

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Friday, October 22, 2010
12:30 p.m. to 4:00 p.m.
Agate Beach Hotel
Cove Room
3019 N. Coast Hwy
Newport, Oregon 97365

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's August 5, 2010 Meeting
(Attachment 1) | Barnes Ellis |
| 2. Looking Ahead: Crime Rates, DA Charging Practices, Judicial Resources And their Impact on Public Defense Services in '11-'13 and Beyond
(Attachment 2 and Handouts) | Chief Justice Paul De Muniz
Michael Schrunck ¹
Walter Beglau ²
Craig Prins, ³ Jeff Ellis ⁴ |
| 3. Action Item: Contract Approval Jackie Page – Mitigation Contract | Kathryn Aylward |
| 4. Action Item: Approval of Service Delivery Plan for Clackamas County
(Attachment 3) | Barnes Ellis
Commissioners |
| 5. Action Item: Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel
(Attachment 4) | Kathryn Aylward
Paul Levy |
| 6. Action Item: Amendment to Eligibility Standards (Attachment 5) | Kathryn Aylward |

1 Multnomah County District Attorney

2 Marion County District Attorney; Vice-Chair Oregon District Attorneys' Association

3 Executive Director, Oregon Criminal Justice Commission

4 Jeff Ellis is the attorney director of the Oregon Capital Resource Center

7. OPDS Monthly Report
- Eboard Report (*Attachment 6*)
 - AD legislative proposals
 - Juvenile representation update
(Attachment 7)

OPDS Staff

Notes

Please note: Lunch will be provided for Commission members at 12:00 p.m., prior to the meeting.

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

The Commission will meet on Saturday, October 23 from 9 a.m. to 2:00 p.m. in the Cove Room at the Agate Beach Hotel for a retreat.

Next regular meeting: December 9, 2010 at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, August 5, 2010
10:00 a.m. – 3:00 p.m.
Room 357
Oregon State Capitol Building
Salem

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Shawn Wiley
Paul Levy
Billy Strehlow
Shelley Winn
Caroline Meyer

The meeting was called to order at 9:56 a.m.

Agenda Item No. 1 Approval of the Minutes of June 17, 2010 Meeting

MOTION: Shaun McCrea moved to approve the minutes as amended; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried:
VOTE 7-0.

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

Ingrid Swenson summarized the information previously provided to commissioners regarding the performance of the two Clackamas County contractors. She said they had both made progress in addressing issues identified by the commission and recommended continuation of the current service delivery model. Paul Levy reported that representatives of both contractors had spoken with him about the addition of independent members to their boards of directors. Commissioner Welch said it had taken too long for these contractors to make recommended changes. Commissioner Ozanne agreed and said that CIDC had been held up as a model but it had taken them five or six years to adopt recommended best practices. He said that IDI had made no progress on implementing an attorney evaluation process. The report should reflect that it has taken them too long. Chair Ellis said that Clackamas is the only large county with a single provider model. While it is not necessary to change the model at this time, the commission may have to revisit the county in the future. Ron Gray has been more engaged in recent discussions about the system and has made a change in the composition of the CIDC board. In two or three years, however, the system may have to be reconfigured. The draft report should be revised to inject a note of caution.

Agenda Item No. 3**Discussion and Approval of PDSC '11-13' Budget Narrative**

Kathryn Aylward reviewed the contents of the agency's proposed budget narrative, including policy option packages and the annual performance progress report. The first key performance measure establishes a goal of filing opening briefs within 210 days of record settlement. Performance Measure No. 2 relates to the level of customer satisfaction expressed by the "customers" of the Contract and Business Services Division. She noted that a recent survey revealed a very high level of satisfaction by the agency's customers. The third measure requires boards and commissions to follow best practices and was scheduled for discussion later in the meeting. Chair Ellis remarked that cost growth over time is less than some would assume. He asked how the cost for death penalty representation could be projected. Kathryn Aylward said that she based it on monthly expenditures. Costs keep accumulating as more people are charged or placed on death row. With regard to forecasting caseload changes she said that it was difficult but that she looked for patterns and that there are Excel tools that help track trends and allow for the use of regression analysis. She said the agency can also make adjustments throughout the biennium and keep the legislature informed when it needs more funds or when there are funds that are not needed and can be reverted. Chair Ellis recommended that the document reflect the difficulty of making projections. Ingrid Swenson reviewed the agency's Affirmative Action Plan.

Commissioner Ozanne said that early in the narrative, the role of public defense in the public safety system should be noted. He also recommended that evidence-based practices, such as the quality assurance programs that have been put in place, should be highlighted. Reference should be made to the BRAC experience so that it is not forgotten. Other Commissioners agreed. Commissioner Lazenby said that for several sessions after 2003 legislators understood that they had to fund public defense and they should be reminded of the lessons learned. Commissioner Ozanne also suggested mention of early disposition programs as another area in which the agency promotes good policy. Commissioner Potter inquired whether it is appropriate to seek continued improvement in customer service satisfaction when 93% of respondents already find it good or excellent. Kathryn Aylward said that continued improvement makes employees' jobs easier too when customers understand the payment policy and don't bill incorrectly. Commissioner Welch said the narrative should describe what actually happened in 2003 when there was a backlog of cases and some had to be dismissed. Chair Ellis recalled the testimony provided by law enforcement representatives at later budget hearings. Chair Ellis offered to sign the narrative with the understanding that the changes suggested would be included.

Agenda Item No. 4**Amendment to Eligibility Standards**

Kathryn Aylward discussed the eligibility standards for appointment of counsel and explained that her goal is to be able to increase the attorney rates enough to capture applicants who are currently being disqualified but are then having to come back to court and report that they have not been able to retain counsel. One of the problems in trying to update the standards is that the current standards include discrepancies between counties and the methodology on which they were based is not sound. To establish a statewide rate it would be necessary to raise the rate substantially in some counties. Judicial Department staff would like to implement the new rates in some pilot counties to see what the impact would be. Commissioner Welch inquired about the two pronged approach to establishing eligibility outlined in the budget narrative. Kathryn Aylward explained how standards are applied but was uncertain whether applicants whose income was below the federal poverty line would qualify regardless of assets. She said that the verifiers use an "ACP calculator" which has all of the criteria built in. Chair Ellis said that he was uncomfortable with the proposal to implement it in only a few counties because it would treat individuals differently depending on which county they were in. Kathryn Aylward responded that they are treated differently under the current system. Ingrid Swenson said that regardless of

the differences between counties, the question remains the same for the court which must decide whether or not an individual is able to retain counsel. Commissioner Ozanne said that it would be self defeating to use unrealistic numbers that would lead to the denial - even if only in a small number of cases - of a constitutional right. It might be appropriate to simply acknowledge that the standards aren't used very much and push them closer to market rates. Use of the Delphi method might be appropriate. Kathryn Aylward said that all of the attorneys she spoke to also said the rates were ridiculously low, but currently there are contractors and hourly rate attorneys who handle these cases for these amounts or less. Sometimes the attorney takes the case, exhausts the client's funds and seeks appointment from the court. Defendants also ask friends and family members to assist them in retaining counsel. Commissioner Ozanne said that this approach might cause legislators to undervalue the services of counsel. Kathryn Aylward responded that these rates are three times the rates paid to public defense attorneys. Greg Hazarabedian said that there are differences between public defenders who have a steady income and private practitioners who do not. The numbers are far below what he charged when he was in private practice in a rural county and not the most expensive attorney in the area. Commissioner McCrea said that the numbers made her uncomfortable. PDSC has to try to maintain costs but it also has to promote quality. Among the factors involved is the number of counts alleged and whether they are aggregated or treated separately. If a private attorney takes a case for less money than it is going to cost, the court may not let the attorney withdraw when the client's funds are exhausted. Kathryn Aylward said that she envisioned sending the fee schedule out annually when the federal poverty guidelines are updated. If the Commission were to just go forward now, the caseload would jump up in these very negative economic times. She was initially inclined to double the current rates but retreated when she considered how many cases might be affected. Chair Ellis suggested approving the increases statewide for a six month period to see what the impact would be.

Kathryn Aylward said it would be a lot of work to have the verifier apply two standards and keep track of how many people received appointed counsel under one but not the other. Verifiers are busy and this would be a lot to ask. The recommendation she made would not cause a catastrophe. It wouldn't affect the caseload and then it could be gradually increased over the years. Commissioner Ozanne said that increasing the rates even more might not make a significant difference. Kathryn Aylward said her recommendation would not cause any increase. Currently approximately 55% of defendants charged with misdemeanors receive appointed counsel and 80% of defendants in felony cases. It might be five or 10% who would be affected. Commissioner Welch said that in juvenile cases there are probably too few private attorneys who handle cases to establish a rate. Some of the juvenile cases should not even be part of the verification system. Very little is probably collected in contribution fees in these cases. Whatever the amount being collected it is probably not enough to pay the cost of collecting it. Kathryn Aylward said that most people can afford to pay the \$20 application fee. Chair Ellis said that at an earlier meeting it became clear that the current system is laughable and it is the commission's responsibility to set standards. He suggested approving the recommended increases for six months and taking another look at that time. Commissioner Stevens said that she thought that a pilot in two counties would be a better approach. Commissioner Welch said PDSC should ask the verifiers to apply both standards and see what the impact would be if the higher rates were implemented. Commissioner Ozanne said that he believed, as Kathryn Aylward had indicated, that there wouldn't be an increase in eligible defendants. "Laughable" remains an appropriate description of the current standards. Chair Ellis said that even if a change were to open the floodgates, it would mean that a lot of people are being denied an important right. He suggested approving the adjusted schedule, having the verifiers implement it and see if a couple verifiers would be willing to track whether the defendant would also have been eligible under the previous standards.

Commissioner McCrea said the test should be done with standards that are at least double the current numbers. Chair Ellis said the verifiers could be asked to apply the recommended standards but also determine what the impact of doubling the rates would be. Kathryn Aylward said that in the past the verifiers have not been willing to track even the amount of money that defendants had. Commissioner Ozanne inquired about use of commission resources to obtain the data. Commissioner Lazenby said the disparity between counties bothered him. Kathryn Aylward suggested that verifiers be asked to report to PDSC any applications that are rejected. OPDS staff could then review the information about the assets of defendants who were denied counsel and rates could be raised without changing the outcome. Commissioner Lazenby supported that recommendation. It would allow PDSC to see the dimensions of the problem before prescribing solutions. Chair Ellis moved to adopt the proposed standards, have the verifiers report on any denials and asked that Kathryn Aylward report back in six months. Commissioner Ozanne inquired whether the Chair could make the motion and Vice-Chair McCrea then made the motion which was seconded by the Chair. The motion was clarified at the request of Commissioner McCrea to include a request that verifiers notify OPDS of denials. Kathryn Aylward said that there wouldn't be any denials if the commission adopted the motion and it won't be possible to measure the impact of the change. Commissioner Potter said that it would be preferable to adopt the initial numbers considered by OPDS. Commissioner Stevens inquired about the validity of those numbers and Kathryn Aylward said they represented an increase of 50% from the existing numbers in accordance with the increase in the Consumer Price Index over that period. There would, however, be a significant increase in some counties if she applied the same rates in all counties. Commissioner Potter said he would prefer to use more realistic numbers. Commissioner Stevens said that instead of the incremental approach it would be better to gather information about who is being denied for a one month period and then arrive at a more realistic number and implement it in full. Chair Ellis called the question.

VOTE 1 – 6. The motion failed.

Commissioner Lazenby clarified his vote by saying that the commission does not yet understand what the impact of its decision would be. A sampling would provide a better understanding of the criteria being applied in different areas of the state. Commissioner Stevens asked if it was realistic to have a single statewide standard. Kathryn Aylward said that there is already a lot of play in the numbers. It probably cannot be a finely tuned instrument. Every case is different. Commissioner Welch said that there is a cost to the system when someone is turned away initially and then is unable to retain counsel. It would be useful to know how common that is. Kathryn Aylward said that that data is available but not entirely reliable. Staff was directed to come back with a new proposal in October.

Agenda Item No. 5

Discussion of Service Delivery Plan for Deschutes County

Ingrid Swenson reported that the District Attorney Elect of Deschutes County would not take office until January of 2011 and had had very little contact with court staff about any expected changes in charging practices or whether he would support changes to the EDP program. She said that OPDS staff had calculated the cost of paying standard case rates for the cases currently being processed through the EDP. It would cause a significant increase in costs. However, she said that it is not clear that all of the cases would be prosecuted if there were no EDP program. She said that since the commission hearing in Deschutes County two senior attorneys had left one of the defense firms, increasing the demand for experienced attorneys. Chair Ellis proposed postponing further discussion of a service delivery plan for the county until after the new district attorney has taken office. Tom Crabtree said that Patrick Flaherty had not yet met with other justice system representatives. Fifteen of the 16 deputy district attorneys had supported his opponent and were now attempting to organize a union in the office. He said that his experience with the EDP program in its first few months of its operation indicated that a lot of cases would not be filed if

there were no EDP program. Ms. Flaherty said during the campaign that he would file fewer cases and concentrate on serious ones. Commissioner Ozanne asked whether part of the need for more experienced attorneys was related to the docketing system. Tom Crabtree replied that it was a significant part of the problem. He said another major problem was that defense providers had not been able to compete with the district attorney's office in salary levels in the previous contract period and had lost a number of attorneys. Commissioner Ozanne suggested that in order to maximize the value of the commission's service delivery review process the commission should address specific concerns, such as the lack of access to defendants in the county jail, to the local public safety coordinating council. He said issues related to the EDP program and the court's docketing system should be addressed by the court but that county commissioners are interested in costs related to operation of the jail. Lack of timely access to clients can increase delay and costs. Ingrid Swenson was asked to follow up on the issue.

Agenda Item No. 6 Best Practices for Boards and Commissions

Ingrid Swenson said that Best Practices for Boards and Commissions was the third of the agency's key performance measures. She referred to a memo provided to commissioners that included information regarding the Commission's compliance with each of the best practices. Commissioners proceeded to discuss each of the best practices and determined that the commission was in compliance with all of the best practices but that further efforts were needed to identify and attend appropriate training sessions.

Agenda Item No. 7 OPDS Monthly Report

Kathryn Aylward reported that other funds revenue earmarked for public defense was still below projected levels but that there was a special purpose appropriation available through the Emergency Board. She said she believed that some of those funds would be needed and that the request would need to be made at the December Emergency Board meeting. She said that if public defense were required to make a reduction comparable to the allotment reductions imposed on executive branch agencies it would amount to \$9.7 million reduction to the Public Defense Services Account. Commissioner Ozanne inquired whether federal funds recently allocated to the state would help with the budget situation. She said she believed they would. She said that PDSC had voluntarily taken cuts similar to those taken by other agencies in light of revised caseload figures.

Shawn Wiley described the Appellate Division's regional contact program and said the division had already provided support in one region on an issue related to whose role it is to assert the right of a crime victim not to be interviewed. He advised the commission that the Oregon Supreme Court had decided *State v. Portius*, holding that denial of additional eligibility for earned time credit under HB 3508 is not appealable. He said that the Court of Appeals will be requiring that briefs be prepared in 14 point type and will limit the length of briefs to the equivalent of 35 pages. The new rules will be implemented gradually but the Appellate Division has decided to comply by the end of August. To address the backlog of cases awaiting argument, the court is also proposing to use two judge panels, which will sit every other month and hear up to 40 cases. The panels would consist of Chief Judge Brewer and a rotating senior judge. He noted a number of favorable rulings from the court of Appeals the previous week including both criminal and juvenile appeals.

Ingrid Swenson provided an update on developments regarding representation in delinquency cases. She and Commissioner Welch had met with Chief Justice De Muniz and discussed the development of a model colloquy on waiver of counsel to be provided to juvenile court judges. He noted a need for additional training of juvenile judges in the delinquency area. Ingrid Swenson said that the Interbranch Dependency Law Workgroup has been meeting for more than a year to identify legislative measures that would improve outcomes in the juvenile dependency

system. Representation by counsel at initial hearings is one of the areas of focus. Commissioner Welch said that it might be appropriate to look at the rates of representation in juvenile dependency cases. Ingrid Swenson said that appointment practices vary dramatically around the state. In a survey of providers it was reported that in eight counties no attorneys are present at shelter hearings. In four counties one attorney is present and in fourteen, attorneys are available for all parties. She said it is a nationally recognized best practice to appoint counsel for all youth in delinquency cases. She said Appellate Division attorneys were working on a model colloquy to provide to the Chief Justice. There are no national models available. Commission Potter asked why PDSC couldn't require the appointment of counsel in all delinquency cases. He said that there are injustices occurring in the juvenile system. Ingrid Swenson said it is not clear that PDSC has such authority and the Chief Justice recommended against seeking to assert control of the appointment process. Commissioner Welch asked whether PDSC should seek legislation requiring the appointment of counsel. Commission Lazenby said that if a legislative measure were introduced it would not be approved in light of the expected budget deficit and it would be more difficult to seek legislation in the future if it were rejected in the next session. Commissioners agreed that PDSC should work with the Chief Justice to pursue the colloquy and possibly seek a court rule in the future.

Kathryn Aylward said that the office move is on schedule for the end of August and that the office would sponsor an open house when the move was complete.

MOTION: Shaun McCrea moved to adjourn the meeting; Chip Lazenby seconded the motion; without objection, the motion carried: **VOTE 7-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Thursday, August 5, 2010
10:00 a.m. – 3:00 p.m.
Room 357
Oregon State Capitol Building
Salem

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Shawn Wiley
Paul Levy
Billy Strehlow
Shelley Winn
Caroline Meyer

The meeting was called to order at 9:56 a.m.

Agenda Item No. 1 Approval of the Minutes of June 17, 2010 Meeting

0:10 Chair Ellis We will call the meeting to order. The first item is the approval of the minutes from the June 17 meeting. I would like to offer a couple of corrections. One is on page one where we are amending the minutes from the previous meeting. It says, "Beginning in January of 2010." I am quite confident that should be "2012." I would move to change that. Then on page three, the first full sentence in the middle of that paragraph where it says, "Four attorneys left in 2001 and then nine left between 1005 and 2008," that is technically correct but it is not what we meant. I would change "1005" to "2005." With those amendments are there any other amendments?

1:18 J. Potter There is a small typo on page seven.

1:23 Chair Ellis Just proving you read it.

1:23 J. Potter Yes. Thank you. Agenda Item No. 3 where it says, "The others will rotate out of the attorney pool for tw-year terms."

1:34 Chair Ellis So it should be a "two." Alright. With those three corrections is there a motion to approve the minutes of June 17, 2010.

MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 2

Approval of Service Delivery Plan for Clackamas County

1:58 Chair Ellis

Ingrid, the next is Clackamas County.

2:06 I. Swenson

Well, Mr. Chair, I think as the Commissioners are aware, this inquiry has been proceeding for some time. It has been over a year since you began your exploration of the delivery system in Clackamas County. We received testimony from the contractors there on several occasions. As I indicated in the recommendation I made to approve the current system you have seen steady progress in all the areas of concern that were brought to your attention at the outset. It wasn't necessarily speedy and it wasn't necessarily enthusiastically embraced, but over that period of time certainly CIDC has conformed in many ways to the best practices that have been recommended by our Quality Assurance Task Force in terms of their attorney evaluation process, which was critical. This was a totally new experience for them. They had never done anything like that in the past and, furthermore, they have taken corrective action in response to the information they received in the attorney evaluation process. In terms of the juvenile consortium, Judge Darling, the CASA director, and others brought issues to your attention which related to the quality and availability of lawyers in those cases. Once again, I think it is fair to say that they undertook some significant steps to address those. They have started an attorney evaluation process. They didn't ask for information about the performance of individual attorneys and now realize that that would be a more effective way to obtain useful information, but they did take this initial step. They continue to make the effort to add another attorney to address the caseload issue. As was explained to you, several attorneys were invited to join the consortium and ultimately decided that it wasn't financially feasible for them to do that so they continue to look. In terms of their boards of directors – well, both these groups are being responsive to the Commission's direction that they have boards, that they look for independent members of those boards and now, of course, the Commission has determined that the best method of selecting independent members is to have outside agencies participate in the identification of those independent members. So they do have some further steps they can take but I think in good faith they have followed what they understood to be the Commission's recommendations for best practices.

5:23 Chair Ellis

Let me ask this. At that last meeting, I urged Ron Gray to meet with Paul to make sure that he understood that our definition of independent included that the appointing source not be lawyers that get compensated under the system. Did that meeting occur?

5:44 P. Levy

Mr. Chair, both Ron Gray and the president of their board, Brad Jonasson, contacted me and I communicated with both of them about that issue. I provided them with information about the providers who do have independent members that meet the Commission's definition. I should also say that Marty Cohen with the juvenile consortium contacted me on that subject as well.

6:16 Chair Ellis

So I think that is not what they have right now?

6:18 P. Levy

That is correct.

6:20 Chair Ellis

But they know that is what we expect them to have.

6:25 P. Levy

I told them that to our knowledge no consortia now has independent members that meet the Commission's definition of a member appointed by an outside source. They are pursuing that. That is what I understood from them. I provided them with the names of public defender offices that do have independent members that meet your definition and who the appointing authorities are.

7:04 Chair Ellis

I view all of this as a triumph of the cajole method now migrating to the mandate method. I think under our timetable they have until 2012 to try to conform. I am optimistic that they have come this far and they will go the rest of the way.

7:23 I. Swenson Mr. Chair, it may well be that they already meet the alternative method for complying with the Commission's requirement, which is to have in place satisfactory systems for quality control and financial management.

7:43 Chair Ellis I interrupted your report.

7:45 I. Swenson Well, no, but so in view of the progress of they have made and in view of the fact that the Commission has now provided direction on the board requirement, the recommendation is that no changes be made to the system that is currently in place there, the service delivery system involving two contractors, each of whom is the exclusive contractor for the area of law in which they provide services.

8:16 Chair Ellis Any comments?

8:15 P. Ozanne Well, I think the judge has some and I do. Judge, why don't you go ahead?

8:20 Hon. Elizabeth Welch Well, the question that I had from the material is this issue about picking board members. I didn't realize that there weren't any consortia that were doing it "right."

8:35 Chair Ellis I think a lot of PDs do it correctly.

8:42 Hon. Elizabeth Welch But it says "beginning in January 2010" that is the first phrase in of this. I guess I am concerned about Clackamas County currently looking for a second independent person.

8:56 Chair Ellis It is January, 2012.

8:56 J. Potter That was the correction.

8:58 Hon. Elizabeth Welch Oh that is what was corrected.

8:59 Chair Ellis And if you look at the Clackamas plan it is 2012.

9:08 Hon. Elizabeth Welch I will just back off. I still have a problem that they're pursuing this as if that wasn't a consideration. It has been way too long and I think we have been very, very nice about it.

9:31 P. Ozanne My comments are kind of along the same lines. I think it is good to be diplomatic and to encourage professional comments. One comment that I have doesn't need to be included in the report. I think Ingrid's general comments reflect a tone and some words that are different from our service delivery plan. I am disappointed that we held up CDIC as a model consortium, and yet I remember conversations five or six years ago about boards. We wouldn't want to hold them responsible for the new definition of a member, but we have been discussing boards and evaluations for, I guess, my memory is five or six years. I will leave that just as a comment for the record. As to IDI, I think our service delivery plan, while we can continue to be encouraging, I think it is too enthusiastic about what they progress towards. As I recall, Mr. Cohen still talked about some kind of informal review. It is great to survey the judges but the review has a different purpose. Plus there has been no progress for years despite conversations when I was executive director and others. I would like to convey in a way, I don't have the words, but at least as to IDI that deliberate speed is needed. It has been – I think the last paragraph on page three should reflect that this has been going on too long and, "Get with it!"

11:50 J. Stevens He did say two months ago that they were working on something.

- 11:54 P. Ozanne Right. After six years that is too long. Especially in light of the fact that we have entrusted this structure with a kind of monopoly power. That is all I have to say. I think as to IDI there should be more of a message that it has been too long and we don't want to hear again that they have been trying.
- 12:21 Chair Ellis Other comments? I would make a couple of comments. Clackamas is the only really large county where we have a single provider model. I was listening very carefully whether we needed to do in Clackamas what has occurred in Marion, which I have said publicly has been a big success. I think where I am is the reports we got in terms of the competence of the representation were positive enough and certainly Judge Maurer is very protective. I know the history there and I think it is not necessary at this time to change, but I would caution. Ron Gray is not going to be there forever. I think the time may well come that we need to revisit Clackamas. I am satisfied for the moment. I am okay with continuing with the single provider model given what I do view as more progress in the last year than the previous eight. I would comment that Ron has come to more of our meetings. It has been much less of a "lob the money over the wall and we will take care of it" situation. I think there appears to have been some change in the composition of their board that has made them more responsive. I am okay for now. It is not ideal and it is a large and very important county. Two years from now, three years from now, we may conclude it needs to be reconfigured.
- 14:57 I. Swenson Mr. Chair, in light of the comments that I have heard should I prepare a sort of revised draft to incorporate these ideas?
- 15:07 Chair Ellis I think so. You are not getting, "It is wonderful and let's just go for it." You are getting some – not push back in terms of changing the outcome but I think push back in terms of injecting these notes of caution you have heard. I don't think it needs to be a big agenda item next time. I think we are there.
- 15:37 I. Swenson Very good.
- 15:39 Chair Ellis With that said, I guess procedurally we probably ought to wait until you have done the revisions to approve it. I think it won't be a big discussion next time.

Agenda Item No. 3 Discussion and Approval of PDSC '11-13' Budget Narrative

- 15:58 Chair Ellis Kathryn. Budget narrative.
- 16:08 K. Aylward In your materials it is after the lavender divider. Let me say first that the page numbers are kind of screwy because the structure of the budget binder itself is – it is coordinated for agencies by DAS. They say, "You have these items on these pages," and then you insert this information from another system. You piece it all together. I didn't want to number the pages consecutively because I am going to have to do them all over again. It starts out with what is page 1, Agency Summary - this hasn't changed significantly for us at all - the breakdown between the account, the Appellate Division, and Contract and Business Services. The next graph, page 2, shows that we are essentially entirely general funds; two-tenths of one percent is other funds. Currently, the other funds that we have are coming in come to Contract and Business Services through the Application Contribution Program. In this biennium we do have other funds coming into the account, whereas our request for next biennium is that it is all general funds. The next page shows the increases from the current biennium to our agency request budget. Keep in mind the agency request budget includes policy option packages. We have about \$30 million dollars worth of policy option packages. That is why you see a significant increase. A lot of this narrative – and it was similar to what we had in the budget binder in the past, you know - is our story. You try to make the budget narrative something that even a person who is not familiar with what the agency does can pick it up and read it and get an idea - our long-term plan and our short-term plan.

- 18:27 Hon. Elizabeth Welch Kathryn, in the spirit of low level nitpicking can I just point out that the second full sentence under long-term plan appears to have some kind of problem with it.
- 18:59 K. Aylward I appreciate it. Once you have reread it enough times and with different people editing it, it is very easy to sort of lose ...
- 19:11 Chair Ellis There are really two thoughts in that sentence, I think. You might consider two sentences, because what happened in '01-'03 was the budget crisis and all that. Then the second half of the sentence talks about the graying and how you attract lawyers into public defense. I think they are two thoughts and not one.
- 20:02 K. Aylward I am not going to go through this part in great detail. If you have comments or things that you would like us to emphasize... After page 8 is our annual performance progress report. It has changed quite a bit from last time. We are now down to just three performance measures, whereas we had I think nine before. The first one is the median number of days to file the opening brief. We have set our goal at 210 days. As Pete Gartlan has said we are not happy about it but it is a good goal to start with. The page is labeled page 7 of 16 which you can see on the graph. If you go back to 2006 the median number of days was 328. We have gotten that down steadily and we are working toward our goal of 210. I hope we will be there next year. It depends on how the caseload goes and if we get the additional positions that we have requested. On page 10 of 16 is Key Performance Measure #2, which is our customer service survey. I am so proud of this. We did it last year and 95 percent said we were good or excellent. I thought, "We can't top that."
- 21:34 Chair Ellis Who are we defining as customers?
- 21:37 K. Aylward We sent the email to 900 people that we have an email address for. It is attorneys. It is attorney staff. It is investigators, psychologists, and basically anyone who deals with our payment and approval process.
- 21:55 Chair Ellis So the provider community.
- 21:55 K. Aylward Yes.
- 21:57 Chair Ellis How about the judicial community?
- 21:59 K. Aylward We have surveyed - as part of quality assurance task force and service delivery - we have surveyed that group separately. This is what is referred to as the convenience sample. It includes only the group that we used last year. It is a larger number. Last year we only sent out 600 because have accumulated more email addresses.
- 22:26 Chair Ellis This is really measuring CBS with the people it has direct contact with. You should be proud. It is a very positive result.
- 22:39 K. Aylward In some of the comments people say, "I have worked with state government my whole life and your agency operates better than any other agency in the state." It is nice to hear but people really mean it if they are taking the time to write things down like that. I am pleased. Key Performance Measure #3 is that boards and commissions follow best practices. Ingrid will be going through that with you later. I went ahead and gave us 100% because I figure by the end of today you will have achieved 100%.
- 23:17 Chair Ellis And we are not permitted to leave until we have achieved that.
- 23:21 K. Aylward The Annual Performance Progress Report isn't due until September 1. This can be considered a draft if you don't make 100 percent. After that the page is labeled page 48, reduction options. Technically the directions say to prepare reduction options at

the 5%, 10%, and all the way up to the 25% level. For us it is not really very helpful when every increment is just a magnitude of the same impact. It is not like you have agencies that have different functions. They say, "Well, if I was going to cut 5% I would stop that function. If it was 10% it would be this other function." For us, it is just money. We do one thing and we pay for it with one account. If it is \$9 million a month or \$10 million a month, whatever it is going to be next biennium, and if we are \$10 million short that is a month. If we are \$20 million short that is two months. I didn't go into a lot. I just put the 25% impact. The next page is our organizational chart. That has not changed. Page 59 is the revenue discussion. Last biennium, and actually in all past biennia, the Judicial Department has made a projection for what they thought they would be collecting in Application Contribution Program revenue. I talked to them because we are preparing our materials on a tighter timeline than they are. Our numbers have to be the same. Both agencies have to put into the budget system that if I say I am receiving this much from Judicial, Judicial has to say they are sending that much. I went ahead and took the lead and made the estimate. We are estimating for next biennium \$3.5 million will be collected through the ACP.

25:27 J. Stevens

What happens when someone just can't pay back?

25:34 K. Aylward

If they can't pay it is waived. If they know up front that the person doesn't have \$20 for the application fee it is waived. If it is ordered and then the person doesn't pay, it is collected on like a civil judgment. But I think what normally happens is if someone hasn't paid their contribution amount and the judgment is entered, they then take whatever is unpaid and it goes in the final judgment as attorney fees. Whether or not that is collected – at the end of the case recoupment comes in line after compensatory fines, restitution, and other things. If a person is incarcerated it is especially difficult to collect on those. Page 63, the Appellate Division - the structure has changed a little bit with the departure of Becky Duncan. Her position was assistant chief defender. Now we just have three chief deputies. We have changed that structure a little bit. We talk about caseload growth. I am on page 67. These packages are referred to as essential packages. A lot of them are system generated. The 010 package - they just look at your vacancy factor and the personnel system just spits out a number. 031 is the standard inflation for the appellate division. Package 020 is mandated caseload. Now we have seen a huge increase in what is coming in the door for the appellate division. We have looked at it a number of different ways. It is not county specific. It is not case type specific. But keep in mind in terms of numbers it doesn't take much of a fluctuation to have a big impact. We are talking about say 100 cases a month, so five more cases and it is a five percent increase. It is really just five cases and they might have come or not. We are seeing a big impact for a small number of cases. But we have included in our agency request budget a request for 12 additional attorneys and two additional support staff. Frankly, I will be surprised in this budget environment if it is going to be possible to get those positions. We will certainly revise this request if the caseload changes as we move closer towards Ways & Means. As of the drafting of this material that is what the numbers show we need. Next, on page 68, where we start with policy option packages, for the appellate division, package 101 is increasing the compensation of the attorneys to match Department of Justice attorneys and their appellate division.

28:58 Chair Ellis

What page are you on? I am losing you.

28:59 K. Aylward

Page 68. The cost of that policy option package is a million dollars. That includes the 12 additional positions. If we got the 12 positions we would need more money to put their salary up too. If we didn't get the 12 positions it is closer to \$800,000 for our existing attorney positions. Then it jumps to page 87 because there are lots of materials that have to go in there. We move on to the Public Defense Services Account. Our program description hasn't changed. The distribution of case types hasn't changed - half a point here or there. What hasn't changed - eligibility guidelines and the verification program haven't changed, although we will talk about a minor change that we are hoping to accomplish in the next agenda item. It is still

130% of the federal poverty line. We still provide most of these services under contract. Then on to page 93 and a chart that is showing our expenditures and what it would look if we adjusted expenditures for inflation. That is part of it. Once you have a chart that goes back 10, 15, 20 years, expenditures always look like they are going up if you use current dollars. Everyone says, "Oh my gosh your expenditures are skyrocketing." I like to include this chart because visually you get a better sense that no, in real dollars, we are pretty much following the line of the caseload. We decided this time, on page 94, to talk about the impact of the death penalty.

- 31:22 Chair Ellis Go back to 93. I find that a very interesting chart. I think a lot of people assume the cost growth has been a much steeper incline than this chart would reflect. I think our legislative friends will actually be happy about this.
- 31:43 K. Aylward I think so too. That line is going up and it going up – you look at the difference between '05-'07 and '07-'09 and someone would say your caseload went down from 357 to 340, so why did your expenditures go up? Partly then we have to get into the discussion about the death penalty cases that are still in the ramping up stage.
- 32:12 Chair Ellis But they are excluded from this chart.
- 32:15 K. Aylward Oh. Well that is true. I know what it is. It was the change in the hourly rate and investigators. That is most of what that increase is. Even though caseload went down we did get an increase. The 1/6 closing the gap for PD parity. Then talking about death penalty cases, there is a chart on page 95. These are actually current dollars. Maybe I should do inflation adjusted for that as well. If you think it is a bit strange to say, "Well wait a minute, you just showed me a chart where you did adjust for inflation and now you are showing me one where you didn't."
- 33:13 Hon. Elizabeth Welch I think it would be interesting to see it too.
- 33:14 K. Aylward Okay.
- 33:20 Chair Ellis How do you come up with a projection in this area?
- 33:24 K. Aylward I am just looking at the monthly expenditures that we have for the death penalty.
- 33:28 Chair Ellis And extrapolating them?
- 33:32 K. Aylward Yes.
- 33:40 Chair Ellis The other story here is that almost nobody leaves the population that we are paying for.
- 33:52 K. Aylward Not upright, no.
- 33:55 Chair Ellis What happens is the costs keep accumulating and getting larger. I think if you were to project to 2013 it would keep going up.
- 34:11 K. Aylward Yes. It will continue to go up until cases age out. In other words, age out of the state system and go to the federal system at the same rate that we are having death sentences ordered.
- 34:30 Chair Ellis Let me just say I think it is very good to break DP out from everything else. Policy makers need to see this.
- 34:44 K. Aylward Then on page 96 we have a description of the mandated caseload package. Our mandated caseload packages include the inflation adjustment, the adjustment for death penalty caseload increasing. Sorry, the regular trial level, non-death penalty caseload is actually decreasing. That drops down. Then the death penalty caseload

that is ramping up from previous biennia. The non-attorney provider cost reflects the fact that a lot of our expenditures are for professional services, psychologists, and a standard inflationary rate doesn't work for them. In addition, as we are encouraging the sort of quality efforts, we are saying to people you really need to have mom in a dependency have a psychological evaluation. That is important. Not only is it costing us more to buy these services, but we are using more of these services.

35:49 Chair Ellis

How do you make a projection on caseload decrease?

35:52 K. Aylward

It is difficult. I look at it and I try to see a pattern and think about it. It is just what we are looking at now. A lot of it is a simple, "Well I have 12 months worth of this year. Do I see it changing? Is it going up or down?" Twelve months of this biennium and finishing it out. I guess, basically an educated guess.

36:32 Chair Ellis

Okay. Maybe that is all we can do. If I were in your shoes how would I do that? I'm not sure I know.

36:42 K. Aylward

There are tools in Excel that will allow you to trend things or use regression analysis. We do that sort of as a double check against what we come up with.

36:58 C. Lazenby

It is all fun with numbers after a certain point.

37:01 K. Aylward

But also because we are adaptable throughout the course of the biennium, this is far away. We are talking about predicting through the end of June, just less than three years from now. We make adjustments throughout the course of the biennium. We keep the legislature informed if caseload is going up. We go to an Emergency Board and say, "Look, we thought it was going to be this. We were budgeted for this and now it has gone up. We need some help." Or we go back to the legislature and say, "You know what? It is working out that caseload is lower than we thought. We can revert a certain amount of money." I don't think it is crucial. It is important to be close but you don't have to be exact. We have had the history of being able to adjust it throughout the biennium. The bottom of page 97.

38:08 Chair Ellis

I am just thinking of that point. You may want to add some language here that makes it clear this is not an easy thing to project. We are assuming it but many things can impact what turns out to be the caseload. It just seems too certain here.

38:45 K. Aylward

There are limitations on how much it can fluctuate. You are not going to have 50% of the caseload you had. You are not going to have an extra 50%. It is pretty narrow one way or the other. It is not going to be more than plus or minus 10% and probably not more than plus or minus 5%.

39:09 Chair Ellis

But you have defined it as a point not a range. I would just inject some caution here.

39:25 K. Aylward

Okay. I am happy to do that. Then the policy option packages that you are familiar with for the account. Package 100, juvenile dependency representation. It is the amount of money that would be needed, \$11 million dollars for a 20% reduction in caseload. Package 102 is the three components of having full-time public defender attorney salaries correspond to deputy district attorney salaries in their counties. That is about six and a half million. The second part is increasing attorney hourly rates to \$70 an hour in non-capital cases and \$95 an hour in capital cases. That is about \$9.1 million. The third part is increasing investigator hourly rates to \$35 an hour in non-capital cases and \$45 an hour in capital cases. That is about \$2.6 million for a total of \$18.2 million in provider compensation. I gave you a handout that should go after – it will be a duplicate page 98. Anyway, I left out one of the essential packages for the account. If you go back to page 97 it should appear between that and the next page. All this is a fund shift. The reason I left it out is because we have never had one before. I am kind of unfamiliar with it. The way the budget is built because it starts with the current biennium, and in the current biennium, as I said earlier, we have an other funds expenditure limitation of \$12.4

million. That is the money that is coming from House Bill 2287, which is the court fees bill. Because those sunset at the end of this biennium, we need a way to replace that \$12.4 million. What a fund shift does in your budget is it simply subtracts it from your other funds and adds to your general funds. That is all for the account. Now on page 111 is CBS. Nothing has changed with us in terms of structure and functions. That is unchanged. We have the two standard essential packages, the personal services vacancy factor and standard inflation. Then in our budget binder is a copy of our affirmative action plan. Ingrid, do you want talk about that at all?

42:49 I. Swenson

The major amendments to the plan, which you previously approved, have to do with strategies for future biennia. Some of them are the same kinds of efforts we have been pursuing in the past. I think there was more of a focus last biennium, and I hope in future biennia, on looking not only at our own efforts - at affirmative action within our office - but also looking to the trial bar to promote best practices in the recruitment and retention of minority lawyers and staff and also trying to make people more aware of the responsibility of lawyers who are part of a system in which there is such dramatic over- representation of minority populations in criminal cases, juvenile cases, and dependency cases, across the board. We have been talking about this in connection with the upcoming management conference. The defense, to some extent, needs to own this issue. It isn't just the corrections people and the police and everybody else who have responsibility for this. I think the defense bar does too. We want to look further into what we can do to assist and encourage lawyers to take on these issues in the course of their representation.

44:32 K. Aylward

That is all that I have included in the narrative portion for your review. Everything else that goes in the budget binder is, as I have said, a system generated set of detailed spreadsheets and reports and personnel reports that can't be edited anyway.

44:56 P. Ozanne

Mr. Chair, a question and then some comments. How much time do you have to make any changes in this narrative? What is the deadline?

45:08 K. Aylward

For Executive Branch agencies the deadline is September 1. Nobody gives us a deadline, but I might as well get it done by September 1. But there is still plenty of time.

45:31 P. Ozanne

Thank you. I don't have suggestions that are massive changes but I have an idea that I think is worth your considering. Kathryn, you and I always speculated about really whoever reads this. I am making the assumption that there may be a new budget intern, or perhaps a freshman member of Ways & Means, or maybe a long-term member of Ways & Means who is pretty energetic and wants to read some of this. With that assumption, which I think may be true, I am thinking that up front somewhere, and all of you are ingenious enough to figure it out, it seems like we, especially in the '11-'13 session, we should highlight the way public defense serves the system, that when public defense is inadequate in terms of resources, delays occur. Delays occur in getting to clients in the jail. Delays occur in handling the cases. Costs mount for the judicial system. We know that judges favor defense attorneys for the obvious reasons that they can manage a client and move the case through the system. It has to be done artfully so we don't sound like we are part of the machinery, but I think the legislature needs to be reminded that there are many things public defense does to serve the system. Another one - I was just looking up two parts to this one. There is a statute that deals with corrections that I think is quite interesting. It is getting national attention. It says that an agency - and then it defines agency and it doesn't include us but it includes corrections and others, shall spend at least 70 percent of state monies that the agency receives for programs on evidence-based programs. You hear it now *ad nauseam*. It is a good move. I think we should say that it means it is based on data that shows what works, and I think we should say two things about that. As defense attorneys we can assist in reaching evidence based outcomes that protect public safety and advance efficiencies by working on the sentencing aspects of that. There is a real important function that defense attorneys can play there. Then somewhere, maybe not in this document, but

I think we start thinking about it in this document, that we have indeed built a system of evidence based practice. At least we can argue that based on our quality assurance programs and we ought to start touting that. I don't think it will be very long before we will be one of the agencies listed. I think we could get brownie points before that then - I think it is page 48 - again, I would suggest those system contributions somehow be placed upfront. I think a lot of people will be interested. Then I know I always overestimate the institutional of memory of political bodies. Either there is memory decay or there are new people. I don't know if BRAC is in the memory of other people as much as it is in ours. I would suggest on page 48 under the public defense services account that the last sentence, "If counsel is not available the cases will be dismissed or held in abeyance." I would make that a little more colorful. I would catch the eye again if someone has made it all the way back here, about how the system will come to a halt and prosecutions will stop. Remind people of that more than we do. This is an excellent job by the way. It is supposed to be a neutral kind of budget but if we can ingeniously add those points I think it would help us somewhat in the coming session.

50:09 S. McCrea

I agree.

50:14 C. Lazenby

Well, we have learned some lessons from the BRAC right? That was really the most detailed lesson that we got in terms of the impact of the lack of defense on the system. That carried us along for awhile, institutionally, in terms of the memory of the folks that operate out of this building. I think you are wise, especially given the gaping hole that we are looking at in the budget, to sort of be able to provide a good faith reminder to the legislature about those lessons so that they don't have to learn them all over again.

50:48 P. Ozanne

Your guess, Chip, is better than mine. My guess is that a fair number of legislators during BRAC didn't really understand what happened. It never hurts to remind them.

51:02 C. Lazenby

That is true. I think it did certainly have an impact.

51:07 P. Ozanne

We need to continue to play it.

51:09 C. Lazenby

I saw a process and it seemed to me that several sessions after that we sort of had this effect where I could feel the legislature kind of going, "We have to fund that. We don't quite know why, but we know we have to." I think there were some very concrete things that came out in the BRAC and what the system suffered and what they had to do to recover and how expensive it was to recover from it. You pay now or you pay twice as much later. It is a timely message and I agree with you.

51:45 P. Ozanne

By the way, I was thinking too, and we are going to talk about early disposition programs later, but I think you ought to throw that in there somehow. That we have developed a procedure to facilitate the early disposition programs and mention that too. We are here to promote good policy.

52:08 I. Swenson

I think in the past we have generally included that kind of information in our budget presentation.

52:20 P. Ozanne

It probably won't have any effect on most folks, but maybe there is some ambitious member who actually reads everything.

52:34 Chair Ellis

Any other comments?

52:35 J. Potter

A far less global issue on page 12 of 16 when you are talking about the customer service that you are very proud of and should be. In number six what needs to be done is you mentioned that the agency's 2010 results show that 93% of the respondents now rate the Availability of Information as good or excellent compared to last year's 89%. Last year you revamped your website and information is better

organized. At some point we can declare victory can't we? At some point there is no cost benefit here. The agency will continue to make improvements. The agency will continue to maintain. If I were a funder, I might say, "Okay, you revamped your website and picked up four points. I am not sure I want to spend a whole bunch more money on improving this when you already have an A rating." Minor point.

53:46 K. Aylward

I think the reason that we would continue is not for the rating, it is the fact that it makes our jobs easier. If we can get the information out there then people don't make mistakes. They don't bill incorrectly. They understand the payment policy. There is no bad feeling when we dock someone's bill and say we can't pay for that. We want people to understand how we work because it makes our lives easier.

54:08 J. Potter

I understand, but my point is you are already there. You have got a 93%. There are going to be some folks who will never get it. Do you want to chase them throwing a bunch of money trying to get them to understand?

54:25 K. Aylward

Okay.

54:27 J. Potter

I suppose it is only on my mind because of the cost of website development. Even within OCDLA we are constantly expanding, updating and making our website better. But at some point we have to say, "We are good enough. In a cost benefit world that is good enough." There will always be folks who won't get it.

54:52 Hon. Elizabeth
Welch

I want to go back to Peter and Chip's comments about what happens when there aren't lawyers for people. Is there in the annals of this organization a fairly in depth description of what happened, what actually happened in terms of backlog and cases that had to be dismissed later on and all the things that come from delay? It seems to me that that ought to be a part of this in a paragraph or two that says this is what happened.

55:32 K. Aylward

We had a lot of stuff that we wrote in advance of the BRAC sort of saying, "We are warning you." There is less after that where we did a wrap up and said what really happened. There is stuff in our old budget binders shortly after that.

55:50 Chair Ellis

My memory is pretty good. I remember the hearing where Peter brought in DAs and law enforcement and sheriffs and the like. They gave very powerful testimony. We can capture a little of that and remind people three sessions later that the system came to our defense because they recognized without us they can't function. There was just great testimony.

56:31 I. Swenson

We do have some interesting quotes from that period of time too, including one from Police Chief Kroeker in Portland about, "If you come to court and ask for an attorney we have to tell you we don't have any and you can go home. Enjoy!"

56:47 Chair Ellis

I remember Mike Schrunk giving very good testimony.

56:52 J. Potter

If you could capture KATU, or whoever the TV station was that showed the guy with Multnomah County doors rising up and the guy scurrying underneath it. These are folks running away from jail legally.

57:07 C. Lazenby

That was actually Fred Pearce visually demonstrating – the federal court ordered him to reduce the prison population. But your point is well taken.

57:22 P. Ozanne

You will do this I'm sure, Ingrid, Kathryn, but assuming maybe it is a separate document because we have talked about a lot of good ideas that I hear. On the sentencing and evidence practices, again, you will want to include the major impact of a well funded juvenile system on health and families in the state and avoidance of excess foster care which is a big issue in Oregon. I think reminding people of those ripple effects and positive ones would be good.

57:58 Chair Ellis And the system costs when you have an inadequate lawyer. It is a lot of money to go out, reverse, and redo.

58:12 I. Swenson I know we don't have another Commission meeting before we want to submit this document. We can circulate our thoughts to you in writing and maybe what we could do is tell you which pieces we would propose to put into this document and which we would like to save for our budget presentation. There is a difference. One is more of an advocacy situation.

58:37 Chair Ellis What is required? Do you need a vote by us to approve a text?

58:46 K. Aylward I need a signature on a piece of paper from you. That is all I actually need.

58:50 Chair Ellis We can work together on that. Here is what I would do. I am happy to sign it based on the discussion and leave it with you. But before you attach it send me the final and you and I can talk. I am okay with that.

59:14 P. Ozanne So am I. I know you will all use your judgment about what to put in and how to say it.

59:22 Chair Ellis Any other comments. Kathryn, thanks. This is obviously an important document.

Agenda Item No. 4 Amendment to Eligibility Standards

59:41 Chair Ellis Kathryn you are still up. The eligibility standards. I remember about three meetings ago we had a very hot debate on this subject.

59:49 K. Aylward Like many things, you think it is going to be easy and then you start looking at it. I had hoped to have something really, really simple to lead into this. What we are talking about is the amount of money that if you have that amount and are charged with this kind of offense, then the Application Contribution Program - the verifier - says, "No, you have enough money to go hire an attorney by yourself." Those are the figures that we are looking at. The issue is that they haven't been adjusted since 1994 and we didn't want to suddenly make a big adjustment so that more people would qualify for court appointed attorneys when we don't have the money to open those gates any wider.

1:00:47 J. Stevens I am not sure I am seeing the piece of paper. It is this?

1:00:50 K. Aylward Yes. What we are trying to do is increase them enough so that we are only capturing the people who are initially disqualified from court appointed counsel but then come to court and say, "Your Honor, I couldn't find an attorney who would take my case for \$500." The judge says, "Nobody would so I am going to appoint counsel for you." So what we are hoping is that we are not impacting the number of people who qualify, we are simply making it a little more realistic and not causing them to be disqualified at first, or found ineligible at first, and then coming back and ultimately being appointed counsel. Part of the problem that I ran into is the disparity from county to county, and as we discussed, the methodology for coming up with those numbers was, in my view, not sound. So although there are discrepancies between, "Does a Portland lawyer charge more or less than a Grant County lawyer?" Well, it depends. If there is only one lawyer in Grant County and he tells you it is X amount then that is what he can get away with because he is the only lawyer in town. The question is, are there differences? Yeah there probably are. Is it worth trying to measure them? I don't think so because even in calling around to different attorneys you will get all different kinds of rates even in one location. In trying to come up with one statewide figure, the problem is that there was already so much disparity that let's say in one county a case type was \$7,500 and in another county it was \$3,500. If you put the \$7,500 up to \$10,000 you have tripled the value for the other county. It was really difficult to not make too much of an impact but to come up

with something that would work and be simplified. The breakdown by categories is less detailed. The current system that the verifiers use has a different dollar amount for almost every case type. Sometimes they are the same dollar amount and sometimes they are different by \$50 dollars. It just seemed easier to say misdemeanors, other than those we have specified, are \$1,000. I don't care if it is a Class A, Class B, Class C, it is \$1,000 if you are charged with a misdemeanor. I have shown a copy of this to the Judicial Department's administrator for the verification program. What Judicial Department would like to be able to do is be able to pick a couple of counties and use this and see if it has an impact - if something doesn't work well or it is confusing for them, or suddenly many more people are qualifying. We just want to test the water a little bit with this.

1:04:17 Hon. Elizabeth Welch

Kathryn, back in the budget narrative you show the two-prongs on page 89 and 90 of the so called application process. Having some experience with this, I am unable to relate to how this works. What does this mean? If this were adopted what does that mean relative to the two-prongs?

1:04:50 K. Aylward

The first prong is if you qualify for food stamps you are in. If you don't qualify for food stamps then we start looking at exactly how much money you do have - income and assets. The verifiers have a little work sheet that says, "Here is your income, here are your expenses. If you have child support, court ordered support, we don't want to take so much money that you then can't pay your child support, all of those things that the program says you are going to need money for. Now at the end of it how much do you have left?" If someone has \$300 in their bank account and their income and expenditures match they would be told that they could have court appointed counsel, "Because we know \$300 isn't enough to let you go out and get your own attorney we are going to appoint counsel. But, by the way, we think you can contribute a \$100 of that \$300 that is sitting there."

1:05:47 Hon. Elizabeth Welch

You are saying it is your understanding that when a verifier determines that a person's income is at or below the federal poverty level that is the end of the process. It is over and they are appointed counsel?

1:06:02 K. Aylward

Unless they have assets that would disqualify them. So you could have zero income but assets, and if those assets could be used to hire an attorney then you won't qualify.

1:06:20 Hon. Elizabeth Welch

Are you comfortable with the proposition that there is no second step if a person is under the federal poverty level?

1:06:27 K. Aylward

I may be mistaken about that.

1:06:35 Hon. Elizabeth Welch

I think it is so mushy and variable from county to county in how this process is even used in reality. I am not disagreeing with you so much as really looking for reassurance. It is not my impression that ...

1:06:50 K. Aylward

I think they do all use this - they call it the ACP calculator. It is an Excel spreadsheet where they just plug in income and assets and down at the bottom it calculates for them whether or not the person can afford the application fee and whether they qualify. Then, can they afford the application fee and how much of a contribution can they afford to make? I would be surprised if verifiers weren't using that.

1:07:22 Hon. Elizabeth

Welch What you are saying is after you qualify under the federal poverty guidelines that second step is to determine whether you still have to pay something. So you are either in or out and then the second step is do you have to –

1:07:37 K. Aylward Contribute something, yes.

1:07:39 Hon. Elizabeth Welch Toward the cost of the process.

1:07:43 K. Aylward What these figures are is pretty much, “Are you in or out?” “If I have \$10,000 in the bank and I am charged with aggravated murder do I get an attorney?” Yes, I do.

1:07:55 Hon. Elizabeth Welch Is there something in the packet here that tells us what these look like? I didn’t bring my page.

1:08:07 K. Aylward It would be in the materials from the meeting where we last discussed it.

1:08:12 Hon. Elizabeth Welch What is your sense of the difference?

1:08:12 K. Aylward My sense of the difference is that in some counties like Multnomah, let’s say, it was \$5,000 for a case type and now it is \$6,000. What are the chances that somebody had \$5,002 in their bank account and therefore did not get counsel and now they would? It is pretty narrow. For another county that figure might have been \$3,500, so now it is nearly double for this case type. Most of the verifiers have assured us that it is pretty much in or out and most people are in. The reason you are out committing crimes – there is a correlation that people who have a lot of money don’t go steal things.

1:09:07 Chair Ellis I am very uncomfortable with us saying let’s experiment in some counties but not in others. I would have a hard time explaining to the individual accused in one county why he or she is being treated differently than in another county. I feel like there is an equal protection issue lurking.

1:09:37 K. Aylward That happens now. One of the verifiers said, “Oh, thank goodness it will be a statewide system because we have clients now in Klamath and Lake and they are charged in Klamath with one case and charged in Lake with another case. In one county they are deemed indigent and in another they are not. Here is this person saying ...

1:09:58 Chair Ellis I think that is a real problem. If your question to us is, “Are we okay with dipping our toe in a few counties but not other counties,” I have a real problem with that.

1:10:16 I. Swenson Mr. Chair, I think one thing to keep in mind is that the ultimate question remains the same regardless of which set of figures you are using, that is, “Can this person afford to hire counsel or can’t they?” The judges make that decision considering all this information.

1:10:39 Chair Ellis I remember three meetings ago when we discussed this. You showed a passage that we had the responsibility here. I am just very uncomfortable doing that other than on a uniform basis.

1:10:57 P. Ozanne To use the term Kathryn sometimes employs, this is creeping me out. This is not at all a criticism. It is more like you are facing a perfect dilemma in the sense that we don’t want to open the floodgates at least bureaucratically. Are we shooting ourselves in the foot to really endorse numbers that are used in the most populous parts of the state, therefore where the most people are? It is not at all realistic. Let’s just set aside the notion that we are creating an artificial structure that will lead to the denial of a constitutional right because we are not really being realistic in terms of

the numbers. In some ways maybe I am contradicting Barnes, but I'm just thinking out loud which is dangerous. But the answer may be to acknowledge that this instrument isn't really used very much, at least by judges, and maybe we should push it up to come closer to market rates. Then if that is true, and this is maybe where I conflict with Barnes, it seems to me there is probably a rural or regional rate and then there is an urban rate. I would, I think, try to regionalize or at least want to think about it. Six thousand dollars for attempted murder in Portland? I don't think I would be lucky enough to find somebody who does that. I appreciate you are sitting here struggling with this. I am sitting here suddenly seeing the complications. Then there is the whole thing of surveys. If we take surveys of attorneys there are hungry attorneys and then there are attorneys who know what a good case is. I am almost thinking that if we really do dig deeper into this there is a recognized way to establish certain standards that isn't survey research. Jim Hennings had a name for it something like the "Omega process" [Delphi method]. It is where you gather together a panel of experienced professionals who then tell you what it takes.

1:13:54 K. Aylward

I guess what I am hearing from you is that you think these rates are still too low and the first reaction from every attorney who looked at it was, "Oh my god, the rates are still ridiculous low. If you are going to fix it, why not just fix it?" But I am thinking we have people doing this work under contract for far less than these amounts. There are people out there willing to do it. Now maybe they do it under contract because they have a guaranteed income. They have a lot of cases and they know that some will be easy and some will be hard, so the average cost can be lower. But even hourly paid attorneys that are out there – the private bar cases - and some of these charge at \$45 an hour, the total amount they billed on the case doesn't come up to these numbers. I don't know. The other thing that happens is you go into an attorney's office and they will say, "It will be \$15,000." The person says, "Well, I have six and the court won't give me an attorney." It wouldn't surprise me if the attorney said, "We'll start with the six and see how it goes." Then if the case goes to trial or takes more time, the attorney says, "Well, my client is indigent because now they have no money. They gave me their last \$6,000. Go and see if you will qualify now." They do and then the attorney says, "Well, I have worked on it already, shall I just keep it?" I don't know. I don't think these are impossibly low. I did call people and said, "I have been charged with drunk driving. What is the least you will charge me? Oh, \$500." What will I get for that? I don't know. Jail time? The other thing that happens and I know that people don't like it when I say it, but this is real world stuff. If you push someone out the door and say, "You can get your own attorney and they go to the attorney and it is more than what they actually have they go to their friends and relatives or they sell something. They end up coming up with the money. It is good to have a little push back. Ultimately, they can come back to court and say they couldn't do it. "I have no friends and my relatives are all poor too. I tried and called two attorneys. This isn't enough money." And then the court will give them counsel. We don't want it to be too easy.

1:16:43 P. Ozanne

Are we shooting ourselves in the foot to look at these rates? If it ever got to a legislator that we are talking about raises in salary, they could look at these rates and say, "Look at how cheaply this can be done." Do you take that seriously as a risk or is it too academic? We are cheapening our own services by this...

1:17:07 K. Aylward

These are three times what we pay.

1:17:15 P. Ozanne

The problem is we rely on volume and triage, which is again something we don't like to admit.

1:17:27 C. Lazenby

These numbers that are on this sheet are get-in-the-door numbers. They are not an all included sort of thing. It is not like \$1,200 for a DUII and that includes trial, or does it?

1:17:44 K. Aylward

It is all inclusive.

- 1:17:47 C. Lazenby There are providers shaking their heads behind you so maybe there is an alternate view from the streets.
- 1:17:54 G. Hazarabedian Well, I have been in private practice and I have been in public defense. In public defense you have a steady paycheck. You have a good benefit package and you are not charging by the case. In private practice you need to charge a real economic cost of what it takes to do that case and that includes your overhead and all sorts of things. The numbers I have seen on these sheets over the years are all far below what I would have charged in private practice. I was in a rural county and not the most expensive lawyer in that county. That is all I would say.
- 1:18:22 C. Lazenby That is what I find unrealistic. If I am charged with a death penalty case that is \$50,000 to an attorney (inaudible).
- 1:18:44 S. McCrea I have three observations. The first is to echo you, Barnes. These numbers make me really, really uncomfortable. The second is I understand that we have a double charge as the Commission. Part of it is to try to contain costs and I recognize that. But part of it is also to promote quality. My concern is – I might do a diversion for \$600 if it was a DUI. Manslaughter and murder is one of the problems, and this was the third thing I was going to get to, is when a person is charged often they are not charged with just one thing. It is not just sex abuse I but it might be four counts of sex abuse in the first degree and one count of rape, then a bunch of counts of sex abuse in addition. Then what do we do? Are we going to take the highest level charge, or are we going to aggregate them and say the person has to have this amount of money in order to qualify? I am concerned that this promotes cost containment over quality. I am concerned that it doesn't reflect a real world situation with lawyers like me who just do criminal cases. I will say in favor of this - or at least I recognize that the attorney fee schedule doesn't take into consideration that a privately retained attorney might be able to come to you and get money for investigation and money for non-routine expenses for experts and that sort of thing, because at that point they have taken the client's money and there isn't money for the investigator. But I would be concerned in a real world situation, I wouldn't take an intentional felony murder for \$30,000 because, number one, I can't do it for that with what it would take, and number two, I would be scared to death that once that money is used up the court is not going to let me out. The court is going to say, "You took the case, Ms. McCrea, you are the attorney. You knew what you were getting into. You finish it." Then I am in the worst of all possible worlds. I am with you, Judge Welch. I feel like my head is going to explode. This is not a judgment on you at all Kathryn. This is a very, very tough for you guys and it is very, very tough for us. I don't claim to have any good answers for it, but I am really bothered by it.
- 1:21:31 K. Aylward Can I tell you what I imagined happening? The federal guidelines are updated in October of every year. Those are distributed to the verifiers and then it is like, "Here are your numbers for this year." I imagined this privately hired attorney fee schedule going out annually at the same time as the update with incremental changes. I just think that politically to make a decision now, in the worst economic times the state has had, to say we are just going to, like that, make a decision and your caseload is going to jump up, I just think that that would be a mistake. If we can go a little bit more toward reality and see that it didn't cause a problem - basically I chickened out. I was going to double them and I thought, "I can't do that. What if this brings in suddenly many, many more cases?"
- 1:22:29 Chair Ellis What if we approved this but let's say for six months? We will revisit it six months from now and see what we have learned.
- 1:22:41 J. Stevens Isn't that basically the idea of testing in two counties?

- 1:22:45 Hon. Elizabeth Welch
The issue is what is it you are testing and what is it you want to know back from the exercise? That would be the real key.
- 1:22:51 K. Aylward
Well, it would be a lot of work but we could ask a verifier to, say, do the old system, do the new system and keep hash marks of how many people made it under this system that didn't make it under that. There is no data. No one has kept any data on that. Verifiers are busy. They do a lot on the fly. It is kind of a lot to ask. This was within my comfort zone and isn't going to cause any big catastrophe. You are just going to slip it in. We will see that it won't impact caseload and then next year we are going to slip it up a little more, and a little more, until you get to what many people would say is a realistic amount.
- 1:23:47 P. Ozanne
No criticism intended, but do we know what will happen if we crank this up even more given the practice? I think a significant number of courts pretty much err on the side of indigency. Are you convinced that there is a floodgate potential here? How much difference does a change in the schedule really make?
- 1:25:18 K. Aylward
It is probably not much. The difference here I don't think is any. I am comfortable that this will not have a financial impact on our expenditures.
- 1:24:30 P. Ozanne
But if we just cranked it up, tripled or quadrupled all these numbers then how significant would it be?
- 1:24:40 K. Aylward
Our statistics are that 55% of the people charged with misdemeanors get court appointed counsel. Now whether the other 45% ask and are denied or just don't ask, that is the number of cases. For felonies about 80% have court appointed counsel. I don't know – those statistics were in the materials from the last meeting. I don't know, maybe five to 10% are denied counsel but five to 10% more cases is \$20 million dollars.
- 1:25:21 Hon. Elizabeth Welch
I have another question. I have a lot of questions and you just need to end this when it is time to end it. Do you know how many courts actually have verifiers working rather than the judges continuing to make these decisions?
- 1:25:41 K. Aylward
I think every court has either full-time verifiers or they have someone who does that little piece of it. All the counties are collecting application fees and contribution amounts, so there is a person doing that.
- 1:25:57 Hon. Elizabeth Welch
What about in juvenile court? Can you say the same thing because I know there is no verifier in some of the counties? That is another whole topic and something I would like to talk about a little bit today. This is very much apples and oranges - the criminal system and the juvenile system. If I could just ask a couple of questions about juvenile. In your notes down below the chart where you get down to privately hired attorney's fees and you have juvenile delinquency and then you have juvenile dependency. I am curious if there are enough lawyers in Oregon who have accepted the juvenile dependency cases for private representation to generalize about the cost. As a person who heard those cases for very, very many years I cannot imagine what the multiplier is that would get it to \$2,000. Do you understand what I am saying? Some of those cases go on, and on, and on. The number of retained lawyers there is microscopic and that is probably exaggerating to call it microscopic. I guess one of the things I am hoping we can talk about, maybe some other time, is to pull at least some of the stuff in juvenile court out of the system altogether - the application process, for instance. In some of the stuff that Ingrid and I have been working on, this issue about waiving counsel comes up. There are judges out there who say, "This kid doesn't qualify for an attorney." The parents may have refused to fill out the form, which is not an unusual event, but in any event he doesn't qualify. I am not talking about delinquency cases now. We don't know what happens there. We

know that when we talk to the judges and we talk to them in writing at this point about their practices, everybody says, "Everything is fine, by the way. Everything is just the way it is supposed to be," and that is part of the issue in determining where these outrageous numbers in some of the courts come from - the percentage of kids that "waive" counsel - it is part of a very complicated process. Judges mention it. They don't mention it uniformly. You correct me if I misstate this but they mention it as a consideration in deciding whether or not the kid needs a lawyer. Then on the dependency side I wonder if there is a way for us to find out how much money anybody has collected from anybody in contribution fees, for a child to get an attorney or for parents to get an attorney in a dependency or termination case. Maybe we could just save the money involved in having someone fuss with that because it is has got to be so diminutive as to be ridiculous.

- 1:29:34 K. Aylward Those figures are available but I think the \$20 application fee isn't a tough threshold. The verifiers say that if they have money for a pack of cigarettes then you know they have \$20 bucks. That was a quote from somebody and I hadn't really thought about it that way, so I think they are collecting the application fee whether or not someone can afford to contribute. I can separate out those collections.
- 1:30:22 Chair Ellis If we are going to do anything do we need to have a motion to approve or something?
- 1:30:32 K. Aylward Yes, or you could just say see if judicial has a verifier who is willing to double track. There is no urgency to doing this today if you want something different.
- 1:30:58 Chair Ellis Well, I feel some urgency because three meetings ago we learned that the current system is just laughable. It is our responsibility to try and set standards. I don't know how the others are coming out. I would like to approve this but ask that you come back to us six months from now. If you can persuade someone to keep track of it that would help. We will review it then based on what we have learned.
- 1:31:34 J. Stevens I am still back on the testing in two counties. I don't know why that is such an odd idea. They do it with all sorts of programs. If you are talking about something that you are not sure what the impact will be, it seems like a two county test is a heck of a good way to find out if we don't make it 10 years long. It then becomes a pilot program in effect.
- 1:32:03 I. Swenson What Kathryn is suggesting is that we ask the verifier in one or maybe more counties to run both of these and just tell us what would have happened if you were using the new schedule. It doesn't really affect the decision in any particular case. We would get this kind of information without it affecting anything.
- 1:32:27 Hon. Elizabeth Welch I think that is a great idea. I think we should do that. I may have trouble convincing someone to do that but ...
- 1:32:37 P. Ozanne I guess I trust Kathryn's judgment that it probably won't make a difference. You have done an admiral job of trying to find that sweet spot. I know about the real world. I think that maybe some people share that we are endorsing the cost of the service that we deliver. "Laughable," I think is still good at this level.
- 1:33:09 Chair Ellis You know I listen to the fear of floodgates. I said to myself if that were really true, and I frankly don't think it is, then there are a lot of people being denied a pretty important right. If it was just me I would say just go forward with this for six months. I don't know if anyone else...
- 1:33:28 S. McCrea This is a proposal to let the verifiers continue to use the old chart, but you are going to ask them to look at the new proposed chart to see what the results would be?

1:33:45 K. Aylward No. The proposal is that you say to me, "Issue this right now and have the verifiers get right on it."

1:34:02 Chair Ellis Why can't we approve this and have them implement it and see if you can persuade one or two of them to compare how this is running versus how the old would have run.

1:34:12 S. McCrea Okay, but if the point is because we are concerned about the floodgates, then it seems like it would make more sense to have something that at least doubles this and have them run that as the test to see whether, in fact, they would be approving so many more people that it becomes a concern for us. Otherwise we are just using something that is still not realistic. That is what bothers me.

1:34:46 Chair Ellis You could do a composite. You could adopt this, and this is a lot of work for the verifiers and they may not be too happy, but ask them to track what would have happened if these numbers were doubled. I don't know if it is like that and what would have happened under the old system.

1:35:09 J. Stevens So they are in effect keeping track of three things?

1:35:11 Chair Ellis Correct.

1:35:09 J. Stevens And the verifiers don't work for us.

1:35:14 K. Aylward That is correct.

1:35:17 J. Stevens There is no way of forcing them to do that.

1:35:20 K. Aylward This is what I tried to coax them into doing. I said, "If you guys don't like the fact that these haven't been updated and you want the Commission to update them, we can't do that blind. We need to have some sense so will you please keep track statistically." This was two years ago and they had developed some ways of tracking their statistics and I keep saying, "Will you please add in there the amount that the person had so that we know did they just miss it or did they easily qualify." I couldn't get them to even include that as something to track.

1:35:59 P. Ozanne What if we sent, and I don't know if anybody else is interested, but what if we sent some resources to do it. Two counties and I'll just pull a number out of the air, \$50,000, and give \$25,000 to each county. Would they do it then? Would they do this survey thing?

1:36:17 Chair Ellis That is a little confusing. We would be sending money to pay an individual who is employed by the court?

1:36:33 P. Ozanne How about if we retained somebody ourselves to do it?

1:36:35 Chair Ellis These are part-time positions, I think, aren't they?

1:36:40 K. Aylward Not necessarily. In larger counties it is full-time and you will have multiple verifiers.

1:36::51 Chair Ellis We need a motion to move this forward.

1:36:51 C. Lazenby Peter, are you proposing sort of an audit type thing?

1:36:57 P. Ozanne I am struggling for a way to get some resources to do this function. I guess maybe it is unorthodox, but if you give the court \$25,000 they can relieve somebody of the duties they are doing now to spend more time as the verifier. I don't quite see the problem but it is certainly unorthodox. I think Shaun is onto something. It is not

going to make a difference. Kathryn's judgment is right. This is going to tell us whether there is a floodgate out there.

1:37:39 Chair Ellis But it is at least an incremental step away from frankly a laughable, current system.

1:37:50 C. Lazenby Are you convinced that the numbers, Shaun, are more realistic if you were to double every number on that sheet? More realistic or closer to a real number?

1:37:57 S. McCrea I think they are closer to a real number. Well, aggravated murder at \$100,000 is going to be at least closer.

1:38:13 Chair Ellis You are never going to have an actual case of an aggravated murder under this system.

1:38:23 S. McCrea You are right.

1:38:23 C. Lazenby We just take the top tier off and drop down. Is the rest of the schedule more realistic? Then the geographic disparity bothers me too. I have a feeling those numbers are different in Lane County and Josephine County than they are in Washington County and Multnomah County. How do you just throw some numbers out there and say we are going to at least examine or try to move toward a statewide eligibility system when the economies are different? I am assuming they are.

1:39:07 Chair Ellis Is there a motion? I will make one if no one else will.

1:39:12 K. Aylward Could I just make a suggestion? How about this? I could ask the verifier, and this could be easy if they are using that work sheet, whenever they deny a person, which is not as often as when they approve, whenever there is a denial because someone has assets to get their attorney, they could just click a button and email that to our office. If we get all of the denials and we see the worksheet, then we can look at it ourselves and see they had \$5,001 or if all of these denials are because they are millionaires. Then our office can compile some actual information. Then we can put these right up to that ceiling where our sampling data says it would make or break whether counsel is appointed. That way we will know it is not going to cost us anything and we can make these rates as high as will not cost us anything. So back to the drawing board?

1:40:12 C. Lazenby That makes more sense to me. Regardless of what the motion was I wasn't going to support it because I don't think we have a handle yet on how to approach this problem. You are right. It is the denials and the marginal denial folks that we need to take a look at to get a sense of how big that population is, what the criteria are - whether it is uniform - where the disparities are throughout the state - and then figure out whether there is something for us to do. If it has an impact on our caseload there are different options that are out there. My ancient sense from when I was doing court appointed work is just what you said. About 55% of the people get a court appointed attorney. They get through that piece whether you are going to get an attorney and that piece about whether you can contribute or not. If you don't have to pay the \$100 bucks up front to get the lawyer it is assessed later on and generally these folks fold it into every fee or waive it or something. There is a small group of folks who bounce around in there. I don't have a number but out of that 45%, they go get private attorneys and maybe one or two percent of those people bounce back and forth. They show up *pro se*, or they show up later on saying, "I tried to get a lawyer." "had a private lawyer and paid a bunch of money and we didn't get along. Now I really am broke," and they get a court appointed lawyer later on in the process. They are really a small impact on the system. Once you get that arrest and into court and get a court appointed lawyer, it all kind of washes away and those questions are gone. I think you are going to find that it is *de minimus* when you start collecting the data. I would like to see how big a problem we have before we start prescribing solutions.

1:42:08 Chair Ellis Okay. I am going to make my motion because I do feel embarrassed by the current system. I felt it three meetings ago when it was described. I think this is an incremental step toward a more commensurate level. I would move that we direct the verifiers to use this new set of data and that we ask Kathryn to report back to us six months from now as to what she finds is the impact of that.

1:42:51 S. McCrea Mr. Chair, are you incorporating in your motion the suggestion that Kathryn made that she would ask the verifiers to let her office know if someone is denied?

1:43:00 Chair Ellis Yes. I would include that.

1:43:07 P. Ozanne Just a point of order but to further your purpose, Barnes, don't you have to hand the chair over to the vice chair to make that motion.

1:43:14 Chair Ellis I have been begging one of you to make it and nobody will do it. I don't know that there is a rule that says I can't, but if I can't it is apparently dying for lack of a second.

1:43:35 S. McCrea We were still doing the motion. I was asking for a point of clarification if it was including what Kathryn had suggested. Then Peter interjected so to the extent that it needs to be made by the vice chair, I will adopt that motion with the addition and the clarification. I will say for the purpose of the record this is done essentially under protest. I agree with your analysis, Barnes, of where things stand and the status quo is completely unacceptable. This is at least something slightly more...

1:44:10 J. Potter So we have a motion and a second. Do we now have discussion?

1:44:14 Chair Ellis Shaun made the motion and I seconded it. I think I am permitted to do that. Any further discussion?

1:44:21 Hon. Elizabeth Welch Can we have a competing motion?

1:44:23 Chair Ellis No. We have to vote on the pending motion.

1:44:29 I. Swenson Could we just clarify, Mr. Chair, what information you would want to see in six months?

1:44:35 Chair Ellis The information is whenever an applicant is denied counsel, send us ...

1:44:46 K. Aylward Right, but it won't work if you adopt this. Then we would have to look at all of them. If you don't adopt this and they send me the number that they are denying I will look at them and see if that makes a difference. If you adopt this then nobody is denied so they won't send us anything.

1:45:06 Chair Ellis There are still going to be a lot of people denied. A misdemeanor on this is \$1,000. There will be a lot of people denied.

1:45:13 K. Aylward We won't be measuring the impact of this change.

1:45:17 Chair Ellis No. That is true. But this change is so incremental. I just don't want to go another six months with the current system.

1:45:32 J. Potter I remain slightly bothered.

1:45:31 S. McCrea Just slightly?

1:45:32 J. Potter Just bothered that Commissioners on either side of me are going to have their heads explode. I am guess that I am bothered that we have staff telling us that, if I can paraphrase, "I essentially chickened out. I had numbers that were more realistic and

I backed off those numbers.” It seems like we should take those staff numbers, those initial numbers that were substantiated and put that in and that should be our chart. That would replace this and that motion then would stand.

- 1:46:28 Chair Ellis How are the exploding heads doing here?
- 1:46:30 Hon. Elizabeth Welch That was the competing motion as far as I was concerned.
- 1:46:35 J. Stevens Do you have real numbers though?
- 1:46:38 K. Aylward Originally what I was planning to do is to say right or wrong these numbers were valid in 1994. The Consumer Price Index has gone up 50% and I will just take these numbers and increase them 50%, but that is when I ran into the disparity between counties. If I increased the highest one 50% and wanted to make them all the same, then the lowest one would have been quadrupled and that is where I kind of ran into trouble. So most of these are either 20, 30, or 50% more than what they were in the majority of the counties.
- 1:47:22 J. Stevens Were the numbers that you backed off from real numbers or were they just your best guess at that point?
- 1:47:28 K. Aylward They were existing numbers plus 50%. If it had been a \$1,000 it would go to \$1,500.
- 1:47:40 J. Stevens You think that is realistic, or is that again a guess?
- 1:47:45 K. Aylward It is based just on the consumer price index change. If in 1994 an attorney said they would do that case for \$500, that same \$500 today would take \$750 just based on inflation.
- 1:48:05 Chair Ellis Alright. There is a motion pending that has been seconded. Any further discussion on the motion?
- 1:48:08 S. McCrea Was your question answered?
- 1:48:10 J. Potter No.
- 1:48:17 Chair Ellis If this one goes down you can make yours.
- 1:48:17 J. Potter I am not making a motion. I am just trying to get a sense if this were to go down, what do these numbers look like under your original before you chickened out deal?
- 1:48:29 K. Aylward For example, the Assault I and II at \$6,000 would have been \$7,500. Because it was \$5,000 before in a lot of counties and I thought let’s make it \$7,500. But there was one county in which it was \$2,500 and tripling that didn’t make sense to me.
- 1:49:01 J. Potter So that is one example. Is that ratio generally the case throughout the chart under your original scheme? That is \$1,500 more on \$6,000?
- 1:49:10 K. Aylward No because we are dealing with 30 different counties or regions and 50 different case types, and I am basically trying to percolate them into one region and much fewer case types. It is very difficult. Assault I and Assault II used to have different rates under the old scheme. I tried to pick the Assault I rate and put it up and include Assault II. The change for Assault Two is significant.
- 1:49:51 J. Potter So you ended up with \$6,000 on the chart that you have and \$7,500 on the chart that you don’t have. On Assault III, and IV, Robbery III, you have \$3,000. What would have been the number on the chart we don’t have?

1:50:09 K. Aylward Let's see. The most common rate – it varies. It probably would have been \$3,700. Twenty-five hundred is typical, so if I had gone 50% more it would have been \$3,750.

1:50:38 J. Potter I guess, Mr. Chair, I would be more comfortable seeing numbers that reflected the research that she actually did if it got us closer to what she thought was market value.

1:50:53 P. Ozanne Is it really research? It is just coming out with a new number out of the air isn't it?

1:51:02 J. Stevens Well, it is more than just out of the air but it makes a lot of assumptions about whether people's time has been affected by the consumer price index.

1:51:18 P. Ozanne But the original numbers we are building on...

1:51:20 J. Potter Right. The original numbers might not have been real if you are just applying consumer index to it. That is not research and I understand that. Clearly it was higher than this guess. What I am working on is that she backed off because she was concerned that it might have an impact. I also know that there are folks out there who are getting a raw deal. I think you are still getting a raw deal under this. If we are going to move incrementally, I would rather move incrementally to her original thought.

1:52:11 Chair Ellis We don't have all of those numbers.

1:52:20 S. McCrea I would make this suggestion, since it is noon, that we take a break now so everybody can think about this a little bit.

1:52:38 Chair Ellis Why don't we take 15 minutes and I am going to suggest that we get our lunches and continue the meeting simultaneously.

(Break)

0:10 Chair Ellis Anything you want to add to where we are?

0:13 J. Potter I don't think I have anything to add to what I said. I believe my position would be that we have to figure out a way to get closer to reality and I don't think that what we have in front of us gets us there. I will concede that it is an incremental step but I am not sure that we are well served by just taking a small incremental step.

0:38 J. Stevens Yeah. It is sort of along the same lines but a little bit different. Rather than doing it in two parts, I would like to have some information about what the reality really is and then go there. I don't know that six months is what you would have thought if you were going to be studying in the first place. The suggestion about having them keep track - how long do you think that should go on?

1:07 K. Aylward I would say only a month.

1:10 J. Stevens I would be much more comfortable in coming up with a real number and going there all at once, than picking Kathryn's excellent but still just a best guess and then having to adjust later again. It means I am going to vote no at this point.

1:35 J. Potter How would we go about doing that best? We could certainly do a survey of all ...

1:42 J. Stevens I liked Kathryn's idea of keeping track of who would have been rejected.

1:49 J. Potter But that still wouldn't get you to a specific number. It would just tell you that based on a number you would be rejected.

1:57 K. Aylward No. They provide the dollar amount. The worksheets that the verifiers use show this person has \$5,001 in assets. Then I would know that going to six or going to 12

doesn't make a difference. That person would get an attorney in either the \$6,000 or \$12,000 range.

- 2:19 J. Stevens Do you end up with the top number at that point?
- 2:22 K. Aylward No. Let's say of the sample everybody had \$5,001. I could put a \$100,000 on that case and it wouldn't impact us. The difference too is, as I was saying at the break, what an attorney is thinking is, "If I am going to set essentially a flat fee, it is going to have to be high enough to account for the fact that this case might go to trial, take a long time or I might get stuck on it." But the hourly attorneys don't have the benefit of a contract and a steady paycheck. When the people on the private bar list take a case at \$45 an hour and then bill us at the end of the case, very rarely are the figures as high as this. I don't know that you get to a high end, an actually realistic number. There is a huge difference. If I go to Shaun McCrea I am going to expect to pay a lot and I am going to get a lot for it. If I go to the \$45 an hour person I might say, "Spend as few hours as possible because I don't have money." There is a huge range in the purchase of services and the quality of services.
- 3:43 J. Stevens If you get the rejections you will know by looking at them whether it was \$5,001 for the average, or \$30,001 for the average.
- 3:58 K. Aylward Right, and then we could look at the high end things and say, "Look, \$30,000 is what this person had and these are the charges and then actually sort of do a survey on that basis. Depending on where the numbers fall if everybody either has no money or a ton of money, then this is sort of arbitrary and we don't have to be exactly right. Anywhere between \$2,000 and \$20,000 and you are still going to catch the same pool of people.
- 4:29 Chair Ellis Okay, there is a motion and a second pending. Unless somebody has more they want to say, I want to call for the question. All those in favor of the motion **VOTE 1-6.** The motion failed. I think the sense of the Commission is it failed because it didn't go far enough. In October you will come back, as best you can, with more information.
- 5:04 Hon. Elizabeth Welch Can we try again? I move that we use Kathryn's numbers. The ones that she backed away from.
- 5:23 Chair Ellis If we had them in front of us that would be helpful.
- 5:30 C. Lazenby To explain my vote and contribute to the sense of the Commission the best I can, the reason for my vote is we don't have a handle on the dimensions of it. I would much rather see a sampling that lets us know the kind of the criteria that is probably being applied in different areas of the state, so that we get a sense of both how much we need to adjust these numbers and how many more people we are going to capture. That is one. Then, we need to get a better sense of what goes on around the state in terms of doing them. The State of Oregon runs into a problem in this building all the time, in the capital, around reimbursement for health care, around reimbursement for a number of other things because the rates are different in different parts of the state. It is a windfall in some areas and it is not enough in other areas because you try to impose a state standard in terms of how you do that. It results in inefficiencies and inequities.
- 6:37 J. Stevens Sometimes places where you might think that things are cheaper it turns out that they are not because they are so much harder to get, like housing in rural Wasco County is horribly expensive because there isn't any.
- 6:59 C. Lazenby You have to recognize that housing and other things in Hood River are really expensive because of the folks they have been attracting there, not to mention what is happening to the real estate in Bend.

- 7:09 J. Stevens Oh, it is cheap in Bend right now.
- 7:18 J. Potter You can design a survey that takes all those things into account. You have got survey monkey experts back there who could easily put something together and send it out to the 900 that are on your list. You could use OCDLA's list and you would come up with a fairly good representation, I think, that might be closer ...
- 7:39 J. Stevens Could I ask another question? Is it realistic to have a single – this gets to Chip's question, is it realistic to have a single sheet for the entire state? Maybe the question is what is the problem of breaking it up into regions?
- 8:02 K. Aylward I think, given my understanding of how the numbers were derived that there is so much play in them that – originally they were trying to choose the bottom 25%, so not the worst, not the cheapest attorney, not the most expensive attorney. There was so much play in that. This county was \$500 and this was \$750 when your range was \$400 to \$4,000. It seemed like, "Why are we trying to make this a finely tuned instrument when it is not?" It might as well be, "Oh, you know, we think about this much." Every single case is different. I would imagine an attorney would say, "Well, in your case it is going to be more because of the particulars of this case, let alone just the charge." As Shaun was saying what do you do if you have multiple counts, multiple charges? So I went with simplicity because specificity was a bit meaningless.
- 9:05 Chair Ellis Okay. Is there an alternate motion at this time? If not, we will move on to the next agenda item.
- 9:10 Hon. Elizabeth Welch I have one more question and it is not an alternative motion. One of the things that I thought about during the break was how much cost, not to the fund but to the system there is when someone is turned down, goes away, flutters around and makes their best efforts, doesn't do anything and comes back and gets a different judge and different situation and ends up getting a lawyer. There is delay inherent in that. There is cost to the victims. I was wondering if there was anything about the way records are kept about appointments that would allow the extraction of information about how common that is.
- 9:55 K. Aylward That information we do have. We know how often someone is denied counsel initially and then later provided counsel. What we don't know is the money amount that triggered the original denial.
- 10:11 Hon. Elizabeth Welch I think it would be useful information to have in terms of assessing what the implications are.
- 10:23 K. Aylward I think it was in the materials three months ago. It may have been a little bit cryptic, but there was a chart that showed the statistics by county of how many applied and were denied. As I said at that meeting I am not really comfortable relying on those statistics. You can see situations where it says, you know, 100 applied, 60 had this answer and 60 had that answer. You are thinking, "But only 100 applied so how could you have 60 yes and 60 no?" There are some problems with that data.
- 10:56 P. Ozanne There was a commentary to the America Bar Association Standards in the '70s and now obviously outdated, in which they concluded that the costs of attempting to determine it weren't worth it on balance because of the costs and the fact that a lot of people will actually get their own lawyers because of the perceived advantage of having a paid lawyer. So that it is really not that big of a difference. Essentially it became a political device. I don't know if that is true now.

11:36 J. Potter So, Mr. Chair, in the absence of a motion are we anticipating that you have given enough direction so that the staff can come back with a new proposal in the October meeting based on some new methodology?

11:50 Chair Ellis That is what I was trying to say. You said it very well. Let's move on if that is alright.

Agenda Item No. 5 Discussion of Service Delivery Plan for Deschutes County

11:57 Chair Ellis Item No. 5 is Deschutes County. I see Tom is here.

12:12 I. Swenson Mr. Chair, I don't have a great deal of additional information for you. I have summarized the testimony that you received at your meeting and some of the issues that were highlighted for your consideration at that meeting. The testimony again pointed to some of the concerns with the EDP program. The Chair had directed that no action be proposed on this county's plan until we had more ability to know if there were going to be changes in that program. Right now I have to report that we don't.

12:57 Chair Ellis When does the new DA come in?

12:59 I. Swenson January 16 or 17, something like that. I think it is fair to say that he has not been terribly active in advance of his taking office in terms of working with system people to prepare for that change. I don't know what the reasons are. There may be very valid ones, but at least as of the time I last spoke with court staff there had been very little contact. I am sure people will be trying to meet and talk about what changes are expected, but so far that kind of thing hasn't happened. Mr. Mazorol is pursuing this and he has spoken to Judge Sullivan about it. He felt that the judge was open to looking at any possible solutions. Our staff at OPDS did calculate the estimated cost of providing individual case rates in those EDP cases and I included that information in your material. It would have a significant fiscal impact if you were to decide the model was not satisfactory and that we wouldn't be using that model or paying for representation under those terms. However, as I also noted, we don't know what would happen to those cases if there were no EDP program. Some of them might be filed as violations. Some of them might not be filed at all. They might be processed through some other early resolution program. It is hard to say without conferring with the new district and understanding what his intentions are. The other piece, one of them, had to do with the difficulty – at least the judge's concern that they did not have an adequate number of attorneys for the most serious cases in the county. Unfortunately, both the Brennemans left the Dekalb firm right around the time of your visit and at least one of those positions has been filled with an experienced lawyer, but to my knowledge the other one has not yet.

15:17 Chair Ellis Is there a story about the two lawyers leaving, or did it just happen to work out that way?

15:20 I. Swenson There is at least one story. I don't know if Mr. Crabtree has more information. Mine is not based on personal knowledge so I don't feel comfortable discussing it. The lawyers are married.

15:47 Chair Ellis I just read two lawyers leaving and it seemed like a lot of lawyers leaving at one time. But apparently if one had a reason the other would follow. Any thoughts or comments from the Commission? Shall we wait for a reasonable period after the DA takes office and see what happens?

16:12 I. Swenson Indeed. It is certainly possible that all of the system representatives there could decide to get together sooner. I think they would let us know if they were looking at this issue. We have offered to participate in discussions if that would be helpful. If we get a resolution sooner we can certainly bring it back to you.

16:34 Chair Ellis Tom, thanks for coming. Anything you want to add to the record?

16:41 T. Crabtree I can certainly confirm what Ingrid had said. Patrick Flaherty has not engaged in conversation with other people in the criminal justice system yet. I have a good relationship with him. I extended an invitation to him to come and talk to my staff about expectations, changes in the system that he anticipates making. It was a very contentious race between him and Mr. Dugan. I think part of the reason that he has not done anything yet is – I think all of the deputies supported...

17:31 J. Stevens Fifteen out of 16.

17:33 T. Crabtree Fifteen out of 16 and the 16th was running for judicial office so he didn't feel it appropriate to endorse anyone.

17:42 C. Lazenby Who did they support, Tom?

17:44 T. Crabtree Mike Dugan. There was an ongoing debate with certain people. One of the newspapers in town, or a weekly newspaper, got

18:05 J. Stevens Well, it is more the price you pay for it now.

18:08 T. Crabtree It is twice the price I have heard. There has been a bit of animosity on both sides, I think. One of the developments that has happened that Ingrid may not even know about is the deputy district attorneys are now trying to unionize and to prevent any changes in staffing when Mr. Flaherty comes into office. I think he will have other things on his agenda at first when he takes office in January. One of the observations that Ingrid made is that they ran numbers, in Kathryn's office, on what it would cost if you had court appointed attorneys in all the EDP cases. My experience from handling that the first months of the program is there are a lot of those cases that would not have been filed if not for an EDP program. I don't think the expense would be the full amount that she suggested. I would say it is certainly going to be higher than the current rate for the EDP program. But I think a lot of those cases would disappear. Whether that is 25% or more, I have no way of knowing. One of the points that Mr. Flaherty campaigned on was that he thought there were too many cases that were filed and not enough concentration on serious cases. I think his intention would be to charge fewer cases than Dugan. We will just have to wait and see how that plays out.

20:18 Chair Ellis Thank you. Anybody?

20:18 P. Ozanne I was going to ask this of Ingrid, Tom, but you may have comments too. Is it plausible to look for a relationship between the lack of a unified docket and the need for attorneys who do serious felonies? Is there some greater demand for attorneys because you can't manage the caseload in the same way?

20:46 T. Crabtree Very definitely. We have to have attorneys in five different courtrooms, five different felony courtrooms, first thing in the morning. Because of the individual docketing there isn't a criminal court. You get spread a little thin trying to do that. I think one of the other major problems we had is, as some of you are aware, during a previous contract period when our office was paying \$26,000 less per person average pay than the DAs, we had a revolving door. The young attorneys that would normally come in and work their way up into felonies left because the pay was so low. Two of them went to work for Dugan. We didn't have the normal building up of experience into serious felony positions.

21:50 P. Ozanne Do you think, Tom, it is more difficult to cover serious felony trials with this specialized docket? Do you need more attorneys to cover the trials as well as the initial appearances?

- 22:06 T. Crabtree I don't know that that is true. It could be. The problem was that normally you had a progression and a certain rate of people leaving, moving on, but ours greatly exceeded what the historical numbers were when the pay was low and housing prices were very high; I couldn't attract serious felony qualified people to work for me so we had this gap.
- 22:39 P. Ozanne I take that point. It seems like the court is pointing out to us that they need more serious felony attorneys. I am wondering how much of that issue could be resolved by the court itself?
- 22:56 T. Crabtree Certainly a substantial percentage of that could be just by the way they handle cases and assign cases. For example, if you have a couple of cases assigned to Judge Sullivan for trial, if only one of those is going to go they don't take the second case and then say, "Oh, Judge Brady, you don't have a trial. Can you handle this one?" It just gets set over. As that happens it creates more and more delay in the system, a longer period of time to go to trial and if it is one individual attorney he can't try a case in two courtrooms so it gets set over. The other attorney that would be able to try the second case in that courtroom, ends up getting set over too. The cases last longer and it ends up taking more time and more attorney resources.
- 24:05 P. Ozanne Thank you. Mr. Chair, just a comment on the draft that I would like my colleagues on the Commission to think about. In the past I have suggested that letters from the chair to go people and there have understandably been concerns about that. I wonder about the jail problem. It is not unique to Deschutes and it is causing delays and lack of accessibility. It seems to me, just in general, we put in all this effort and work and we hope it helps, systemically. I don't think we are contributing our full value to this exercise. There are in each county a local public safety coordinating council, and it was indicated last time that it doesn't meet often, but I wonder - just for future thought - whether some of these issues, and I think the jail issue is an appropriate one, if we shouldn't cc the sheriff and the presiding judge, with a letter to the chairman of the local public safety coordinating council saying, "We have reviewed this and are interested in how the system works." This is costly to the county because of the delays. That is not making it personal. It is just trying to create an institutional mechanism.
- 25:16 Chair Ellis Your thought is a letter from somebody. I think Ingrid might be better...
- 25:26 P. Ozanne Yeah, a letter or something.
- 25:26 Chair Ellis We cover three points - the EDP, the jail, and the docketing?
- 25:38 P. Ozanne No. I think the EDP and docketing are matters for the judges. I don't think a local public safety coordinating council would talk about that. What they usually talk about is interagency things. Here we have a jail that is expensive. A Commissioner sits on the council and will be interested. We are saying we can save them money that is caused by courthouse delay and people are saying, "Give us more access to the jail as defense attorneys." That would be the issue, for example, here. I happen to direct a local public safety council that is relatively active. This would be a way to induce some more system thinking when we have spent a lot of time and effort. We are never really sure if our research is used by anyone. Here is an example where it might be.
- 26:31 Chair Ellis Would you be comfortable with that?
- 26:31 I. Swenson I would be happy to. I would want to confer with the defense lawyers first about any previous efforts that they may have made to expand access.
- 26:45 Chair Ellis It would all be written in a "We are just here to help" tone.
- 26:50 I. Swenson I would be happy to look into that.

26:52 T. Crabtree Maybe a copy to the editorial board of any local newspapers might be helpful.

27:02 Chair Ellis Okay.

Agenda Item No. 6 Best Practices for Boards & Commissioners

27:08 Chair Ellis Ingrid, the next item is the best practices for boards and commissions. I think we are supposed to do our self-assessment criteria sheet.

27:21 I. Swenson That is correct. As Kathryn indicated this is the third of our key performance measures. The expectations are listed on the attachment to your materials. Then I distributed by email yesterday, and then today in writing, my draft comments on how you have complied with each of those. You may want amend or remove particular items. It is entirely up to you. It was just for your guidance today as you decide where you are in terms of compliance.

27:58 Chair Ellis Shall we go down this one paragraph at a time and see if anyone wants to comment on Ingrid's draft. Then we grade ourselves as either a yes or a no. Executive Director's performance expectations are current.

28:26 J. Potter Yes.

28:29 S. McCrea Yes.

28:29 P. Ozanne Yes.

28:29 C. Lazenby Sure.

28:30 Chair Ellis Alright. 2. Executive Director receives annual performance feedback.

28:42 Commissioners Yes.

28:44 Chair Ellis Now Ingrid says that we held a formal feedback in February, which we did, but do not provide formal feedback annually.

28:54 I. Swenson It was two years between those events and I certainly wasn't going to remind you to do it any sooner.

29:02 J. Stevens So you are comfortable with two years?

29:00 I. Swenson I am and I think there are other ways that you provide that feedback.

29:10 Chair Ellis I would be happier if we ended the sentence with 2010.

29:21 C. Lazenby I was under the impression when we did that in February that that was the beginning of annual.

29:26 Chair Ellis It was a little look back and a little look forward, so it was annual. Everybody okay with yes on 2?

29:34 S. McCrea Yes.

29:34 Chair Ellis Alright. The agency's mission and high-level goals are current and applicable. I feel fine about that. Okay. The board reviews the Annual Performance Progress Report. To be honest, Ingrid has a done slick job of not quite answering the question. It says here that members are conscientious in their review of materials. What is it we would call the Annual Performance Progress Report?

30:15 I. Swenson It is a report that I am required by statute to prepare.

30:22 Chair Ellis Okay. That is the one so I do review that annually. Alright. So we are okay with 4?

30:27 Commissioners Yes.

30:27 Chair Ellis The board is appropriately involved in review of agency's key communications. I feel good about that. Anybody have a problem there? Okay. 6. The board is appropriately involved in policy-making activities. You bet. We are the policy makers. 7. The agency's policy option packages are aligned with their mission and goals. Okay.

31:10 S. McCrea I still think we should have a meeting in Mexico at John's place.

31:11 Chair Ellis 8. The board views all proposed budgets (likely occurs every other year).

31:20 J. Stevens Yes.

31:19 Chair Ellis 9. The board periodically reviews key financial information and audit findings. Okay? 10. The board is appropriately accounting for resources. Okay? 11. The agency adheres to accounting rules and other relevant financial controls. Well, certainly to the best of my knowledge we do. I am not quite sure what 12 means, but it says that board members act in accordance with their roles as public representatives.

32:12 J. Stevens We don't do anything to embarrass them.

32:12 Chair Ellis Try not to. 13. The board coordinates with others where responsibilities and interests overlap. I thought Ingrid's statement was good on that. Now this is the one that I wasn't sure how to answer. The board members identify and attend appropriate training sessions.

32:43 P. Ozanne I am prepared to say no. My reasoning is that I think a representative - and by the way I am not lobbying for myself, I think it should be the chair or the vice president, but it could be someone else - ought to go to national training conferences on best practices on an annual basis. We should know what the rest of the country is doing. As far as I am concerned we don't. We get information from Ingrid but I think it would be good for one of our representatives to attend. It is good for our system. I think we are fairly insular. As I was saying to someone we do have to remember that our system is disfavored in the best practices, that is a contract system, and I think we should try, and we do, to see how we can improve it. I think we have a lot to offer as well as far as quality assurance and those sorts of things. I don't think we are getting the training as Commission members in that regard.

33:52 S. McCrea That is true in that regard, Peter, but I think that it depends on how you define appropriate training sessions.

34:09 P. Ozanne Public defense management would be what I am saying should be included.

34:15 S. McCrea I am not sure I would have it as an unqualified no, because I think different people have targeted - I mean I go to OCDLA events and other things that have to do with public defense and my role as a private provider who does not take public defense funds.

34:37 P. Ozanne I would certainly agree. I just think we should fill in the gap with something you or the chair goes to.

34:52 Chair Ellis I stumbled over this a little. I think Paul has had a couple of sessions with us where he has walked us through ethics issues and I did think of that as training. I think it was now three years ago that Jim Hennings and MPD hosted the National PD group. I did attend a fair amount of their sessions and that might be what you are describing.

I am not sure what whoever wrote this is thinking about but I felt uncomfortable putting an unqualified yes. I am not sure that I could say that. At the same time I don't recall ever declining to do anything.

- 35:49 J. Potter I think Peter's point is well taken. There are some national things that we would benefit from. There was the meeting that Ingrid went to in Washington, D.C. involving the US Attorney General and talking about the defense function across the nation.
- 36:07 Chair Ellis That is the report that praised us.
- 36:08 J. Potter Having one of us there might have been an appropriate training session.
- 36:13 S. McCrea I am not opposed to it. Have passport will travel.
- 36:16 Chair Ellis If it is in Mexico.
- 36:23 S. McCrea No, pretty much everywhere except maybe Nebraska.
- 36:23 Chair Ellis The other thought I have is I get to fill out one of these for another organization and I always find something other than perfect to show that I am not just a soft touch.
- 36:36 Hon. Elizabeth Welch How do you do a qualified answer on this. Can you split it?
- 36:40 Chair Ellis I think we put no. We fess up that we probably haven't done it.
- 36:50 K. Aylward Could I make a comment, Mr. Chair? We have three key performance measures. The very first thing that people see when they open our budget binder is our annual performance progress report. It has a giant pie chart that shows red and green. If we don't meet all of these best practices and our target is to meet all of them, the first thing that they will see in our budget binder is that we are not meeting our targets in two-thirds of our key performance measures.
- 37:34 P. Ozanne Self-assessment is one-third?
- 37:35 K. Aylward Yes.
- 37:35 Chair Ellis You get 15 out of 16 on your self-assessment and that is a ding.
- 37:44 K. Aylward Our target is to meet 100% of the best practices.
- 37:50 Chair Ellis I am sorry. I cannot tell a lie. I think it is what it is.
- 37:59 J. Potter We have room for improvement on this. Is there any way to state that.
- 38:04 J. Stevens Can we split our vote like 50/50?
- 38:04 Chair Ellis We could check both boxes.
- 38:08 C. Lazenby I think the real response is "needs improvement." It is not like we are avoiding any training. We have the guidance.
- 38:20 S. McCrea We are not failures.
- 38:23 Chair Ellis So are we permitted to waffle it?
- 38:27 I. Swenson Certainly when we appear before the Ways & Means Committee we can talk about the specifics. Kathryn is concerned about the initial reaction.

38:41 Chair Ellis What if we did this? Using Ingrid’s statement check yes but then added a sentence that said, “On discussion, the board recognizes it should do more outreach to national groups,” something in there that shows we are not quite doing everything we could. Let’s do that.

39:11 J. Potter Might we ask our representative from Legislative Fiscal to speak to this? How do other agencies, other boards, address this kind of concern?

39:27 J. Borden It is impressive to see that you are looking at these in an open forum. The 100% is aspirational. The legislature wants all the boards and commissions to reach that 100%. By the nature of the form it is acknowledged that you may not get there. Nobody is perfect. I think the chair’s suggestion makes perfect sense and that is to note that there is room for improvement and the board is moving in that direction. I think that seems very appropriate from my perspective.

40:02 Chair Ellis Okay. Is everybody happy with that?

40:11 P. Ozanne So we get green.

40:11 Chair Ellis It is a pale green. 15. The board reviews its management practices to ensure best practices are utilized. We just did. Then others. Any others? Alright. Have we done our task?

 [The Commission’s amendments to the draft self assessment analysis is attached as Exhibit A to these minutes.]

40:31 I. Swenson Thank you very much, Mr. Chair.

40:35 Hon. Elizabeth Welch On the others, does this allow us to take credit for all those wonderful comments that our consumers made?

40:46 Chair Ellis Kathryn thinks those were addressed to her and not the board.

40:47 K. Aylward You have to do your own survey.

40:59 Hon. Elizabeth Welch But that doesn’t belong here?

41:02 K. Aylward I don’t think so.

Agenda Item No. 7 OPDS Monthly Report

41:19 K. Aylward There is still a big question mark looming over our current biennium budget. As I said earlier, we have an Other Funds spending limitation of \$12.4 million. That is the amount we are expecting the fee bill to generate. I personally don’t think we are going to hit that target. So even though we have the authority to spend that money, if it is not there we can’t spend it. I think we will be three quarters of a million to a million shy on that figure. We are also looking at current expenditures. We have a special purpose appropriation of \$3.5 million, which is with the Emergency Board. The latest we could go back is the December Emergency Board to request all or a portion of that. After the December Emergency Board it reverts to the General Fund and no longer has our name on it. At this point we will need to go and get a portion of that money. I do not believe it will be the full \$3.5 million. It is a relief that there is \$3.5 million available because I think that will cover us, but that is not including any discussion about the Governor’s allotment reductions that executive branch agencies faced. We were asked to provide information on the cost and the impact. That would be \$9.7 million out of the account. There is no way that we could absorb that. There is no way that our actual costs would come in with that much of a differential. Nobody has come calling yet and I am not going to bring it up.

- 43:11 P. Ozanne Kathryn, today's newspaper indicated that the federal government is probably going to send \$287 million, or something like that - about half of the current biennium gap of \$500 some million - primarily for teachers and education and Medicare. A lot of people have been hoping that would come. I assume it is too early to tell whether that would have any ripple effect in a positive way on us.
- 43:45 K. Aylward I can only think that it will. As I have said before, one of the other things in looking at where our agency request budget began for 09-11 and where we are now, it is as if we have taken cuts of the same magnitude because we have revised our figures. Caseload has dropped and we have gone back and said we will reduce our essential budget level by \$9 million. Then, "Here, you can take another million." Then in February, "Here is another million." So I think in dribs and drabs over the course of the biennium, and certainly by the end of it, we will have given back an equivalent amount of what Executive Branch agencies were asked to cut. It is just that we can only do it as we move through a biennium and information changes. That is all I have on this current biennium.
- 44:45 I. Swenson Shawn Wiley is here this afternoon to tell us what is happening at the Appellate Division. Shawn is one of the chief deputy defenders.
- 44:58 Chair Ellis Welcome.
- 44:56 S. Wiley Mr. Chair, I appreciate the opportunity to update you on what has been going on in AD. We began implementing the regional contact program. I think Pete Gartlan outlined it for you at the last meeting. We have assigned AD attorneys at the Deputy II and Senior Deputy level to specific counties to serve as resources for practitioners in the county. Kathryn and Ingrid have been instrumental in advising the CBS analysts to serve as kind of conduits to introduce the attorneys and to get the word out that that program exists and that those resources are available. We are going to be sending at least one representative from each region to the October management conference to facilitate those contacts. I am happy to note that the program has already borne fruit. In Washington County the Metropolitan PD office started grappling with a thorny issue where DAs were sending letters to individual attorneys saying they couldn't contact the victim in a particular case. They were trying to figure out what they were going to do as a group to challenge that practice. They called up the contact persons. Actually, we have a number of attorneys assigned to that county in our office. They talked to a couple of attorneys who were able to attend the meeting personally and participate in the discussion. From all accounts they did an excellent job of contributing positively. In fact, when the discussion turned to using mandamus as an avenue, they directed the discussion to Eric Johansen who is our office resource for mandamus. It was a very good test run for the program. It seemed like ...
- 46:42 Chair Ellis Mandamus against the DA?
- 46:42 S. Wiley It is not actually against the DA. There is a court order involved. It is a complicated issue which they are still grappling with quite honestly. I don't know what the final approach will be but we are happy that they reached out to the representative in our office and that we were able to help.
- 47:03 Chair Ellis I am just curious because this sounds like an interesting subject. Were the DAs saying it is as though they represented the victim?
- 47:12 S. Wiley I think it came down to the victim asserting a right under the constitution to not be interviewed or contacted and the DAs feeling that under the system as it exists that was their role. There is quite a bit of confusion, as the chair recognizes with his question, of how that is all supposed to work out.
- 47:34 Chair Ellis It is probably not on our agenda but I am interested in how this gets resolved.

- 47:39 S. Wiley I am sure we will have some further news as it develops. Again, I am not sure exactly how it will play out as far as the challenge and how it is playing out as far as the practice itself. Pete wanted me to give you an update on *State v. Portis* which was the Supreme Court case dealing with appeals from denials of the 30% under House Bill 3508. Not unexpectedly, given the tenor of the oral argument, the Supreme Court decided against us and they ruled that the amendments to 3508 passed this year as Senate Bill 1007, rendered any inmate who hadn't already received the 30% ineligible. So, essentially, all appeals of denials were moot because they couldn't grant any relief that would do any good to the people doing the appealing. That is going to moot out any appeals that are pending on 3508 issues in our office. We expect the state to probably move to dismiss and that will be that. In the Court of Appeals we have a couple of updates on the day to day operations, the way that we do business with the court. First, as the Commission probably knows, the court is imposing rules requiring a 14 point font and imposing some word count limitations in lieu of a page limitation. The upshot is that our opening brief in the Court of Appeals will be limited to the equivalent of 35 pages, so quite a bit of a difference from 50. Those rules are designed to go into effect gradually and kind of on a case by case basis, depending on when the notice of appeal was filed in a case. But as an office we just decided to pull the plug and have one date that we go over as an office with possibly some exceptions. We have decided to implement that and we are going to time it to coincide with the move of our office which is at the end of this month.
- 49:46 Chair Ellis Remember the old song about writing lengthy briefs. If you had more time it would be shorter.
- 49:55 S. Wiley We believe the limitations will actually make our briefs stronger. We are excited to impose those limits on our own attorneys.
- 50:07 P. Ozanne Fourteen point though.
- 50:07 J. Stevens Big enough for people our age to read.
- 59:14 J. Potter What font do you have to use now?
- 50:20 S. Wiley We are at 13 point font.
- 50:23 J. Potter But the font itself?
- 50:26 S. Wiley It is the size. The second news out of the court is that Pete met with Chief Judge Brewer on Tuesday. Among the things that were discussed was a proposal by the chief judge to have, in addition to the regular panels, a two judge panel consisting of Chief Judge Brewer and a rotating senior judge, who would sit every other month and would hear up to 40 cases.
- 51:05 Chair Ellis Rotating senior Court of Appeals judge or rotating senior trial judge sitting by designation?
- 51:12 S. Wiley All of the above. The plan B judges, so that would include retired and semi-retired. The purpose would be to alleviate the delays in docketing. We are currently looking at about seven months between the completion of briefing and the case being set for oral argument. That delay is expected to grow as time goes on. Pete floated the proposal to our staff meeting yesterday and there was some spirited debate akin to the discussion earlier among the Commissioners, regarding whether or not a two judge panel would provide the same hearing as three judge panel. We are mulling over our response to the chief judge's proposal.
- 52:05 S. McCrea Did I hear right up to 40 cases a month?

52:07 S. Wiley Forty cases every other month.

52:15 Chair Ellis Does Judge Brewer sit on a panel?

52:15 S. Wiley He does.

52:16 Chair Ellis So this would be in addition to his regular panel duties?

52:23 S. Wiley Last year they were regularly having two panels per month for our cases. Chief Judge Brewer was consistently sitting on the second panel. I think he has gone into what would be called a regular rotation now. He sits occasionally but not every month.

52:40 Chair Ellis These cases assigned to this two judge panel would be random?

52:46 S. Wiley Random. I believe it is limited to our dockets as he has proposed it to our office. I am not sure of that detail but I would be happy to get that information for you. This is breaking news.

53:10 Chair Ellis It sounds like affirmance.

53:16 S. Wiley Certainly some of the attorneys in our office felt that. It might just be a matter of perception rather than reality. You essentially have to convince two judges that you are right normally. Now it just happens to be the only two judges.

53:28 C. Lazenby Any chance of an “all ties go to the defendant” rule?

53:37 S. Wiley We’ll ask for that. That will be our counter argument. Lastly, I just wanted to the opportunity to point out, as Commissioner Potter put it, a flurry of decisions that came out of the Court of Appeals a week ago Wednesday. It was just a number of significant victories resulting from the fine work performed by trial attorneys and the attorneys in our office and the JAS unit. On the AD side, in a case called *Lopez-Minjarez*, the panel overturned a highly publicized aggravated murder conviction. It resulted in overturning the “natural and probable consequences” jury instruction, which is a standard jury instruction that the defense community has been challenging as contrary to law for years.

54:27 I. Swenson Wasn’t that your case?

54:27 S. Wiley Yes it was. Thank you.

54:34 Chair Ellis That was at the Court of Appeals level?

54:34 S. Wiley It is.

54:34 Chair Ellis So that could go up?

54:38 S. Wiley We’ll see. It is likely that the state will petition for review in the case. There were also two significant wins in merger law. One was in *State v. Watkins*, in which the defendant stabbed a corrections officer seven times in the course of a single criminal episode. The Court of Appeals held that an interval of three to four seconds between attacks did not constitute sufficient pause that demonstrated repeated violations of the same statute for purposes of the merger statute, so all seven counts should have been merged. It was a very tough win. The second merger case and I am not sure I am pronouncing this correctly, but it is *Sauceda* where the court held the failure to merge burglary convictions that were based on the same entry was plain error. We had previously won that it was error but the court is going farther than that, which is significant in the merger field because it is a murky area. There is a victory in *State v. Gonzalez*, where the court held that impounding a car after discovering that the driver was suspended or revoked, for purposes of deterring unlicensed drivers from

using the roads, is not a valid community caretaking function. So the trial court erred in not suppressing the evidence discovered during the inventory that went with the impoundment. In another victory the court said that the fact that defendant was on probation at the time of the offense did not constitute proof of an enhancement factor that he committed the crime while on release status from other pending criminal charges. I wanted to bring to the Commission's attention two very good victories by the JAS unit. In *DHS vs. MJ* which concerned the definition of a refugee child, they obtained a reversal by stating that the trial court should have found that the child in question was a refugee child and kind of nailed down what was involved in that. It really impacts a wide range of immigration issues. In *DHS v. CJ*, the court held that a mother's use of marijuana did not present a reasonable likelihood of harm to her children such that the juvenile court could take jurisdiction of her children. I appreciate the opportunity to highlight those.

56:54 Chair Ellis

Thank you for the summary. Those are interesting. Congratulations. It sounds like really good lawyering going on.

57:03 S. Wiley

Thank you very much.

57:09 Chair Ellis

Anything else?

57:08 I. Swenson

Mr. Chair, I wanted to briefly update you on the delinquency representation issue and Judge Welch can certainly comment. Since I last reported to you in June, we were able to meet with the Chief Justice and bring to his attention the information we had gathered from the trial judges and the juvenile departments. At the end of that conversation his recommendation to us and to the Commission was that we develop a model colloquy for waiver of counsel in juvenile court with the idea that when one considers all of the things that a youth would need to understand in order to make a knowing waiver of counsel, it would cause both the judge and the youth to be aware of the significance of the decisions that are being made. We have colloquies occurring now. We don't have good records on this but we certainly understand that some of them are very brief. It is sometimes no more than asking the juvenile court counselor, "Did you talk to him about the waiver of counsel? Does he understand it?" "Yes," and that is the end of it. That is not sufficient. The Chief Justice was willing to prepare a letter to juvenile judges once this colloquy has been developed and provide it to them and recommend it to their use. He also talked about the need for more education of juvenile judges in the delinquency area. It is an area that is overlooked to some extent because there is federal funding available to train juvenile judges in dependency law but that funding is not available for training in delinquency law. Consequently over time there have been a lot of very high quality trainings in the dependency area, but very few in the delinquency area. He is willing to promote additional training in delinquency cases. Anything else, Judge Welch, you want to mention about that meeting?

That overlaps a little bit with some work that is going on in a group that is called the Interbranch Dependency Law Workgroup. This is a group that was put together by legislators and the Chief Justice. It has been meeting for more than a year. It now includes a broad membership which includes the Chief Justice, Chief Judge Brewer, a number of juvenile trial judges including Judge Waller from Multnomah County, and Kip Leonard who just retired as the juvenile judge in Lane County is now chairing this group. It also consists of representatives of DHS (the Department of Human Services), the Oregon Youth Authority, the Commission on Children and Families, and a whole array of interested people. Their purpose of this year-long set of meetings was essentially to say, "What can we as a group representing all three branches of government recommend to the legislature that might improve outcomes for children in our dependency system?" They focused in many of those meetings on the representation piece, looking to that as one of the areas where improvement was definitely needed and where improvement would help to bring about some of the changes that they were hoping to achieve. They haven't yet finalized their resolution, but I think their ultimate resolution will be to support in the legislature

additional funding for public defense to permit attorneys to be present and participate from the very beginning in dependency hearings, because that is a place where they are sometimes absent, or if they are there they haven't had adequate time to prepare or they don't have adequate discovery, and consequently parents' and children's rights are not appropriately protected at that very critical stage of the proceedings. So we will see where that goes, but at the last meeting of that group they also talked about the need for more training for juvenile judges and that it should include training in delinquency as well as in dependency cases. There is a large crossover group in both of these systems, so training for dealing with youth in one context certainly would apply to youth who happen to be in the other part of that system. I think that is all that I have. Kathryn has some information on our move unless there are any questions on the juvenile piece.

1:02:20 Hon. Elizabeth Welch

In our travels in the last two or three years, we have found situations involving the waiver issue and its implications, but we have also seen courts where the appointment of counsel in dependency cases was also surprising. I am wondering if it might not be helpful and worthwhile, and maybe that is going on in this other group that you just described, to take a look at the same kind of question about the rate of representation of children and of parents, and specifically the duration of the representation of children, because that was a big issue in one court.

1:03:43 I. Swenson

We certainly know that the practice varies dramatically around the state. We don't have good data at this point about that. In some counties attorneys are almost never appointed for children in dependency cases. That is because the local juvenile judge doesn't think it serves a valid purpose, so it doesn't happen. One interesting thing, I did survey the defenders about presence at shelter hearings. This is still an incomplete count, but the information I received was that in eight of the counties that responded, there are no attorneys present at that initial shelter hearing. In four counties there is an attorney present, so one party could be represented, but if there are multiple parties nobody is present to represent them. In 14 counties people are present with very varying amounts of discovery available to them. Some report excellent access to information before the hearing. Others report almost none. It is going to be very interesting to put it all together.

1:05:03 J. Potter

Refresh my memory, Ingrid, about national standards regarding waiver in delinquency cases for juveniles? What is the national standard?

1:05:11 I. Swenson

It is certainly a recommended practice that juveniles be represented in all cases. That is certainly the National Juvenile Defenders Association's recommendation. I think every national advocacy organization would say that all youth should be represented in all cases. That is certainly not happening nationally. There are some states where – and I reported this to you in March, there are states where they do appoint for the youth in every case. I saw an interesting comment from the United State Department of Justice, from Laurence Tribe who is the new representative at the Department of Justice for indigent defense issues. This was part of a presentation he made to the council of chief justices who met at the end of July. His remarks focused on delinquency cases and urged the chiefs that they had an obligation to be pushing for representation of every juvenile in every case, pointing to all of the collateral consequences and other aspects of delinquency adjudication. It was a strong statement.

1:06:24 J. Potter

I read that statement as well. It was an excellent statement. So right now what you have reported is we are going to have a questionnaire developed that judges – a more detailed questionnaire than what they now do. Who is developing that questionnaire?

1:06:41 I. Swenson

Well, our attorneys within the Appellate Division will be doing that. We have to assign somebody in the near future. Shawn may know but I don't think an assignment has been made. We have attorneys who have volunteered to work on it.

The idea would be to have an annotated colloquy that would anticipate some of the questions that would arise in the usual case and then include annotations saying, "This is why this is required and this is where this could lead," and those kinds of things. California has developed a form. It is not ideal. It is something to work from and other jurisdictions have plea forms that include information that would be useful for this colloquy form. I did inquire with the National Juvenile Defender Center whether there were existing models and they said there are not.

1:07:40 J. Potter So help me understand how this works. The kid is sitting there. The judge is going through this form. The kid is answering the questions and may or may not understand the questions. Is there ever a point where the judge finally says it is clear to me that we have to appoint a lawyer here?

1:08:00 I. Swenson The idea would be that it would only be used in those situations where a youth or a parent has said they want to waive counsel. "Well, before you can do that I need to give you some information, ask you some questions." Some adult criminal cases repeat verbatim the colloquy that took place with respect to particular waivers and whether they were sufficient. I assume that in most cases, not all, but in most cases the juvenile judges are not following anything as detailed as they do in the adult system.

1:08:40 J. Potter I understand the adult system a little bit. It still concerns me that we are not just biting the bullet and appointing lawyers in these delinquency cases.

1:08:55 I. Swenson We don't have the appointment power.

1:08:59 J. Potter You suggested to us at one point that maybe the Commission did have some authority in a liberal reading of the statute. What is your view on that now?

1:09:11 I. Swenson Well, what our statute, Chapter 151 says, is that the Commission "shall develop guidelines and policies" regarding a series of areas, one of which is the appointment of counsel. You could read that broadly or more narrowly. Chapter 135 and other chapters relating to appointment of counsel, make it clear that it is the court that does the appointment. The issue comes down to who decides under what circumstances. The legislature directed the Commission to adopt policies regarding when the court can substitute one counsel for another, so you have authority in that area. Certainly, when I spoke with the Chief Justice about this, and I have reported his comments to you before, it was not his recommendation that we seek to assert that kind of control over the circumstances under which the judges make these appointments.

1:10:06 J. Potter I suppose there would be some political backlash from judges, but it still troubles me that our role here is to try to get representation where it is appropriate. We just had a discussion on the amount that attorneys get paid and the chair said there were injustices being done under the current system. There are injustices being done in the juvenile system. We have a shot here of doing something. Why don't we do something?

1:10:41 I. Swenson I think we should to do something effective. I do think that development of this colloquy can start the kind of conversation that needs to happen. In the survey that we did of these judges, it is pretty clear that they feel very strongly about their current practice. Our telling them that we think they should be appointing in every case probably would not cause that to happen. I think many judges would say, "I know the law and I will decide under what circumstances this youth may waive counsel. You are not the legislature and you can't tell us that this waiver isn't valid."

1:11:33 Hon. Elizabeth
Welch There is another level of discussion that is possible here and that is that the Commission draft legislation and introduce legislation that says every child should be represented in every proceeding in juvenile court. We can't do that sort of legislation. I don't see that there is any basis in the charge to this Commission that

would allow us to tell a circuit judge what to do. The only option is to go full bore. There are a few states – Washington doesn't really qualify but they are awfully close.

- 1:12:20 I. Swenson They do it by court rule.
- 1:12:25 Hon. Elizabeth Welch Yes, court rule. I wish I could remember which ones – there were a couple of surprising states... But beyond what Ingrid is talking about in terms of making judges change the way they do things, I absolutely concur with her in terms of what I have read and seen and heard. The other option is to say, "Okay, we have taken a look at this and we are not going to be able to do anything." The question is if a bill was introduced what would happen and what would we accomplish? What would be accomplished in the current fiscal biennium.
- 1:13:14 P. Ozanne Something more than just the colloquy. Have Barnes send a letter to the Chief.
- 1:13:23 Hon. Elizabeth Welch I think he is prepared to support what the sense of this group is. He is supportive but he is also very practical about...
- 1:13:47 C. Lazenby How much of a framework is there in the appellate cases around this issue? If the system doesn't do something to move in this direction what is likely to occur as a result of the direction the caseload is going?
- 1:14:15 I. Swenson We are looking for cases to litigate for the purpose of addressing...
- 1:14:18 C. Lazenby So there is nothing on it now.
- 1:14:23 I. Swenson There are some cases but...
- 1:14:23 C. Lazenby Gotcha.
- 1:14:28 J. Potter I understand now what you said earlier, that maybe a broad reading of the law could conceivably construe that we had some authority. What the judge has said is probably not and that we should put together a legislative change, or the Chief, through the judicial college, I suppose, could make a rule change.
- 1:14:49 C. Lazenby My concern about the legislative piece is you go ahead and you draft that and you toss it into a legislature that is looking at a three billion dollar hole. They see that as an additional cost and they take it up and decide not to pass it. You then have this argument that the legislature considered it and rejected it. I think the better way is rather than rely exclusively on our 151 authority, which I think is – I am not going to say it is a stretch but it certainly isn't explicit about our having that authority - but I do think we send this to our ex-officio member, the Chief, saying, "This is an important public policy piece and it has been accomplished other places by court rule. Can't we at least lay out some criteria for the trial courts to follow?" I think that would be an improvement and something safe from collateral attack. That is my sense.
- 1:15:55 J. Potter I am concerned that five or 10 years down the road, 15 or 20 years down the road, we will have a uniform constitutional requirement, or statutory requirement, or rule requirement that says kids are going to get presentation in delinquency cases. Everybody knows that that should be the case now. I don't want to be in a place where we were sitting here and we didn't do anything. We talked about it but we didn't do anything. Even if the doing is to have Barnes write a letter to the Chief and very clearly point out that this needs to be accomplished. He can accomplish it. We know the judges will push back. It is a fundamental justice issue here. It is an outrage that this is happening.
- 1:16:57 Chair Ellis Why is everybody looking at me? Do you want to try drafting something like that?

1:17:05 I. Swenson A letter from you to the Chief Justice?

1:17:12 Chair Ellis Yes.

1:17:12 I. Swenson Of course I would be happy to.

1:17:23 P. Ozanne What if we all signed it?

1:17:25 Chair Ellis I think that is an even more powerful statement. Part of me is a little hesitant to set him up and make him look like if he doesn't act on that he is a bad guy, because I don't think he is, but if that the way to go, let's try it.

1:17:50 I. Swenson Mr. Chair, because we had talked about this model colloquy, I suppose what I would like to do is develop that and then provide that to him along with a letter that urges him to not only promote that discussion but take further action as necessary to require appointment of counsel.

1:18:16 Chair Ellis Okay.

1:18:16 J. Potter Strengthen it as much as you can and let us back off to some political degree. I think there should be, without a doubt, clear language that can't be mistaken.

1:18:34 I. Swenson I just don't want you to underestimate the amount of resistance there is to that, and some of it not improper. The grayest areas are in the probation violation area. As the testimony you heard in March told you in a juvenile case there can be some very informal sanctions for probation violations. There is a right to counsel at every stage, but do you really want to impose that on the youth in all cases? You would have to try to draw some good lines there as to when it was appropriate to appoint counsel, not just at every possible juncture.

1:19:24 J. Potter If we could get to that point I would be pretty happy if we were looking at the exceptions.

1:19:30 I. Swenson There are more concerns. I realize I haven't really summarized the information that we received from the judges for you, so I will do that before you have the next discussion that includes going forward with this.

1:19:46 J. Potter I understand the hesitation not to put it all on the Chief and put him in a bad position, but it seems like we are in a bad position. We had testimony here in this room from Washington and they gave us a good outline and you have given us a good outline. If we have to push it off on the Chief or the legislature I think we should do that.

1:20:09 P. Ozanne I take Chip's point seriously. I would favor giving the Chief a little slack and as far as legislation is concerned he would probably testify in favor of it, but the chances of it succeeding in the next 10 years, or at least the next five, are zero. I think we are kind of forced to and certainly could explain that to the Chief too.

1:20:50 C. Lazenby I think you have a better chance of getting there - given the fact as Ingrid is saying that there is bound to be a significant amount of resistance from the people with robes who deal with this and who are worried about the efficiencies of their courts - by working in conjunction with the Chief Justice in coming up with a court rule that can move us further down the road.

1:21:17 P. Ozanne Look at sentencing guidelines. You talk about pushing. We got that through.

1:21:24 Chair Ellis There are those judges who are kind of paternalistic and they kind of make things work out.

1:21:35 S. McCrea I think maybe we should appoint Judge Welch our ambassador and send her around to the different counties.

1:21:43 Hon. Elizabeth Welch Yeah. There is nothing like sending around a Multnomah County judge.

1:21:47 Chair Ellis Anything else?

1:21:48 I. Swenson No. Kathryn has some information for you on the move.

1:21:50 K. Aylward Not really. I just wanted to give you an update. According to the lease, the building is supposed to be ready for occupancy August 25. I went yesterday. It looks like more than three weeks' worth of work to me left to do, but I am sure we are still on target according to the general contractor. We don't know yet exactly how the timing of things will work out. On Friday the 27th our phones will be operational until 5:00 and then they will come after 5:00 and pull the plug on the phone and move them on Saturday. At some point late in the day Friday we are not going to have computers and probably desks and chairs will be disappearing. I think we will effectively be closed but still have a sort of skeleton crew and a way, if there is any kind of emergency, that we can deal with that. The building is gorgeous inside. It is so nice. The windowsills are a kind of like walnut colored wood product. I don't know if it is real. It looks beautiful and the kitchen cabinets and reception area. It is going to be very pleasant and we will have an open house after we have unpacked and settled in.

1:23:16 S. McCrea I appreciate that we haven't been invited to help participate in the move.

1:23:19 K. Aylward That was the other bit of news. We got a quote for the move. It was nearly \$30,000 to move us a mile away. I was stunned. How can that be? We will do it ourselves for that, but I am meeting with the movers.

1:23:39 P. Ozanne You asked for some ideas to compete with the statue across the way. What about a group statue of the Commission members?

1:23:51 K. Aylward I am meeting with the movers tomorrow and I am going to discuss the fact that that is an astronomical amount of money.

1:23:59 S. McCrea Aren't there other moving companies in Salem?

1:23:59 K. Aylward There are. This is a combination of not only taking down the specialized steel case and Herman Miller furniture, but reassembling it at the other end.

1:24:11 S. McCrea We will leave it in your capable hands, Kathryn.

1:24:14 Chair Ellis Just call us when it is over.

1:24:16 K. Aylward For a party.

1:24:23 Chair Ellis Anything else? Anyone in the audience have anything? If not, I would entertain a motion.
MOTION: Shaun McCrea moved to adjourn the meeting; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Meeting adjourned.

Appendix A

Self-Assessment criteria

1. Executive Director's performance expectations are current:

Commissioners were provided with the Executive Director's annual report to the Commission in February of 2010; Commissioners performed an evaluation of the Executive Director's work and provided feedback in an executive session at the March, 2010 PDSC meeting. In addition, Commissioners approve periodic amendments to the agency's Strategic Plan that includes specific directions to the Executive Directors and other managers in the agency regarding implementation of the plan.

2. Executive Director receives annual performance feedback.

PDSC held a formal feedback session in February of 2010.

3. The agency's mission and high-level goals are current and applicable

The agency's strategic plan is current, the most recent revision having occurred in December of 2009. At the PDSC retreat in October there will be an opportunity to review and update the plan. Commission members also receive the Executive Director's Biennial Report to the Legislative Assembly which addresses the current goals of the agency and includes a progress report on efforts to achieve those goals.

4. The Board reviews the Annual Performance Progress Report

Members are conscientious in their review of materials provided prior to commission meetings, including annual performance progress reports.

5. The Board is appropriately involved in review of the agency's key communications.

PDSC is asked to review and approve key agency documents before they are issued – the agency's biennial budget proposal, Emergency Board submissions other than routine reports, requests for proposals, proposed contracts, all rule and policy changes.

6. The board is appropriately involved in policy-making activities.

PDSC is the policy making body for the agency. Its policy making responsibilities are set forth in statute. Its strategic plan establishes the goals and strategies the agency follows in pursuing its mission.

7. The agency's policy option packages are aligned with its mission and goals.

PDSC's mission is to establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice. All of the agency's policy option packages are directed at achieving that mission.

8. The board reviews all proposed budgets.

In 2010 PDSC members received presentations on the budget proposal for '11-'13 at three of its regular meetings. Calculating the agency's essential budget packages (or the current service level) is largely a mechanical process. Policy option packages on the other hand are completely discretionary with the agency. At the June meeting PDSC identified the policy option packages for the '11-'13 budget. For the August 2010 meeting Commissioners were provided with a draft of the budget narrative that will accompany and explain the agency's budget proposal.

9. The board periodically reviews key financial information and audit findings.

Throughout the course of the year the Commission receives periodic updates on budget developments and the agency's expenditure of funds. PDSC input is sought before any policy level decisions are made regarding budget priorities. The agency does not have dedicated auditors but at the Commission's request performed an internal audit of the accounts payable function of the Business Services Division and is prepared to repeat such an audit on a periodic basis.

10. The board is appropriately accounting for resources.

PDSC approves a budget proposal for the agency that is then presented to the Legislative Assembly. The Legislative Assembly ultimately passes budgets for CBS, AD and the Public Defense Services Account. Funds are expended in accordance with budget requirements and in some biennia, such as the current one, interim reports are prepared for the Emergency Board and the Interim Ways and Means Committee. Copies of these documents are provided to the Chair of the Commission and to other Commissioners upon request. Copies of the reports are included in Commission materials. During

the course of the biennium OPDS management reports to the Commission regarding use of budgeted funds.

11. The agency adheres to accounting rules and other relevant financial controls.

The agency has been awarded the State Controller's Gold Star Certificate for achieving statewide accounting goals and excellence in financial reporting for each fiscal year since the agency was created.

12. Board members act in accordance with their roles as public representatives.

PDSC members are held in high regard for their work on the commission by members of the legislature, legislative staff, public defense contractors and other members of the public safety community. PDSC's members have established a reputation for being hard working and committed. They have informed and spirited discussions about issues affecting public defense and how their policy decisions might affect the public's interest in a well balanced public safety system.

In addition, all PDSC members serve in other roles in their own communities and on other statewide bodies. Public defense is fortunate to have a board composed of members who represent the public as effectively as these members do.

13. The board coordinates with others where responsibilities and interests overlap.

The Chief Justice's role on the commission and in selecting other members of the commission permits coordination with the Oregon Judicial Department, and the Chief Justice has facilitated communication with the judges and others on overlapping interests.

Public defense providers, who are essential to Oregon's public defense system, are consulted on a regular basis. The Commission has made them welcome at all of its meetings, has invited them to participate actively in those meetings and to provide input on a regular basis to the decisions made by PDSC.

John Potter and Shaun McCrea's presence on the Commission allows for close coordination with the broader defense community. Each of the other Commissioners has ties with other important community groups whose perspectives can enhance the Commission's discussions.

From time to time PDSC has found common cause with prosecutors, such as support for the John R. Justice Act, which has now been enacted into law and financed. Chair Ellis on behalf of the Commission, and the head of the Oregon District Attorneys' Association communicated jointly with Oregon's Congressional delegation in support of this loan repayment assistance program for prosecutors and defenders.

Commissioner Ozanne in his capacity as the original Executive Director of the agency included representatives from across the public safety system as advocates for adequate public defense funding during the agency's budget hearings in 2003 and that cooperation continues.

14. The board members identify and attend appropriate training sessions.

A formal training opportunity for commission members was offered two years ago but that training, designed for gubernatorial board and commission appointees, was more suitable for new appointees than for PDSC's Commissioners all of whom are veterans of this and other boards.

While not a training session, per se, Commissioners received information presented by the agency's General Counsel after the 2007 legislative session and on other occasions regarding application of the ethics rules to public officials. In 2010 Commissioners requested additional information about the extent of their statutory responsibilities. The information provided assisted Commissioners in prioritizing areas of focus for upcoming meetings, and also served as a reminder of the scope of their responsibilities.

The Commission recognizes that its members need to participate in national meetings and trainings for board members of public defense organizations. The National Legal Aid and Defender Association sponsors periodic trainings that would be beneficial for Commission members to attend.

15. The board reviews its management practices to ensure best practices are utilized.

Such a review occurred at the August 5, 2010 Commission meeting.

16. Others. None.

Attachment 2



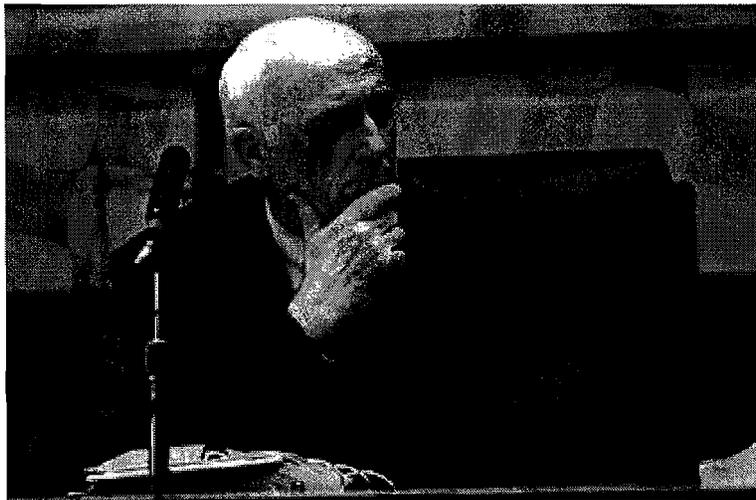
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Multnomah County stops prosecuting dozens of illegal acts as crimes, widening disparities between counties

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Aimee Green, The Oregonian



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Rob Finch/The Oregonian

Multnomah County District Attorney Michael Schrunk

After years of budget cuts, **Multnomah County District Attorney Mike Schrunk** says he's had no choice but to stop prosecuting dozens of illegal acts as crimes.

Among them, most addicts caught with small amounts of drugs such as heroin, cocaine or meth; first- or second-time shoplifters caught stealing anything worth less than \$250; suspects who resist arrest, or who run away from police officers; drivers who hit and run, as long as they have insurance when they are caught.

Multnomah County is treating those offenses as violations -- similar to being cited with a speeding ticket. Pay the fine and walk free. There's no threat of jail time and no probation.

"In a perfect world, you commit a crime, you'd be prosecuted for what it is," Schrunk said. But, he added, "we don't have unlimited funds."

Schrunk says Multnomah County can no longer prosecute some lower-level crimes as misdemeanors or -- in the case of residue drug possession -- felonies, even though state law classifies them as such. The new

policy -- implemented in waves over the past few months -- has widened the divide between Oregon's largest county and its neighbors, Clackamas and Washington counties, where prosecutors still aggressively pursue many of the crimes that Multnomah County is decriminalizing.

Some counties -- including Washington, Linn and Clatsop -- have public-safety levies or timber money that allow prosecutors to pursue every case they think is worthy. For example, a **Washington County levy** pays for 19 of the 100 positions in the DA's office. It's up for renewal this November.

Other counties also struggle to hold offenders accountable.

Marion County District Attorney Walt Beglau said his office hasn't been prosecuting some misdemeanors at all -- not even issuing a ticket -- for as far back as 20 years. Among those crimes are minor vandalism, failing to appear in court to face misdemeanor charges and punching, slapping or spitting without causing injury, unless it involves domestic or sexual violence or an attack on police.

"The police investigate them, a crime has been committed and we do nothing," said Beglau, the frustration apparent in his voice. "...This sends a bad message."

Lane County District Attorney Alex Gardner said his budget has been grim for decades.

"We've been required to do more and more with less and less," Gardner said.

By his last count, levies that would beef up the number of police and prosecutors have gone to voters 14 times in the last 20 years.

"They all have gone down," Gardner said.

Even in Clackamas County, which can afford to pursue many of the misdemeanors Multnomah County is not, prosecutors have eased up on first-time shoplifters who steal less than \$1,000 worth of merchandise. They are cited for violations if they immediately agree to plead guilty.

Reductions among Oregon prosecutors mirror a national trend, with prosecutors across the country laying off staff. The down economy has hurt, and violent crime in the United States is down. In Oregon, crime was at a 40-year low in 2009 -- although so far in 2010, some crime rates, including car thefts, have been ticking up in Portland.

Struggling DA offices say crime hasn't dropped enough to compensate for the lack of funding and increased costs.

Some worry that decriminalizing some crimes will embolden offenders to commit more crime. A lack of criminal prosecution also can be disheartening to victims. Schrunk said not fully prosecuting lower-level

suspects encourages some residents and businesses to move from the inner core out to quieter neighborhoods or strip malls.

By and large, Schrunk has gotten nods from public defenders and players in the criminal-justice system for cutting where it's least painful.

Although the budget for the district attorney's office actually rose by about five percent this year, to \$25.7 million, personnel costs accounted for most of the gain. The number of full-time deputy district attorney positions has dropped over two years from 85 to 73.

Schrunk says he continues to aggressively prosecute the most serious crimes -- murder, rape and armed robbery. His office also protected a host of misdemeanor crimes from the cut, including drunken driving, domestic violence, sexual abuse and weapons crimes.

However Schrunk's office is relying more on certified law students, who, for example, may end up going head-to-head in misdemeanor drunken-driving trials against some of the most experienced privately retained defense attorneys in the state, including Des Connall and **Stephen Houze**.

Prosecutor Jeff Howes, who oversees Multnomah County's misdemeanor trial unit, said his office has written lots of exceptions into the illegal acts that no longer will be pursued as misdemeanors.

"My hope is that word doesn't get out among the criminals that you can steal anything up to \$249 and not be prosecuted for a crime," Howes said, adding that he will seek criminal convictions under aggravating circumstances or for chronic shoplifters -- those who are caught in the act three times in six months.

What's more, prosecutors will pursue misdemeanor convictions for chronic graffiti scofflaws and anyone already on felony probation or post-prison supervision.

Lane Borg, executive director of **Metropolitan Public Defender**, says he's sure prosecutors will find a way around pursuing criminal charges against the offenders they're particularly concerned about.

"They can pursue cases they want to go after," Borg said.

Aimee Green

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Attachment 3

CLACKAMAS COUNTY UPDATE AND PROPOSED SERVICE DELIVERY PLAN– October 2010

(1) Summary of Information and Testimony Received by PDSC from August 2009 to June 2010.

Information from previous PDSC meetings relating to the public defense delivery system in Clackamas County is available on the Commission's website:
<http://ww.oregon.gov/OPDS/docs/Agendas/03-04-10.pdf>.

At its March 4, 2010 PDSC meeting the commission deferred further discussion of a service delivery plan for Clackamas County until resolution of the question of whether or not boards of directors should be required for all PDSC contractors, and, if so, what the composition and responsibilities of those boards should be.

At its April 22, 2010 meeting PDSC adopted a policy statement requiring, with respect to contracts beginning in January of 2012, that every public defense contractor (a) be governed by a board of directors with at least two independent members or, in the alternative, (b) demonstrate to PDSC's satisfaction that the contractor has appropriate financial safeguards and quality assurance mechanisms in place.

At its June 2010 meeting the Commission continued its discussion on Clackamas County and received testimony from Ron Gray of CIDC and from Marty Cohen representing IDI. They reported as follows:

Ron Gray said that the Clackamas Indigent Defense Consortium's (CIDC) president has written a proposed revision of the group's bylaws. The new bylaws will allow the group to bring in two outside members. Judge Ray Bagley is still available and when the new bylaws are in place, recruitment for the second member will begin. The board will continue to have nine members, two of whom will be permanent. The others will rotate out of the attorney pool for two-year terms. The President of the board, Brad Jonasson, has recently retired but will remain president for a year. They are still discussing how to recruit the second outside board member. Chair Ellis suggested that they confer with Paul Levy about the method of selecting the outside members since the Commission has defined independent board members as persons who are not receiving public money for cases and who are not selected by those who do.

Mr. Gray said that another CIDC member had been appointed to the bench and one had retired. In seeking to replace those two members, the group received a large number of applications. One attorney with approximately 10 years of practice has been accepted. A second attorney who has been practicing in another consortium is being considered. She was one of three

well-qualified attorneys who applied. There are also two new lawyers in the apprenticeship positions. CIDC has now approved a “work up contract” which would allow an attorney to start out taking only misdemeanors and minor felonies. He will continue to work with his mentor from the apprenticeship program and will be reviewed after six months. After six months it will be determined whether he will be a permanent members and, if so, he will continue to “work up” to handling more serious cases. With this member the group will have 30 members, its highest number. A former court bailiff will be starting the apprentice program.

Chair Ellis commended CIDC for making good progress and responding to the Commission’s concerns.

Marty Cohen said that Independent Defenders, Inc. (IDI) had conducted an online survey of judges, CASAs, juvenile court counselors, DHS and OYA workers. More than 60% responded. For the most part respondents thought that the attorneys were doing well. The survey did not identify lawyers by name. Respondents were asked to assess quality of representation by the entire group. Some respondents said that they would prefer to provide information about individual attorneys. Some responses did talk about the work of individual attorneys. Some who provided very negative information did not identify the attorneys about whom their comments were made. Mr. Cohen said he was trying to obtain additional information. Commentators said that communication with the group has improved. IDI members meet annually with the CASAs. The last meeting was very successful. No new members have been added to the board but Mr. Cohen has talked to a retired judge about serving. If independent members must be selected by someone other than the consortium members, the group will have to revise its bylaws.

Mr. Cohen reported that the group’s working relationship with the judges is fairly good. Judge Darling seems satisfied with the progress that has occurred. The caseload has fluctuated over the last six months. Delinquency cases are down but dependency cases have gone up. One new attorney has been added to fill a vacancy but no others will be added until it appears that the caseload will require another attorney.

In terms of attorney evaluations, Mr. Cohen said that he does them on an informal basis. The group is planning to create a more formal process.

Ron Gray said that CIDC had evaluated all of its attorneys and included the names of individual attorneys on the questionnaire. Board members were then assigned to attorneys who were criticized. In one case an attorney was reported to be effective in court but very unorganized. That attorney hired a consultant to her organize her office. There have been reports of significant progress.

At its August 4, 2010 meeting PDSC members discussed the proposed service delivery plan for Clackamas County. As reflected in the minutes of that meeting, commissioners amended the proposed plan and directed staff to present the amended plan for consideration at the October 21, 2010 commission meeting.

Ingrid Swenson summarized the information previously provided to commissioners regarding the performance of the two Clackamas County contractors. She said they had both made progress in addressing issues identified by the commission and recommended continuation of the current service delivery model. Paul Levy reported that representatives of both contractors had spoken with him about the addition of independent members to their boards of directors. Commission Welch said it had taken too long for these contractors to make recommended changes. Commissioner Ozanne agreed and said that CIDC had been held up as a model but it had taken them five or six years to adopt recommended best practices. He said that IDI had made no progress on implementing an attorney evaluation process. The report should reflect that it has taken them too long. Chair Ellis said that Clackamas is the only large county with a single provider model. While it is not necessary to change the model at this time, the commission may have to revisit the county in the future. Ron Gray has been more engaged in recent discussions about the system and has made a change in the composition of the CIDC board. In two or three years, however, the system may have to be reconfigured. The draft report should be revised to inject a note of caution.

(2) Proposed Service Delivery Plan for Clackamas County

[Please note: material in bold type is new and bracketed material is being deleted.]

Comments

The public defense delivery system in Clackamas County relies on a single provider for criminal defense representation and a single provider for juvenile and civil commitment representation. Lack of competition does not in itself, appear to have negatively affected the delivery of public defense services in the county but when the sole provider is a consortium it is more likely than other types of providers to lack a system for evaluating the work of member attorneys, a method for addressing underperformance and mechanisms for admitting new members and preparing for transitions in leadership.

Overall the representation provided by members of CIDC is rated as “good,” and representation by IDI as “good to excellent.” The quality of representation provided in individual cases, however, is reported to vary from one attorney to another in both consortia.

Neither of these contractors, at the time of the Commission hearing in March of 2009, had in place a process for systematic evaluation of the work of their attorneys and both had sometimes failed to address significant performance issues even when they were well known. After the March 2009 hearing both contractors took some very positive steps to address attorney performance. At the January 28, 2010 PDSC meeting it was reported that CIDC had nearly completed its initial round of attorney evaluations. IDI had begun research on an evaluation process and implemented some quality improvements. One attorney was terminated from IDI consortium membership. Two attorneys began specializing in child representation as part of a six-month pilot project. IDI members met with Judge Darling, with CASAs, and with DHS to discuss ways of enhancing their effectiveness as community partners.

Further progress was reported at the June 17, 2010 PDSC meeting. Ron Gray said that CIDC's bylaws were being revised to require two independent board members. The consortium had not had difficulty replacing two members who left, they had created a "work-up" program and added another apprentice. Attorney evaluations were completed and board members were monitoring those with negative performance reports. Chair Barnes Ellis commended CIDC for its progress and for responding to the Commission's concerns.

Marty Cohen said that IDI had established an evaluation procedure which included obtaining input from a broad group of those involved in the juvenile court system. **Unfortunately respondents were asked only to rate the work of the consortium as a whole and no information was sought about performance by individual attorneys.** The group has continued to seek an outside member for its board and, in view of the Commission's new policy on board members, will have to revise its bylaws to meet the new requirements. **It is not clear why it had not been possible to recruit one or more outside board members since other contractors have not reported similar difficulties.**

It is hoped that [these] positive developments will continue. Both groups have made significant strides towards implementation of **more** effective quality control mechanisms. CIDC has been able to replace retiring members with qualified attorneys, to continue its apprenticeship program and to implement a new "work-up" program to help attorneys become qualified to handle serious cases. While IDI has not made as much progress on its attorney evaluation process, it has addressed the issues raised by Judge Darling and is clearly striving to meet PDSC's expectations. **Some of t[T]he principal concerns identified in the initial report on Clackamas County have been or are in the process of being addressed.**

The Commission does not believe that prior to this structural review either contractor made earnest efforts to adopt best practices that had long been recommended by PDSC. The CIDC administrator has been a major contributor to quality improvement efforts statewide and has conferred

with other administrators about the effective administration of consortia. Nevertheless, CIDC failed to address its own quality assurance issues. It is hoped that both contractors are now committed to monitoring and ensuring the quality of representation being provided by their members. OPDS is instructed to provide periodic updates on reported performance of both consortia.

Recommendation

[While it will be critical for both consortia to ensure that they have the capacity to “evolve” to meet changing circumstances, the current public defense delivery system in Clackamas County appears to be functioning satisfactorily and no changes are recommended.]

While previous efforts made by both these contractors to ensure appropriate oversight of consortium governance and quality of representation has been disappointing, CIDC appears to have made significant progress and IDI has at the very least been made aware of PDSC’s expectations for it and other providers in future contract periods. Structurally, the public defense system appears to be functioning satisfactorily in Clackamas County and no changes are currently recommended. Within the next several years PDSC will consider whether the current system continues to be an appropriate model for this major county and whether the contractors have been able to evolve to meet changing circumstances.

Attachment 4



Oregon

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www.oregon.gov/OPDS

October 7, 2010

MEMORANDUM

To: Public Defense Services Commission

From: Paul Levy, General Counsel

Re: Proposed Policy and Procedure for Recoupment of Expenses for the Provision of Court-Appointed Counsel

Introduction

The Office of Public Defense Services (OPDS) is aware that courts currently use a variety of approaches to determine what amount if any to order a party to pay at the conclusion of a case where the court has provided public defense representation at state expense. While the issue arises most often in criminal cases, there are similar issues in other types of cases in which counsel is appointed by the court.

The variety of approaches may arise, in part, from a lack of clarity in the statutes that govern the matter, which one judge has recently suggested be amended. In the opinion of OPDS staff, a statutory change is not required but greater consistency and fairness could be achieved through the publication of a "schedule of compensation" by the Public Defense Services Commission (PDSC), along with an explanatory statement in the PDSC Payment Policies and Procedures. This memorandum sets forth the basis for this recommendation.

Current Statutory Scheme

Courts are authorized to order payment for the cost of providing representation at the time a court appoints counsel and later at the conclusion of a case. Payment orders made at the time of appointment are part of what is commonly known as the Application Contribution Program (ACP), pursuant to ORS 151.487. Any amount ordered as part of the ACP is "subject to the guidelines and procedures issued by the Public Defense Services Commission...". ORS 151.487(1). The PDSC's guidelines and procedures for the ACP program are set forth in a 305-page "ACP/Verification Desk Manual," compiled and administered by the Oregon Judicial Department.

MEMORANDUM

October 7, 2010

Page 2

Courts are authorized to order payment for the costs of public defense representation at the conclusion of a case by ORS 151.505, which provides, among other things, that courts are to establish a "reasonable attorney fee" by reference to a "schedule of compensation" established by the PDSC. Although the Commission has previously established a Schedule of Guideline Amounts, which includes, among other things, the hourly rates for non-contract attorneys in capital and non-capital cases, the Commission has not yet published a schedule of compensation to assist courts in establishing a reasonable attorney fee for purposes of ordering payment for the cost of public defense representation.

The creation of a schedule of compensation that provides courts with the typical costs of providing public defense representation for specific case types is likely to eliminate some confusion and inconsistency in current court practices in ordering payment for such costs. Courts are authorized, pursuant to ORS 151.505(2), to calculate a "reasonable attorney fee" by multiplying a reasonable number of hours for a case by "the hourly rate" established by the Commission. But this method often proves unsatisfactory, since the non-contract hourly rate is largely irrelevant to the majority of public defense cases which are handled by contractors on a unit price basis. Thus, a schedule of compensation providing typical case costs, for both counsel and nonroutine expenses, is likely to be of greater assistance to courts in establishing an amount to order a party to pay for the costs of representation.

The proposed addition to the PDSC's Payment Policies and Procedures is a short statement regarding the purpose of the proposed Schedule of Compensation. The schedule provides the most typical cost that PDSC incurs when it contracts for representation for specific case types. The schedule also provides the average nonroutine expenses for those case types incurred pursuant to ORS 135.055. The proposed addition to the Payment Policies and Procedures does not set forth in detail the steps a court should take in establishing an amount to order as payment for the costs of representation since most of those directions, such as considering a person's ability to pay any amount, are provided explicitly by the relevant statute.

Proposed addition to the PDSC Payment Policies and Procedures:

1.8 Recoupment of Attorney Fees and Expenses

At the conclusion of a case in which the court appointed counsel at state expense to represent a person, the court may order the person to pay a reasonable amount for the cost of appointed counsel and for expenses authorized under ORS 135.055. Pursuant to ORS 151.505(2), determination of reasonable costs by a court may be made by reference to a Schedule of Compensation established by the Public Defense Services Commission. For this purpose, the PDSC will provide and update as necessary a Schedule of Compensation (Exhibit ??), which describes the typical cost to PDSC to provide representation for listed case types and the average amount expended for each case type for nonroutine expenses authorized under ORS 135.055.

**Public Defense Services Commission
2011 Schedule of Compensation
For Purposes of Recoupment Pursuant to ORS 151.505(2)**

	Typical contract rate	Average expenses (rounded)	Total cost
Murder	\$20,000	\$16,000	\$36,000
Measure 11 felony	\$1,600	\$1,900	\$3,500
Non-M11 A felony	\$980	\$320	\$1,300
Non-M11 B felony	\$820	\$180	\$1,000
C/U felony	\$600	\$150	\$750
Misdemeanor, contempt, extradition	\$310	\$40	\$350
FAPA & Support	\$600	\$0	\$600
Probation violation	\$200	\$0	\$200
Habeas corpus	\$1,500	\$100	\$1,600
PCR	\$2,300	\$1,100	\$3,400
Civil commitment	\$310	\$40	\$350
Juvenile felony	\$600	\$400	\$1,000
Juvenile misdemeanor	\$310	\$40	\$350
Juvenile probation violation	\$200	\$0	\$200
Juvenile dependency	\$700	\$100	\$800
Termination of parental rights	\$2,300	\$300	\$2,600

Attachment 5

PRIVATELY-HIRED ATTORNEY FEE SCHEDULE	STATEWIDE
Homicides	
Aggravated Murder	\$50,000
Intentional, Felony Murder	\$30,000
Manslaughter I or II (Class A or B Felony)	\$15,000
Crim. Neglig. Homicide (Class C Felony)	\$6,000
Assault/Kidnap/Robbery/Menacing/Harassment	
Attempted Murder	\$6,000
Asslt. I or II, Kidnap I or II, Rob. I or II (Class A or B Felony)	\$6,000
Asslt. III or IV, Rob. III (Class C Felony)	\$3,000
Asslt. Pub. Safety Off., Res. Arrest (Misdemeanor)	\$1,500
Assault IV, Menacing, Reck. Endanger, Harrassment (Misdemeanor)	\$1,200
Sex Offenses	
Rape I or II, Sodomy I or II, Unlaw. Sex. Pen. I or II, Sex. Ab. I (Class A or B Felony)	\$7,500
Rape III, Sod. III, Sex. Ab. II (Class C Felony)	\$4,000
Sexual Abuse III (Misdemeanor)	\$3,000
Drug Offenses	
Manufac./Del. Cont Sub Schedule I, II or III (Class A, B or C Felony)	\$3,500
Possession Cont Sub Schedule I or II (Class B or C Felony)	\$2,500
DUII and Driving While Suspended/Revoked (DWS/R)	
Felony DWS/R	\$1,200
Misdemeanor DWS	\$1,000
Felony DUII	\$2,500
Misdemeanor DUII	\$1,200
Diversion Eligible DUII	\$600
Probation Violations, Contempt and VRO	
Probation Violation	\$750
Contempt / Violation of a Restraining Order (VRO)	\$750
Other Offenses Not Listed Above	
Class A Felony	\$5,000
Class B Felony	\$3,500
Class C Felony	\$2,500
Misdemeanor	\$1,000
Extradition	\$1,000

Attempt Or Solicitation to Commit "X" Crime: To determine the fee for an "attempt" to commit a crime, use the attorney fee for the next less serious underlying offense; e.g., for attempted Assault I or II, use the Assault III attorney fee schedule.

Fees For Conspiracy To Commit "X" Crime: Use the attorney fee for the underlying offense when determining the fee for conspiracy to commit a crime; e.g., for conspiracy to commit murder, use the intentional murder fee.

Jessica's Law cases: Use the same fee as for intentional murder.

If an interpreter is required, add \$150 to the relevant Privately-Hired Attorney Fee Schedule amount.

Privately-Hired Attorney Fee Schedule – For Non-Criminal Public Defense Case Types:

Juvenile Delinquency: Use the amount from the Privately-Hired Attorney Fee Schedule for the highest offense alleged.

Juvenile Dependency: Parent or Child Representation: \$2,000

Termination of Parental Rights: Parent or Child Representation: \$5,000

Civil Commitment: \$1,000

Postconviction Relief: Use the amount from the Privately-Hired Attorney Fee Schedule for the most serious conviction being challenged.

Habeas Corpus: Use one-half the amount from the Privately-Hired Attorney Fee Schedule for the offense on which the incarcerated person is filing the Habeas Corpus petition.

PRIVATELY-HIRED ATTORNEY FEE SCHEDULE	STATEWIDE
Homicides	
Aggravated Murder	\$100,000
Intentional, Felony Murder	\$50,000
Manslaughter I or II (Class A or B Felony)	\$25,000
Crim. Neglig. Homicide (Class C Felony)	\$12,000
Assault/Kidnap/Robbery/Menacing/Harassment	
Attempted Murder	\$12,000
Asslt. I or II, Kidnap I or II, Rob. I or II (Class A or B Felony)	\$12,000
Asslt. III or IV, Rob. III (Class C Felony)	\$6,000
Asslt. Pub. Safety Off., Res. Arrest (Misdemeanor)	\$3,000
Assault IV, Menacing, Reck. Endanger, Harrassment (Misdemeanor)	\$2,500
Sex Offenses	
Rape I or II, Sodomy I or II, Unlaw. Sex. Pen. I or II, Sex. Ab. I (Class A or B Felony)	\$15,000
Rape III, Sod. III, Sex. Ab. II (Class C Felony)	\$8,000
Sexual Abuse III (Misdemeanor)	\$6,000
Drug Offenses	
Manufac./Del. Cont Sub Schedule I, II or III (Class A, B or C Felony)	\$7,000
Possession Cont Sub Schedule I or II (Class B or C Felony)	\$5,000
DUII and Driving While Suspended/Revoked (DWS/R)	
Felony DWS/R	\$2,500
Misdemeanor DWS	\$2,000
Felony DUII	\$5,000
Misdemeanor DUII	\$2,500
Diversions Eligible DUII	\$1,500
Probation Violations, Contempt and VRO	
Probation Violation	\$1,500
Contempt / Violation of a Restraining Order (VRO)	\$1,500
Other Offenses Not Listed Above	
Class A Felony	\$10,000
Class B Felony	\$7,000
Class C Felony	\$5,000
Misdemeanor	\$2,000
Extradition	\$2,000

Attempt Or Solicitation to Commit "X" Crime: To determine the fee for an "attempt" to commit a crime, use the attorney fee for the next less serious underlying offense; e.g., for attempted Assault I or II, use the Assault III attorney fee schedule.

Fees For Conspiracy To Commit "X" Crime: Use the attorney fee for the underlying offense when determining the fee for conspiracy to commit a crime; e.g., for conspiracy to commit murder, use the intentional murder fee.

Jessica's Law cases: Use the same fee as for intentional murder.

If an interpreter is required, add \$150 to the relevant Privately-Hired Attorney Fee Schedule amount.

Privately-Hired Attorney Fee Schedule – For Non-Criminal Public Defense Case Types:

Juvenile Delinquency: Use the amount from the Privately-Hired Attorney Fee Schedule for the highest offense alleged.

Juvenile Dependency: Parent or Child Representation: \$4,000

Termination of Parental Rights: Parent or Child Representation: \$10,000

Civil Commitment: \$1,500

Postconviction Relief: Use the amount from the Privately-Hired Attorney Fee Schedule for the most serious conviction being challenged.

Habeas Corpus: Use one-half the amount from the Privately-Hired Attorney Fee Schedule for the offense on which the incarcerated person is filing the Habeas Corpus petition.

	A	B	C	D	E	F	G	H
1	Client	Current		Would qualify		Would qualify		
2	Assets	Private Atty	Option 1	under Opt 1	Option 2	under Opt 2	CaseType	Outcome
3	\$615	\$500	\$750	Y	\$1,500	Y	MPV	CAC
4	\$800	\$750	\$1,200	Y	\$2,500	Y	DUIS	CAC
5	\$849	\$750	\$1,200	Y	\$2,500	Y	MISS	CAC
6	\$1,010	\$1,000	\$2,500	Y	\$5,000	Y	CFEL	CAC
7	\$1,300	\$1,000	\$2,500	Y	\$5,000	Y	CFEL	CAC
8	\$1,377	\$1,000	\$2,500	Y	\$5,000	Y	CFEL	CAC
9	\$1,636	\$1,000	\$2,500	Y	\$5,000	Y	CFEL	CAC
10	\$1,946	\$750	\$3,000	Y	\$6,000	Y	CFEL	CAC
11	\$2,300	\$500	\$2,500	Y	\$5,000	Y	CFEL	CAC
12	\$2,300	\$2,000	\$2,500	Y	\$5,000	Y	CFEL	CAC
13	\$875	\$500	\$750	N	\$1,500	Y	CONT	CAC
14	\$1,346	\$500	\$750	N	\$1,500	Y	CONT	CAC
15	\$4,268	\$1,000	\$3,000	N	\$6,000	Y	CFEL	CAC
16	\$6,522	\$2,000	\$5,000	N	\$10,000	Y	AFEL	CAC
17	\$1,846	\$500	\$750	N	\$1,500	N	CONT	CAC
18	\$2,222	\$750	\$1,000	N	\$2,000	N	OTMS	CAC
19	\$2,978	\$500	\$1,200	N	\$2,500	N	MISS	CAC
20	\$3,250	\$750	\$1,000	N	\$2,000	N	OTMS	CAC
21	\$3,972	\$850	\$1,200	N	\$2,500	N	DUIS	CAC
22	\$5,687	\$1,500	\$1,000	N	\$2,000	N	MISS	CAC
23	\$6,685	\$750	\$1,000	N	\$2,000	N	MISS	CAC
24	\$7,634	\$750	\$1,200	N	\$2,500	N	DUIS	CAC
25	\$8,151	\$500	\$750	N	\$1,500	N	DPV	CAC
26	\$10,860	\$1,000	\$2,500	N	\$5,000	N	CFEL	CAC
27	\$23,783	\$1,000	\$1,200	N	\$2,500	N	MISS	CAC
28	\$25,730	\$2,500	\$3,500	N	\$7,000	N	AFEL	CAC
29	\$39,488	\$1,000	\$1,000	N	\$2,000	N	MISS	CAC
30	\$109,941	\$1,000	\$1,200	N	\$2,500	N	MISS	CAC
31	\$932	\$500	\$750	N	\$1,500	Y	PV	FTA
32	\$40,033	\$1,000	\$2,500	N	\$5,000	N	CFEL	FTA
33	\$682	\$500	\$750	Y	\$1,500	Y	FPV	Pro se
34	\$867	\$500	\$1,000	Y	\$2,000	Y	MISS	Pro se
35	\$1,060	\$500	\$750	N	\$1,500	Y	DPV	Pro se
36	\$1,268	\$500	\$1,000	N	\$2,000	Y	MISS	Pro se
37	\$1,273	\$750	\$1,200	N	\$2,500	Y	MISS	Pro se
38	\$1,669	\$1,000	\$1,200	N	\$2,500	Y	DUIS	Pro se
39	\$1,560	\$750	\$750	N	\$1,500	N	CONT	Pro se
40	\$1,596	\$750	\$600	N	\$1,500	N	MISS	Pro se
41	\$1,733	\$500	\$750	N	\$1,500	N	FPV	Pro se
42	\$3,634	\$750	\$1,200	N	\$2,500	N	DUIS	Pro se
43	\$5,022	\$750	\$1,000	N	\$2,000	N	DWSS	Pro se
44	\$20,010	\$500	\$750	N	\$1,500	N	FPV	Pro se
45	\$57,681	\$500	\$750	N	\$1,500	N	FPV	Pro se
46	\$740	\$500	\$750	Y	\$1,500	Y	DPV	Retained
47	\$2,233	\$1,500	\$2,500	Y	\$5,000	Y	CFEL	Retained
48	\$2,460	\$2,000	\$2,500	Y	\$5,000	Y	CFEL	Retained
49	\$1,178	\$700	\$600	N	\$1,500	Y	DUIS	Retained
50	\$1,239	\$1,000	\$1,200	N	\$2,500	Y	DUIS	Retained
51	\$1,472	\$750	\$1,000	N	\$2,000	Y	DWSS	Retained
52	\$1,596	\$750	\$1,200	N	\$2,500	Y	DUIS	Retained
53	\$1,696	\$1,000	\$1,200	N	\$2,500	Y	DUIS	Retained
54	\$1,783	\$1,000	\$1,200	N	\$2,500	Y	DUIS	Retained
55	\$4,346	\$1,500	\$2,500	N	\$5,000	Y	CFEL	Retained
56	\$2,596	\$1,000	\$1,200	N	\$2,500	N	DUIS	Retained
57	\$6,569	\$1,000	\$2,500	N	\$5,000	N	CFEL	Retained
58	\$11,265	\$2,500	\$3,500	N	\$7,000	N	BFEL	Retained
59	\$11,443	\$2,500	\$3,500	N	\$7,000	N	AFEL	Retained
60	\$12,996	\$750	\$1,000	N	\$2,000	N	MISS	Retained
61	\$71,547	\$2,500	\$3,500	N	\$7,000	N	BFEL	Retained
62	\$112,798	\$5,000	\$3,000	N	\$6,000	N	MISS	Retained

Estimated annual fiscal impact

	Minimum	Maximum
Option 1	\$114,675	\$143,325
Option 2	\$323,638	\$404,495
Incremental cost of Option 2	\$208,963	\$261,170

Attachment 6

Members

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

**Ex-Officio Member**

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

August 24, 2010

The Honorable Peter Courtney, Co-Chair
The Honorable Dave Hunt, Co-Chair
State Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairpersons:

Nature of the Request

The Public Defense Services Commission (PDSC) was requested to report to each Emergency Board by the following budget note in HB5100 (2010 session):

The Judicial Department and the Public Defense Services Commission are requested to report to each Emergency Board and Interim Joint Ways and Means Committee and the Joint Committee on Ways and Means at the beginning of the 2011 Legislative Session on the following:

- (a) estimated versus actual revenue receipts from House Bill 2287;
- (b) legislatively approved Other Funds budgeted expenditures and applicable positions;
- (c) actual expenditures and applicable positions funded with House Bill 2287 revenue;
- (d) caseload changes; and
- (e) any management actions taken related to any anticipated House Bill 2287 revenue changes.

PDSC requests that the Emergency Board accept this report.

Agency Action

The agency has prepared and submitted the attached report.

Action Requested

The PDSC respectfully requests that the Emergency Board acknowledge receipt of this letter and the attached report.

Legislation Affected

None.

Sincerely,

Ingrid Swenson, Executive Director
Public Defense Services Commission

Public Defense Services Commission
Status Report on Revenue, Expenditures and Caseload
Submitted to the September 2010 Emergency Board

Estimated versus actual revenue receipts from House Bill 2287

The Oregon Judicial Department (OJD) initially estimated that HB2287 would generate \$39.6 million in additional revenue. If HB2287 revenue continues at current levels without additional growth, OJD anticipates 2009-11 collections of \$33.8 million. Actual collections as of July 31, 2010 were \$14.7 million.

Assuming the current revenue projection of \$33.8 million is met, PDSC's portion of the revenue would be \$2.1 million short of the initial target.

Legislatively approved Other Funds budgeted expenditures and applicable positions

The Legislatively approved Other Funds limitation for the Public Defense Services Account for funds received from the Justice System Revenue Account is \$12,380,573. This figure is the funding required for seven of the eight quarters of the 2009-11 biennium. There is no additional position authority associated with this expenditure limitation.

Actual expenditures and applicable positions funded with House Bill 2287 revenue

As of this date, \$4,351,768 has been transferred from the Justice System Revenue Account to the Public Defense Services Account. The funds transferred from the Justice System Revenue Account are expended on public defense representation provided under contract. Actual expenditures to date are \$4,272,950; the remaining balance will be expended with the next monthly contract payments.

Caseload changes

In a report to the June 2010 Emergency Board Meeting, the agency projected FY2010 caseload at 170,319. Actual FY2010 caseload was 172,374, a 1.2% increase over the previous projection. The agency is projecting FY2011 caseload to increase slightly over FY2010 principally attributable to increasing C felonies, DUIs and juvenile dependency proceedings. All other case types are anticipated to remain essentially flat.

Attached to this report is a table showing historical fluctuations in caseload.

Management actions taken related to any anticipated House Bill 2287 revenue changes

All public defense services at the trial level for criminal, juvenile and other cases in which appointed counsel is statutorily or constitutionally required are provided by private contractors and hourly paid attorneys. PDSC's contract payments are based on the number and seriousness of cases handled. Because PDSC has no ability to control its caseload it has limited ability to control the cost for attorney services. In addition to payments made to attorneys under contract, however, PDSC authorizes and pays for "non-routine" defense related services that are "reasonable and necessary" to the defense of the case such as investigator and expert witness costs.

PDSC's Executive Director and the Director of its Contract and Business Services Division met with representatives of the agency's Contractor Advisory Group in June of 2010 and solicited recommendations for minimizing the cost of non-routine expenses in public defense cases. In July the agency notified all of its contractors that it would implement a practice of reducing the amount of initial authorizations for these expenditures and requiring contractors to submit additional justification for additional funding. It is hoped that the heightened scrutiny applied to these requests will ensure that only those expenses that are truly reasonable and necessary will be approved and that providers will make an earnest effort to complete the authorized services in the amount of time initially approved. Because the agency is also required to ensure that the quality of representation provided by its contractors meet state and national standards of justice as required by ORS 151.216(1)(a), PDSC has urged contractors to vigorously pursue approval of all appropriate expenditures. Any savings realized from a reduction in non-routine expenses would be used to offset the funding shortage currently projected for the agency's budget.

In consideration of a possible shortfall in HB2287 revenues, the Legislative Assembly appropriated \$3.5 million in General Funds to the Emergency Board for a special purpose appropriation, to be available to the Commission for public defense costs, if needed. The agency anticipates that it will have to request additional funding from the special purpose appropriation at the Emergency Board's December meeting. The nature of the request will be based on the most current projections for revenue and expenditures at that time.

Public Defense Caseloads
FY1989-FY2010

Fiscal Year	Total Caseload	Change (cases)	Change (%)
1989	84,614		
1990	92,038	7,424	8.8%
1991	96,730	4,692	5.1%
1992	103,028	6,298	6.5%
1993	103,330	302	0.3%
1994	108,963	5,633	5.5%
1995	121,700	12,737	11.7%
1996	129,693	7,993	6.6%
1997	133,596	3,903	3.0%
1998	147,038	13,442	10.1%
1999	152,950	5,912	4.0%
2000	163,944	10,994	7.2%
2001	166,658	2,714	1.7%
2002	167,893	1,235	0.7%
2003*	146,947	-20,946	-12.5%
2004	170,902	23,955	16.3%
2005	171,850	948	0.6%
2006	179,058	7,208	4.2%
2007	178,002	-1,056	-0.6%
2008	170,282	-7,720	-4.3%
2009	169,493	-789	-0.5%
2010	172,374	2,881	1.7%

* Appointments were deferred to the following biennium

Attachment 7

MEMO

To: Members of the Juvenile Law Interbranch Workgroup

From: Public Defense Services Commission

Re: Increasing Representation of Parents and Children at Shelter Hearings in Juvenile Dependency Cases

Performance Standards for Attorneys at Shelter Hearings

The performance standards for lawyers in juvenile dependency cases adopted by the Oregon State Bar¹ provide explicit guidance for lawyers representing parents and children at initial shelter hearings. Lawyers are advised to obtain relevant documents; meet with the client; assert the client's constitutional rights; assist the client to exercise his or her right to an evidentiary hearing; present arguments about: the jurisdictional sufficiency of the petition, the appropriateness of venue, the adequacy of notice, the need for shelter care and why continuation of the child's placement at home would or would not be contrary to the child's welfare, whether reasonable or active efforts were made to prevent removal, whether available services can prevent the need to separate the family, whether DHS's proposed placement is the least disruptive and most family like setting that meets the child's needs, the possibility of placement with relatives, arrangement for visits, applicability of the Indian Child Welfare Act; and request temporary orders that the client directs such as temporary restraining orders, child support orders, visitation orders, orders to the agency to investigate particular placements and the like.

Representation at Shelter Hearings in Oregon Counties

Unfortunately, information received from 26 Oregon counties in response to a survey of PDSC providers indicates that in nine counties no attorneys are present at shelter hearings; in four counties one attorney is usually present and is appointed to represent one party while the other parties are unrepresented; in thirteen counties attorneys for all parties are present. In these latter counties some attorneys receive extensive discovery and have an opportunity to meet with the client before the hearing; others receive only limited information and are appointed at the hearing, leaving no opportunity for preparation.

One might assume that representation for all parties at shelter hearings is more common in urban counties than in rural counties but that is incorrect. For example, attorneys are generally present for all parties in Union, Wallowa,

¹ The Specific Standards for Representation in Juvenile Dependency Cases can be found on the bar's website: <http://www.osbar.org/docs/resources/juveniletaskforce/JTFR3.pdf>.

Malheur, Baker, Grant and Harney Counties but not in Clackamas, Jackson, Linn or Polk Counties.

The Office of Public Defense Services has performed either a structural review or a quality assurance site visit to review the performance of its provider offices in most counties of the state and has uniformly urged its contractors to provide representation at shelter hearings. In some counties, OPDS believes its contractors have made genuine efforts to make representation available to all parties. In others, it is not clear why it has not been possible to provide such representation.

Compensation of Public Defense Attorneys in Juvenile Dependency Cases

Payment for public defense representation in juvenile cases is provided either by the hour (\$45 per hour) or under contract. All but one of OPDS's contracts are unit contracts in which there is a flat rate for representation in each casetype. The typical contract rate for representation in a dependency case is \$700. Under their contracts attorneys are required to represent clients in these cases from the time of their appointment for the duration of the case or of their appointment. If the case ends after the jurisdictional hearing, no additional compensation is provided. If a review hearing or a hearing before the Citizen Review Board is held post jurisdiction, the typical amount of additional compensation provided to the contractor is \$290 per hearing². The additional compensation paid to contractors for representation at Citizen Review Board hearings has resulted in much greater participation by attorneys in these hearings.³ If a special contract credit were awarded to attorneys for participation in shelter hearings, OPDS believes that such participation would increase and become the norm in most counties. If attorneys received an additional amount of \$90 (two hours at \$45 per hour) for participation in the shelter hearing, the total estimated cost would be approximately \$800,000 per year or \$1.6 million for the biennium⁴. The additional award would be made both to attorneys in counties where representation is already provided at shelter hearings and to attorneys in those counties where it is not in order that those who are already providing such representation would not be penalized. The additional compensation would also make it possible for some contractors to add more attorneys and therefore increase availability to attend shelter hearings, which are generally scheduled on short notice.

² A typical contract rate for representing a child or parent in a termination of parental rights case is \$2,200.

³ Because scheduling conflicts often prevent an attorney from participating in Citizen Review Board hearings, contract credits are awarded when the attorney participates in the hearing by phone or sends a legal assistant to provide designated information to the board and to report on board action to the attorney.

⁴ In FY10 there were 9,019 new dependency credits.