by Paul J. DeMuniz, and current criminal and vehicles codes. KDS has a central library where criminal law forms, jury instructions, ethical opinions, etc. may be found. We strongly encourage all new attorneys to attend OCDLA seminars and CLEs. Also, mentoring by more experienced attorneys is very important.

12. Is there a procedure for insuring that less experienced attorneys have access to more experienced attorneys when they need advice? Do you have a formal mentoring system? Please describe your system.

KDS does not have a formal mentoring system. However, our group of attorneys is small enough that if any newer attorney has a question, several attorneys are available for answer questions and give advice. Every one of our attorneys is accessible by e-mail as is the administrator if questions need to be dealt with quickly. See # 13 below, also.

13. How are cases distributed among attorneys? Do you have a process for assigning cases based on the seriousness and complexity of the case? If so, how do attorneys progress from handling less serious and complex cases to handling more serious and complex cases?

Attorneys handling criminal cases are assigned to certain courts. The KDS case coordinator assigns cases at the initial arraignment based upon a random list of the assigned attorneys in each court. The assigned court is announced at arraignment and an attorney is assigned. The more complex Measure 11 cases are kept on a separate assignment list. Again, we attempt to assign an attorney in the court they normally would be assigned to. However, that is not always possible. Each attorney who is Measure 11 qualified is assigned an equal number of cases per month. Newer attorneys are assigned as co-counsel in two separate cases with two separate board members as mentors. The new attorney will follow the case through trial, or negotiation with the more experienced attorney until the attorney and the board is confident the attorney is comfortable with the more complex cases. Attorneys handling juvenile cases are all highly qualified attorneys and are assigned in each of the four juvenile courts equally.

14. How soon are attorneys notified of appointment to a case? Do attorneys routinely meet with clients within the timeframes set forth in the contract with PDSC?

Attorneys are notified of new appointments the same afternoon or the next day after arraignment. For instance, if a bail hearing is scheduled for the day following arraignment, the KDS receptionist will notify by phone the new attorney of the hearing. Otherwise, the paperwork advising the attorney of a new appointment is delivered to the attorney. KDS has an attorney at arraignment time each day. The assigned attorney will schedule an appointment with the client as soon as possible when the client calls for an appointment.

15. Does your system provide continuity of representation when possible? If a client has been represented by a consortium member in the past are future cases involving that client generally assigned to the same attorney?

If a client has been represented by one attorney in the past, we generally try to assign the same attorney to avoid conflicts.

16. Does your organization have a standardized procedure for identifying conflicts or does each attorney or law firm have its own procedure? When are conflict checks conducted? How soon is a case reassigned after a conflict is identified?

Our case coordinator uses a lap top computer every day at arraignment to check for conflicts at arraignment. When the data is entered into our database, our receptionist/data entry clerk will check conflicts again at that time. If the police report is available at the time of arraignment, our receptionist/data entry clerk will check the police report for witnesses and/or victims to check for conflicts, also. I believe the individual law firms also check for conflicts at the time they receive police reports and information from the client. If a case must be reassigned because of a conflict, it is sent back to the main KDS office with a memo to the new attorney outlining the conflict, setting out approaching court dates and informing the new attorney of important information. The file will usually be reassigned within two working days from receipt at the KDS office.

17. Do consortium members meet regularly as a group? If so, how frequently?

The consortium members usually meet quarterly to discuss current cases and policies in the criminal justice system.

18. Is there a mechanism for regular communication among consortium members such as a newsletter, e-mail list, website, regular mailing?

The KDS administrator will distribute any news or cases via e-mail. Each KDS attorney has an e-mail address and current lists are made available to all attorneys.

19. Is there a mechanism for sharing research or forms?

Again, information is sent to the administrator who distributes the information via e-mail, or photocopies of information will be sent directly to each attorney.

20. What system do you use to monitor the volume of cases assigned to each attorney or law firm? How do you insure that attorneys are not handling too many cases?

The KDS attorneys are assigned to only an agreed upon number of courts. For each court, there is a list of attorneys to be used when cases are assigned which controls the number of cases. Also, at the end of each month, cases are printed by attorney. The KDS administrator keeps a total of cases assigned for each attorney to insure that no one is receiving too many cases.

21. How do you insure that attorneys are providing quality representation? Are there regular evaluations of attorneys? If so, how and by whom are they performed? Are there other mechanisms in place to insure that consortium attorneys are providing quality representation?

KDS contracts with attorneys whom they feel will provide quality representation of clients. KDS does not evaluate the attorneys on a regular basis. If there is a complaint or a question about representation presented by the courts, the DA, or other criminal justice agencies, KDS takes the steps to insure an investigation into the matter.

22. How do you address problems of underperformance by attorneys?

KDS brings the attorney to a board meeting and advises the attorney of complaint. The attorney is given the opportunity to give their side of the story. The board addresses the problem and hopefully resolves it.

23. Do you provide training or access to training for consortium lawyers? Please describe. Do you require a minimum number of criminal, juvenile or civil commitment law- or trial practice-related CLE credits per year.

KDS does not provide training for our contract attorneys. We require the same minimum of CLE credits as the Oregon State Bar. We do encourage all of our attorneys to attend OCDLA seminars and CLEs.

24. Are attorneys required to report disciplinary actions by the bar? How many consortium attorneys have been disciplined by the bar? What were the circumstances?

No, attorneys are not required to report disciplinary actions by the bar at this time. However, this is an area where KDS will change its policy about reporting actions. Because of our small community, KDS is usually aware of any action taken.

25. What is the consortium's process for handling complaints from judges? From clients? From others? Is there a designated contact person for complaints? Is that person's identity generally known in the criminal and juvenile justice community?

The KDS Board of Directors discusses and answers all complaints made by the judges and/or any other person in the justice community. Clients usually make their complaints in writing to the court and if the Judge allows the attorney to withdraw, a new attorney is assigned at that time. Richard Garbutt is our authorized representative and everyone in the justice community knows how to contact board members if needed.

26. What steps have you taken to address issues related to cultural competence such as the need for interpreters, training regarding cultural biases, culturally appropriate staffing, awareness of immigration consequences?

KDS uses the court interpreter for office appointments and any hearings or trials where a Spanish interpreter is needed. Several of the individual offices have staff who speak Spanish to help with interpretation. KDS attorneys have attended Diversity Training through our local courts which was especially geared with the Hispanic population and the tribe in mind.

27. Do you have a system in place which allows clients to evaluate the quality of services received from consortium attorneys?

No, we do not.

28. Are consortium attorneys and the administrator active participants in policy-making bodies of your criminal and juvenile justice systems?

KDS has a representative on the courthouse security committee and they have had a representative on the Local Public Safety Coordinating Council. KDS attorneys also regularly attend bench-bar meetings.

29. What are some of the things your consortium does especially well? Please describe.

KDS is especially proud of the fact that our assignment of attorneys is efficient and timely. We believe that cases will be processed much more effectively if they get off on the right track from the beginning. It is very frustrating for everyone involved if a conflict is discovered late in the case and it is necessary to reassign the case. We are also proud of our organizational structure and management. KDS tends to retain our attorneys over the long haul. We have good continuity in the courts and deliver consistently good service.

30. Are there any areas in which you think improvement is needed? Please describe.

KDS is currently working on a way to formalize complaints by judges, etc., concerning a contract attorney. At the present, complaints are verbal only. We will require complaints to be in writing so we may deal with them more efficiently. The Citizens Review Board is neglected because of conflicting court schedules. We have instituted a plan to allow the attorneys to be represented at the CRB with credible information for the Board. We are hoping that this will solve the problem of conflicting priorities.