

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 23, 2009

12:45. – 4:45 p.m.

Mt Bachelor Village Resort
19717 Mount Bachelor Drive,
Bend, Oregon 97702

AGENDA

- | | |
|---|---|
| 1. Action Item: Approval of the Minutes of PDSC's September 10, 2009 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Action Item: Commission Approval of Service Delivery Plan for Lane County Criminal Cases
<i>(Attachment 2)</i> | Barnes Ellis
Commissioners
OPDS Staff |
| 3. Action Item: Commission Approval of Service Delivery Plan for Polk County
<i>(Attachment 3)</i> | Barnes Ellis
Commissioners |
| 4. Action Item: Contract Approval
<i>(Handout)</i> | Barnes Ellis
OPDS Staff |
| 5. OPDS Monthly Report
<i>(Attachment 4)</i> | OPDS Management
Team including 2010
Proposed schedule |

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.

Next meeting: PLEASE NOTE THAT THE PDSC MEETING PREVIOUSLY SCHEDULED FOR NOVEMBER 12, 2009 HAS BEEN CANCELLED. The next meeting of the Commission is scheduled for December 10, 2009 from 9am to 3pm at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION
OFFICIAL MINUTES

Thursday, September 10, 2009
9:00 a.m. - 1:00 p.m.
B & C Conference Room
Public Service Building
125 E 8th Ave
Eugene, OR 97401-2926

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

STAFF PRESENT: Ingrid Swenson
 Kathryn Aylward
 Peter Gartlan
 Becky Duncan
 Paul Levy
 Shelley Winn

(Meeting was called to order)

Agenda Item No. 1 Approval of the Minutes of PDSC's August 6, 2009 Meeting

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

Agenda Item No. 2 Presentations on Public Defense Delivery in Criminal Cases in Lane County

Chair Ellis discussed the Commission's previous meetings in Lane County and its decision to establish a panel of attorneys to handle conflict cases from the public defender's office, replacing the traditional court appointed attorney list which had previously been in place. The Commission hoped the panel would allow new attorneys to enter the practice but under appropriate supervision and monitoring. The Commission has now returned to hear how that system is working after several years.

Marc Friedman thanked Commissioners for coming to Eugene to review the work of the Lane County Public Defense Panel. He noted that there were a number of panel members at the meeting. The panel handles 30 to 40 percent of the caseload. One criticism that has been raised is that he as the administrator

may not be harsh enough to handle problems. But the question for the Commission is whether the system itself is flawed. Another separate issue is the perceived desire on OPDS's part to end the hourly system. Panel members urge the Commission not to establish a unit based system as proposed by one group of lawyers. The open panel system itself is not flawed. Perceived quality of representation issues are not unique to Lane County.

There are currently 26 members of the panel but there have been as few as 24 and many as 32. There is no limit on the potential number. The panel has an application process that includes a background check and contact with references. Some attorneys join the panel directly out of law school. The Oversight Committee decides whether or not to admit new applicants. Attorney assignments are made from lists of attorneys qualified for misdemeanors, lesser felonies, major felonies, Measure 11 felonies and murder cases. The Oversight Committee decides who is qualified for each list. Qualifications are reviewed every two years. Cases are assigned from each list on a rotation basis. Some cases are individually assigned if the client or the case is particularly demanding. Approximately 3 or 4 applicants have been rejected for panel membership. Some have been approved for a lower level of cases than they applied for. Some lawyers have been removed from the lists. Before being removed attorneys are offered the opportunity to work with a mentor who does not get paid for his or her services. Sometimes this has worked out, other times it has not. The panel's system for training and supervision of new attorneys could be better. The principal problem is that new attorneys come in qualified to handle only misdemeanors but there are very few misdemeanor cases in the county. Besides the mentorship component, the panel co-sponsors a CLE seminar with the public defender's office every two months. The percentage of each panel attorney's time that is devoted to criminal cases varies but no member spends more than half of his or her time on them. Most of the cases assigned to the panel are conflict cases and the attorney that appears at arraignment with the defendant generally keeps the case unless it is a case type for which the attorney is not qualified. People handling the more serious cases tend to be criminal law specialists some of whom may take only the occasional appointed case. Mr. Friedman takes some panel cases himself, often those on which there has been a late substitution of counsel and which other panel members decline to accept. He spends approximately 10 to 15% of his professional time handling panel cases and approximately 50% managing the panel, which includes reviewing attorney billings and other administrative responsibilities. He has a staff person who devotes 70% of her time to panel administration.

Mr. Friedman described the Oversight Committee that was established by the Commission. It currently includes Commissioner McCrea, Judge Mary Ann Bearden, Janise Auger from the public defender's office and local attorney Tony Rasta. There is one vacant position. The committee decides who is admitted to the panel and when attorneys need additional mentoring or removal from one or more lists. The group is hoping to increase the frequency of its meetings to once every other month.

Commissioner Ozanne asked whether the Commission's expectations of Mr. Friedman had been unrealistic. Mr. Friedman said they had. He does not have sufficient time to observe panel attorneys and has depended on others to alert him to problems. He needs to be more proactive in contacting the judges. While input from the court is needed he is not certain that a judge should serve on the Oversight Committee. He also questions whether a public defender should be on the committee. If the current panel is not meeting the

Commission's needs it might be appropriate to consider a group that is more on par with the public defender, not just a conflict provider. The cases received by a conflict provider are often cases in which the attorney-client relationship is already strained. With respect to the size of the panel, the current volume of cases is not sufficient. Fourteen of the 26 attorneys are Measure 11 qualified, three are only misdemeanor qualified and the others are in between. There are too few attorneys to handle the more serious cases and far too many attorneys available to handle the less serious cases. Panel attorneys continue to support an open panel, however, which means they will each have fewer cases. New attorneys are in need of mentoring but experienced attorneys are being asked to provide mentoring without compensation.

Commissioner Ellis said that defense attorneys around the state donate their time as mentors.

Commissioner Ozanne inquired whether case rates rather than hourly compensation wouldn't be a better business approach.

Mr. Friedman described the process he uses to review attorney billings. He said that even if a unit rate were implemented in Lane County the attorneys would still want it to be an open system. The current system is working, however. Some attorneys had to be removed and the system could be further improved but major changes are not needed.

Chair Ellis said that the Commission is not focused on any particular method of compensation but is focused on quality.

Dan Kruse said that he completed law school in 2006. He works approximately half time for an environmental organization and has a sole practice in criminal defense. His criminal defense practice includes retained cases and public defense cases from the panel. His panel work, which is approximately 30 or 35 percent of his overall practice, has allowed him to continue doing public interest work in the environmental area. He is 28 years old and does not have children or major debts beyond his education loan debt so he is better able to work for \$45 per hour than older colleagues. He shares office space with another attorney. He participated in the public defender clinic in law school and has had a number of mentors but did not have the opportunity to co-counsel on any cases before taking on panel cases. He would have felt more comfortable asking his mentors for additional help if they were getting paid for their time. He currently handles misdemeanors, lesser felonies and major felonies from the panel. He said it took a lot longer to qualify for minor felonies than to move from minor felonies to major felonies. He recommended that misdemeanor attorneys be permitted to work on lesser felonies under the supervision of qualified attorneys. Currently he is getting more than enough cases from the panel and is able to mentor newer lawyers on some cases.

Chair Ellis congratulated Mr. Kruse for his courage in making a solo practice work directly out of law school.

Robert Rainwater is a new member of the panel. He practiced in California for 33 years before returning to Oregon. He was told of the need for more experienced lawyers to handle panel cases and applied for membership. He said he would probably not be involved in defense in Lane County but for the open panel.

Chair Ellis said that an attorney with his experience might be able to find work in counties with other models as well.

James Van Boeckmann testified that he is one of the younger members of the panel. He is 43 and has three children. He has been a lawyer since 2003. He took public defense cases through the list that predated the formation of the panel and then applied for panel membership. He is now Measure 11 qualified. Half of his time is devoted to public defense, the other half to immigration law. He was mentored by a number of local attorneys and members of this group of lawyers now help each other out.

Robbie Manders has been practicing criminal defense for 20 years. It is approximately 95 to 98% of his practice. The public defense portion varies from 30% to 65 or 70%. He is very satisfied with the way the system works and doesn't see it as any different from what was in place 20 years ago. Things have probably not gotten any better under the panel but the question the commission should be asking is why experienced lawyers are leaving the panel. Money has not been the only reason they leave. They feel that certain Lane County judges treat them as second class citizens. Maintaining an open system has a price in that it requires you to be constantly dealing with new people. He believes that part of his practice should be pro bono so he doesn't mind not being paid to mentor other lawyers. He doesn't see a reason to change the way public defense cases are handled in Lane County.

Laura Fine started her legal career as a legal aid attorney and then moved to public defense. She spent six years at the public defender's office but wanted to be able to devote more time to her cases so she began her own practice. She continues to handle University of Oregon legal aid cases. She handles civil commitment cases and Measure 11 cases from the panel and also serves on the federal panel. She handled a high-profile misdemeanor case for the panel last year and likes the flexibility that the panel provides. She has been an advocate for the panel from the beginning. The open panel has allowed people like Dan Kruse and Robert Rainwater to handle public defense cases.

Marc Friedman said that while inadequate compensation is part of the problem the group would still prefer the hourly rate to case rates. Chair Ellis said that he did not see how a panel system could work on a case rate basis.

Mr. Friedman said he would like for there to be parity for panel attorneys. He said that the panel could provide information to OPDS that would make the cost of panel cases more predictable since that is one current benefits of a case rate system. He said that the panel has already improved its mentoring program but they are just not equipped to establish an apprenticeship system. He is willing to become a more proactive administrator. The group that has submitted a consortium bid is not equipped to handle the full panel caseload and the model that has worked best in Lane County is a two provider system.

Judge Debra Vogt said there are a lot of really good lawyers in Lane County. The four judges on the criminal team see attorneys at their first appearances since they handle arraignments, probation violations and similar matters. They see more of the blunders made by new lawyers than the trial judges do. The judges are not aware of what the requirements are for new attorneys. She and the other judges have indicated a willingness to provide feedback to lawyers on their performance in court but the panel lawyers don't ask for it. The prosecutors often come in for such feedback. The District Attorney's office also

inquires of her how their newer attorneys are doing. Mr. Friedman has not asked about the performance of the panel lawyers.

Lane County Presiding Judge Mary Ann Bearden said that quality of representation would always be a problem as long as compensation remained too low. The court cringes whenever they lose an experienced lawyer from the panel.

Commissioner Welch said that input from judges is absolutely critical for the evaluation of attorney performance. An administrator can't sit in the courtroom often enough to really evaluate the lawyer and most lawyers spend very little time in trial. The judges observe them resolving cases and making other appearances.

Commission Ozanne said that the panel system was adopted to honor the preference of the Lane County lawyers but the important issue is whether the clients' interests are being protected. The question is what system over time will provide the best defense structure? Can the panel provide the experience, a sufficient number of cases, and the necessary oversight?

Judge Bearden said she shared his concerns. To stay with the panel is just a nod to the bar and their strong feelings. She has looked at it both ways. When she was part of the juvenile consortium it wasn't a perfect system either. There isn't one. There is a greater danger that clients will not be well served with the panel, however. By serving on the Committee she has been trying to make it work but it is an unwieldy system and needs a lot more oversight. She calls Marc Friedman if she becomes aware of a concern by one of the judges about a panel attorney. This occurs several times a year. She makes more calls to Marc Friedman about panel attorneys than she does to the public defender's office.

Commissioner Welch said that judges don't usually initiate a call to a contract administrator unless the circumstances are egregious. If they called about all of the things that concern them they would be calling all the time.

Judge Bearden said that another area of concern is that panel attorneys don't always arrange for another attorney to cover their cases when they are unavailable.

Judge Vogt said that it would also be helpful for panel lawyers to introduce themselves to the judges before appearing in their courtrooms. She sometimes looks around and doesn't believe a panel lawyer is present to appear on the panel cases and then finds that a new lawyer she has not met is representing the panel clients. The public defender's office is good at introducing their new attorneys.

Judge Bearden said that in her conversations with deputy district attorneys over the years she has learned that they sometimes have to settle cases to avoid what they believe would be certain post conviction relief when defense attorneys don't do their jobs. If the Commission decides on a closed group there would need to be an opening for new lawyers to come in. If the Commission continues to have an open panel it needs a lot of structure and either way it needs to be paid for. She thinks an open door consortium with a case rate makes better business sense than the current structure.

Lane County District Attorney Alex Gardner said that both DAs and defense attorneys would agree on who the problem lawyers are in the county but it is

hard to turn on people you may be fond of. He spent the first ten years of his career in Roseburg where he believed the average competence level of the private defense bar was quite a bit higher than in Lane County. He said there are extremely talented people in Lane County but they don't self-police effectively. There is a strong sense that nothing is done when concerns are expressed, as in a capital murder case his office tried which he discussed with OPDS. There was profoundly, grossly incompetent representation by the non-panel counsel in that case. There have been a number of panel attorneys coming through the system. Some of them do court appointed work for 18 or 20 months before they are removed from the panel. Most of them have not had the benefit of the kinds of apprenticeship training that DAs and public defenders get. Marc Friedman's role is different from his role and from Greg Hazarabedian's role at the public defender office. Marc is more like an air traffic controller than an employer. He can make assignments but not supervise people.

Greg Hazarabedian testified that he has worked well with Marc Friedman in the administration of the public defense system in Lane County. He does not view the panel as being competitive with his office. The panel includes lawyers who participate in the defense clinic at the public defender's office and lawyers who were employed by the office. The public defender and the panel co-sponsor CLE sessions every other month. He would like to see the panel or its successor continue to take only the conflict cases that they are currently taking. There is a large conflict caseload since the public defender office has been in operation for many years and has represented many clients. The large majority of conflicts are identified early in the process. The substitution process is handled informally if no trial date has been set. A motion and order for substitution is required in cases that have been set for trial. He estimates that only 20 or 25% of the cases involve clients who may have issues that make it more difficult to work with them. He does not have a position on the structure of the group that handles conflicts in the county and is not convinced that a consortium model is necessary to increase compensation. Some consortia have quality issues too. The four lawyers who submitted a consortium bid are capable lawyers. He would like to see the openness of the panel continue.

Agenda Item No. 3

Update on Service Delivery in Umatilla and Morrow Counties

Doug Fischer, the director of the Intermountain Public Defender Office in Pendleton said that it has been a challenge to recruit and retain lawyers for his office. The district attorney appears to have an easier time recruiting, but both offices lose attorneys on a regular basis. There are 7.5 FTE attorney positions in his office. Three of them have been in practice since the 1990s but the others have practiced for only three or four years.

Chair Ellis inquired whether he was considering sending new attorneys in his office to the trial skills training offered by the Metropolitan Public Defender in Portland. Mr. Fischer said that he is committed to doing so. Mr. Fischer also said that he planned to use some of the overage payment he will receive from OPDS to hire another attorney.

Paul Levy noted that it was part of OPDS's recommendation that a new attorney in the office would not just help to cover the caseload but would also be used to provide oversight and training within the office. OPDS staff received favorable reports about the work of the office in criminal and juvenile delinquency cases but it remains difficult to retain attorneys in the area. He has urged Mr. Fischer

to confer with his colleagues in other counties about how best to continue to have a collaborative office while adding more structure.

Commissioner Welch asked about the youth in delinquency cases who are not represented by counsel. Mr. Fischer said that they see only the youth for whom counsel have been appointed and suggested that the Commission seek this information from others.

Agenda Item No. 4 OPDS Monthly Report

[The tape recording ended before the meeting was adjourned. PSDC staff in attendance at the meeting provided the following summary of the balance of the meeting.]

The Commission made the following decisions regarding how OPDS staff should approach current contract negotiations.

One of the Commission's original priorities had been to mitigate rate differentials among similarly situated contractors. While in some instances, it may be impossible to mitigate rate differentials if the rates proposed vary significantly, Commissioners agreed that rate differentials are acceptable as long as all bids are carefully reviewed to determine whether the prospective contractor could provide quality representation at the rates proposed.

Regarding counties in which there are multiple providers and where the public defense caseload has declined, the Commission discussed whether all providers should be offered a reduced caseload or whether some providers should be preserved at the expense of others. A concern was expressed that if providers were eliminated now when the caseload is down, there could be a problem if and when the caseload increased if those providers were no longer available. The Commission decided that in counties with declining caseloads, reductions should be applied to all continuing contractors in order to preserve those who provide quality representation and whose services may be needed in the long term.

It had been reported to the Commission that many consortia representatives objected to the case rate differential that currently exists between public defender contracts and consortium contracts. Under current contracts, public defender rates are approximately 20% higher than non-public defender rates. Public defender contractors provide additional services and benefits such as investigation, training, stability, institutional presence and community participation; in addition, public defenders have fixed budgets and are unable to supplement their income with non-contract work. Staff testified that the investigation costs alone would require a 10-14% differential. Based on the needs of the public defense system as a whole for these additional services the Commission approved continuation of a rate differential between public defenders and non-public defenders.

The commission also decided that contracts for juvenile cases would require agreement that attorneys working under a contract would be obligated to complete the number of juvenile CLE credits required under the Oregon State Bar's Performance Standards during the two year period of the contract. The Commission further agreed that all court appointed attorneys in state court juvenile proceedings would be required to observe the other of the provisions of the performance standards as well. -

Peter Gartlan reported that the Appellate Division has five arguments before the Oregon Supreme Court this month. Four of the cases are being argued by attorneys making their first appearance before the Supreme Court.

Becky Duncan reported that the division is responding to HB 3508, which, among other things, provides for increased earned time (from 20% to 30%) for certain inmates. To receive the increase, an inmate must be resentenced. DOC is identifying the inmates eligible for consideration for the increase and notifying the inmates, the DAs, and the courts of the inmates' eligibility for consideration for the increase. Once DOC files a notice with a court, the DA must notify the victim (if there is one) to determine whether the victim objects to the increase. If the victim objects (or the DA objects), the DA must notify the court of the

objection. A court may also object on its own. If no one objects, no hearing is held, and the court simply signs a supplemental judgment (prepared by DOC) authorizing the increase. If anyone objects, the court must schedule a hearing and appoint counsel for the inmate.

OPDS will work with the courts to make the appointments. OPDS and the courts would like the attorney who handled the original sentencing to be appointed if possible. The attorney will be compensated for the representation; it is a resentencing, for which payment rates already exist.

At the hearing, the inmate will appear by phone. The evidence is limited to that available at the time of the original sentencing. Under the statute, a court shall grant the increase unless it finds "substantial" reasons not to.

If a court denies the increase for an indigent inmate and the inmate wants to appeal, the Appellate Division will initiate an appeal. The division does not know how many appeals will arise. DOC has determined that approximately 800 inmates would be released in the three-month period from August to October 2009, if given the increase. DOC will send notices to those inmates, a subset of those will have hearings, and a subset of those will be denied the increase. It is the last subset that might appeal.

Because HB 3508 was enacted as a cost-savings measure and the default is that the increase is that courts should grant the increase, the Appellate Division hopes there will not be too many of these appeals. But, that depends on whether there are objections and how the courts rule in response to those objections. Paul Lipscomb of MCAD reported that the Marion County DA's office had two different deputies review the cases where inmates were eligible for consideration for the increase. One deputy recommended objecting in 30% of the cases, the other in 50% of the cases. Lane Borg of MPD reported that the Multnomah County objection rate was 30%.

Becky Duncan also reported that HB 3508 has another provision that relates to the deportation of inmates and that OPDS is working with the governor's office to determine how that will be implemented. The intention of the provision is to allow persons who would be subject to deportation to stipulate to their deportation and be removed from custody (and the country) before the completion of their DOC sentence. The deportation would occur only when the inmate has six months or less to serve in DOC custody. OPDS is working with the governor because one condition of the "stipulated deportation" the governor intends to require is dismissal of any pending direct appeals.

[The meeting was adjourned.]

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, September 10, 2009

9:00 a.m. - 1:00 p.m.

B & C Conference Room

Public Service Building

125 E 8th Ave

Eugene, OR 97401-2926

MEMBERS PRESENT:

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

STAFF PRESENT:

Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Becky Duncan
Paul Levy
Shelley Winn

(Meeting was called to order)

Agenda Item No. 1

Approval of the Minutes of PDSC's August 6, 2009 Meeting

1:25 Chair Ellis

I would like to call the meeting to order and thank you all for coming. This is a meeting of the Public Defense Services Commission. Let's start with the minutes of August 6, 2009. Are there any additions or corrections to the minutes of August 6? If not, I would entertain a motion to approve the minutes as presented.

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

Agenda Item No. 2

Presentations on Public Defense Delivery in Criminal Cases in Lane County

We are here in Lane County. We were here several years ago, and the purpose of our going around the state and meeting in communities, is to facilitate our understanding of what is happening in a particular area, to interact with the people in that area from all elements of the criminal justice system, and to see if in partnership we can't improve the quality and efficiency of defense services. In Lane County we had in my memory, two public meetings four years ago that did lead to restructuring of one component which is the caseload not covered by Lane PD. We actually crafted a new approach for us and I think for the state in

this county which is used for, what some call the conflict piece or the alternate provider piece. It had been a traditional court appointed system. We tried to craft a new system that would both allow particularly younger lawyers to get some experience in the field, but under appropriate supervision and the kind of case assignment. We have had a few years to work with that and I think we are now at a point where we would like to hear from those involved how they feel that is working and whether we need to make any changes in it. So, with that background is Mark here?

3:56 M. Friedman

I am right here.

4:03 Chair Ellis

Do you want to lead off?

4:05 M. Friedman

I shall. I want to thank you all for coming down to Eugene to talk with us. I realize you are here because there have been some questions that have been raised in terms of reviewing how the panel has been working. Our official name is the Lane County Public Defense Panel. I think we are just generally referred to as the "Panel." We are a conflicts group. We have been responsible for handling approximately 30 to 40 percent of the cases and that amount varies. Essentially, we handle the cases that the Public Defender's office does not. It is not often that I get to sit before a group like this. Usually I am standing, but I am here for what I hope is an open discussion. My hope is that we will be saving the panel or the panel concept. I am not really here to save my job. I say that because I know that from some of the reports that have been written, some of the criticisms that have been raised in terms of how the administrator has been working.

5:30 Chair Ellis

I assume that you have seen the draft.

5:36 M. Friedman

Before I talk specifically about the panel and operations what I would like to do is just kind of lay out what I see are some fundamental questions that have been brought up and things that I will hopefully be able to address. I will tell you right now that I don't have the answers for all of these things, but I have got some ideas. We have a number of members of the panel here and a mix of folks that I will ask you to hear from later on. The question is whether the system is flawed, or is the administrator or the administration the problem? One of the criticisms that we have heard is that the administrator is too nice, not harsh enough, not hard enough to handle the problems. I ask you to see that in context. The question here is whether there is an organizational flaw or perhaps an individual flaw. What I am suggesting is that we don't want you to do anything that essentially throws the baby out with the bath water. The other thing that I would like you to think about in terms of some of these fundamental issues is that there is a need to differentiate between the perceived desire to end the hourly system. That is how we operate. We are paid on an hourly system. We are paid a pittance on an hourly system, and again I will get to that in a little while. There has been ... at least we who are part of the panel have seen what we believe is a desire to establish a unit based system, perhaps a consortium type system here in Lane County. You will hear that there is a consensus to not go that route.

7:20 Chair Ellis

Consensus among the panel attorneys?

7:21 M. Friedman

Among the panel attorneys, correct. What I am hoping is that the alleged or purported problems of some panel attorneys are not used as an excuse to end the panel. The fact is that the open panel is not flawed. Any problems that may exist in terms of quality or qualifications of attorneys, I will submit that that is not really a problem or not unique to Lane County. The question of there being a quality problem is a misperception. What goes along with that is this whole question of if we throw more money at it are we going to get better representation? The fact of the matter is that the Lane County Panel has many, many fine, well qualified attorneys.

8:19 Chair Ellis

Marc, let me start a conversation here. How many members of the panel are there?

8:29 M. Friedman Currently there are 26 active members of the panel. Of the 26, they deal with a range of cases. If you would like me to address that now I will, otherwise, I can get to that in a little bit.

8:40 Chair Ellis I thought I heard you use the phrase “open panel?”

8:47 M. Friedman Yes, and what I mean by an open panel is that there is no limit potentially to membership. We have had as many as 32 attorneys on the panel and I think we have probably had as few as 24. I can’t remember exactly how low we have gone.

9:02 Chair Ellis What does one do to become a member?

9:05 M. Friedman An individual applies for membership and there is an application process in which they lay out their qualifications and they provide us with references. We do a background check with the bar and we call the references, particularly if somebody is from out of county we do some fairly detailed work. A number of people that have come into the panel are brand new attorneys, fresh out of law school, so there is not a whole lot of background checking to do. Ultimately, the question of whether somebody is admitted to the panel or not is brought to the Oversight Committee. The Oversight Committee decides whether or not they are admitted to the panel and the types of cases that they are allowed to take. Just so we are clear, the panel handles all levels of cases with the exception of juvenile cases and aggravated murder. We handle everything else that constitutes a conflict within Lane County Public Defender.

10:06 Chair Ellis Are cases assigned, the Measure 11 and more serious cases, to the experienced attorneys?

10:11 M. Friedman Absolutely.

10:11 Chair Ellis How is that done?

10:12 M. Friedman We have lists. Lists of misdemeanor qualified attorneys, lesser felony qualified attorneys, major felony qualified attorneys, and Measure 11 qualified attorneys, and murder and some of the other mental commitments and things like that.

10:30 Chair Ellis Who makes the judgment on whether someone is qualified on a major felony?

10:39 M. Friedman That issue, when somebody is originally admitted to the panel, is something that is addressed by the Oversight Committee. The Oversight Committee reviews that based upon my recommendations from the background work that we have done. Then we review that every two years in terms of an attorney’s qualifications. We can have a given attorney on the panel that may be qualified and willing to take both misdemeanors and Measure 11 cases. Therefore, they would fit on those lists. I can tell you that for the most part when an ordinary, run of the mill case - in other words the case that either comes directly out of arraignments, or more often than not for the panel a case that arises as a conflict from the public defender’s office - when it comes into our office we determine, again, the level of case and typically there is a rotation system so the next attorney up is the one that would get that case.

11:31 Chair Ellis The next attorney

11:31 M. Friedman on that list.

11:36 Chair Ellis in that qualified group?

11:34 M. Friedman Correct. So if it is a misdemeanor case that comes to us it would be the next misdemeanor qualified attorney that would take that case. If it is a Measure 11 case that comes to us it would be the next Measure 11 attorney. The exception, however, is oftentimes either we are

aware from contact with the public defender's office that there might be some unusual or difficult circumstances with a case, or often as not the court, and particularly the presiding judge, will notify us that there is a case where the public defender is withdrawing and there may be something difficult about the case, whether it is the client or the complexity of the case. In those circumstances we essentially handpick the attorney that is going to take those cases. I will tell you that for the most part that applies to the Measure 11 cases.

- 12:28 Chair Ellis How many lawyers have applied to be on the panel that the Oversight Committee chose not to admit?
- 12:37 M. Friedman I can think of probably three and maybe four. There are a number of circumstances where somebody applies to be at a higher level than we believe they are qualified for, and they get admitted to the panel but at a lower level. Then part of the process is to sort of establish whether or not they are capable of handling these higher levels of cases.
- 13:05 Chair Ellis Any lawyers been taken off?
- 13:05 M. Friedman Yes.
- 13:05 Chair Ellis What is the process for that?
- 13:10 M. Friedman Again, what we have tried to do is work through a process in which we have a mentorship where, essentially, we try and pair an attorney up with somebody who is more experienced and help them come along with the process in terms of understanding the cases.
- 13:28 Chair Ellis Does the mentor get paid for that?
- 13:28 M. Friedman No. The mentor does it basically as a volunteer. Only the attorney that is appointed to the case gets paid for the case. There are very few exceptions to that and with those exceptions we actually have to apply to Salem for authority to have a co-counsel appointed. Again, those will generally all be cases in which – I can think of one lesser felony misdemeanor case that was very involved where co-counsel was appointed. That has occurred a few times. We have been in existence now for three and a half years and I can only think of maybe two other times on Measure 11 cases. Otherwise, where there has been a mentorship it is basically on a volunteer basis. What it consists of is the attorney that has the case goes to somebody who said they would be willing to essentially coach that attorney. We have had some great success and some cases where it hasn't worked out.
- 14:36 Chair Ellis One of the arguments four years ago when we went through this process, that favored the kind of open panel that we ended up with, was the argument that it allowed for entry of new lawyers other than as full-time employees of Lane PD. The counter concern if we had gone to a consortium was that it is very hard for new lawyers to enter and get training and supervision. The thesis of the panel concept was the belief that with the panel system, with an administrator, with an Oversight Committee, there would be a mechanism for training and supervision of entry level lawyers. How is that going?
- 15:42 M. Friedman I think it could go better. I think it is going pretty well, but I think it could be better. I will tell you what the big problem is. The big problem for the new attorneys, particularly in the last couple of years, is they come in as misdemeanor qualified. We have had so few misdemeanor cases in Lane County that they are not getting the cases and consequently not getting the mentorship to come along, so there has been a problem there.
- 16:10 Chair Ellis Is the training and supervision synonymous with the mentor program that you provide?
- 16:16 M. Friedman Yes. Separately there is a CLE and we have always encouraged everyone on the panel to attend. We now require membership in OCDLA and things like that. We have now started a

program in cooperation with the PD's office of actually sponsoring CLEs. We do that every two months. What you are talking about, and what I guess what I am thinking of, is the more direct hands on, one to one, with the new attorneys.

16:51 Chair Ellis One of the other concerns is in a PD structure the lawyer who practices there is a 100 percent criminal defense and becomes presumably experienced and specialized. With the panel one concern is that the lawyers may only have, say, 10 or 20 percent of their practice in defense. For the eighty percent they may be doing a range of other things that have some relevance but they are not defense practice. What is your best estimate of the 26 that are on the panel, what percent of their practice do you think is defense work.?

17:46 M. Friedman I think it varies greatly from attorney to attorney. I would say that there probably isn't anyone who is doing more than 50 percent. I would say the majority of people are probably doing more in the range of 20 to 30 percent of their cases. Again, that may be more of a reflection of the number of cases. We get a fair number of more serious cases. We get a fair number of lesser felonies. We are not getting very many of the misdemeanor cases. It is curious that you ask. One of the things that I recall when the panel was first organized was that there was the – I think it was from you, Peter - the indication that no one on the panel should expect to have more than 50 percent of their work dependent upon this type of work, indigent defense work, for their income. We intentionally are not. We certainly have achieved that given the number of people on the panel.

18:49 Chair Ellis I don't recall that being a goal. I do recall it being a reality that needed to be communicated to the prospective members.

18:53 M. Friedman Again, I don't suggest that that was a goal but and that is the reality given the rotation system that we have. Let me just give you a little bit more information about how we are structured. The majority of our cases are conflict cases. We have an attorney that staffs arraignments, both morning and afternoon in custody arraignments. The attorney that actually staffs that arraignment, if they are qualified, will get those cases out of arraignments. There is certainly an incentive to staff arraignments in order to pick up cases. If the attorney that is staffing it - and again we have a calendar and people tell us their availability - if the attorney isn't qualified then the attorney that gets appointed from the panel is the next one typically on the rotation system. There can be significant flux in terms of the number of cases that a given attorney will pick up in a week or in a month. Again, there is nothing hard or fast in terms of any expectation on the part of anyone on the panel in terms of how many cases they are actually going to have in front of them, but I think in terms of having people do other things besides criminal defense work, I think there is certainly some benefit in terms of providing some kind of a range of experience. Especially when we get into the more significant cases, the major felonies and Measure 11s, there has been some degree of specialization. It may be an adverse specialization in that there are certain people who have chosen not to do sex cases and we respect that. We allow that in terms of appointment on the cases. Again, with regard to these more difficult cases what will typically happen is I will call around to the attorneys who I believe are capable and qualified to handle those cases. They have the ability to say "nay" or "yea" on those cases. For some of the attorneys on the panel they are basically there to take on these more difficult cases. They don't take cases in the usual routine fashion.

21:16 Chair Ellis Do you yourself handle cases?

21:17 M. Friedman I do. I handle cases. My preference has always been that I would rather have the panel attorneys take cases. The reality is when I have the case, and this is often the difficulty we run into in terms of appointing somebody. These are cases where the defender's office has withdrawn and they have withdrawn fairly late. The court has pressing trial calendars and is insisting that we are going to hold fast to these dates. Whether or not that might change in the future or not is a subject to be determined, but when I call up an attorney and say, "Hey, I have got this case. It is a significant case and the court says it has to be tried by X date. Will

you take it?" Guess what? A lot of times people have to say no. What ends up happening is those are the cases that I oftentimes end up appointing myself to. Then I am the one who deals with the court in terms of needing and getting time.

22:13 Chair Ellis What percent of your own time is handling cases? What percent is handling administration, and what percent is, I don't know, what else do you do?

22:25 M. Friedman I would say handling cases is probably 10 to 15 percent of my time. I would say the actual administrative part of my time is – it sort of blends together in terms of – I have got staff that is there. We get the dockets every day and do appointments. There is a little bit of overlap between what I am doing and what my legal assistant does. I would say it takes probably 60 to 70 percent of her time. We have got the list, so I will be involved both in terms of communicating with the judge, primarily the presiding judge and communicating with the attorneys in terms of appointment on those cases so that part varies. Again, the way our system is set up all of the attorney bills come to our office. I review all those bills before I submit them to the OPDS office for payment. That takes up some amount of time in terms of reviewing those bills. We have these voucher sheets that basically spell out the type of work that is involved in a case. We make certain data entries in terms of the costs, the hours, so that we can track statistically how much time people put into cases.

24:34 Chair Ellis Describe to us your interaction with the Oversight Committee.

24:41 M. Friedman The Oversight Committee, which concurrently consists of Shaun McCrea.... Just so you understand, the original composition of the Oversight Committee was directed by you folks. The directive was that there would be a judicial member, there would be a member from your commission, and then there would be a member from the public defender office and then attorneys from the community. So originally it was set up with five members. Currently it consists of Judge Bearden. Shaun is on the committee. From the public defender's office is Janise Auger, and Tony Rasta, who is here as well, is the local attorney representative. We are one member shy right now. Also, someone who attends our meetings, but is kind of an ex officio member, is John Potter. Ultimately the Oversight Committee has the authority to say "yea" or "nay," in terms of who is on the panel. I would say our meetings, until recently, have probably been less than sufficient in number. Typically I have called a meeting when there has been a question either with regard to new applications - if there are applications to the panel I will usually try and get a number of applications together for review – or, if there are issues that have come up with regard to disciplinary matters, we address those. We have been meeting and one of our goals has been to meet at least every other month. We have been working toward that. Again, ultimately the Oversight Committee has the say.

26:49 Chair Ellis I interrupted you earlier on and I just wanted to get a feel for ...

27:03 P. Ozanne Can we continue with the interruptions? I have a couple of questions. Marc, I appreciate your frankness about the issues and management versus structure. I just wondered, first, do you think now with several years' experience our expectation that you would be in a place and be able to monitor and collect information about the performance of the attorneys was realistic in light of the structure, the number of attorneys, your compensation, etc.? Could you talk a little bit about how realistic it was to have you make direct observations, and direct input on performance?

28:02 M. Friedman To be honest with you, I think that is asking too much in terms of being able to observe each and every attorney on a real routine basis. I have tried to go in, and again, trial rates are fairly low so the opportunity to observe people is usually only in status hearings, sentencing, and things like that and I have tried to take those opportunities. To be honest with you, I have been dependent, perhaps too dependent, upon hearing back from the court and sometimes from other attorneys on the panel when issues have arisen. I will say this, when I have been notified of an issue I have dealt with it immediately. One of the problems that I have

struggled with, and I don't know if Judge Bearden is here, but I know that we have discussed this, is the desire to have greater contact with the judges. I probably should have realized that I needed to be more proactive in going out and soliciting, perhaps, from the judges, their comments. I haven't done that. I have communicated a fair bit with Judge Bearden, but I have not yet done as much with all the other judges here in Lane County. My understanding again from reading some of these reports is that that is a concern that some of the judges have had issues with attorneys. Unless it was relayed through Judge Bearden I didn't know about that. Can I do more? Absolutely. I can do more in terms of actively soliciting. I had made a request at one point to meet with all the judges at a judge's meeting. I assumed because of scheduling matters with the judges that that hasn't come about, but that is still a goal so that the judges are aware – I would hope that they are aware of who I am and what my role is, but if they are not I would take that opportunity to let them know.

- 30:07 P. Ozanne I am not suggesting that you should do it, I was wondering whether it was really realistic to expect more. I also wanted to speak for myself. I don't know about the Commission, but one of the reasons we have a Commission is to separate the defense function from the judicial function. I think it is important to get advice from judges and listen to them and address their concerns, particularly in an organization like yours. It shouldn't be the be all and end all of who is a good attorney.
- 30:31 M. Friedman I agree. We can address this now or later. One issue I have had with the structure of the Oversight Committee, and no knock against the court, but I don't know that the court should actually be on the Oversight Committee.
- 30:52 P. Ozanne We thought about that.
- 30:53 M. Friedman I don't know if a public defender should be. I could understand when we were originally formed that that made some sense to have that input. In terms of actually being there and evaluating attorneys, making decisions, we are an unusual creature.
- 31:12 P. Ozanne What is the problem with that? I can see it with the judicial. Tell me what you think the problem is?
- 31:18 M. Friedman We have been constituted as a conflicts group. I don't know that there is a tremendous cry to change from that. It is certainly my belief that if this Commission were to decide that there needed to be something else in Lane County, then that something else needs to be on par with the public defender's office not merely a conflicts group.
- 31:44 Chair Ellis It is a given that there has to be an alternate provider, and it is a given that, from our point of view, we want comparable quality.
- 31:57 M. Friedman Right.
- 31:57 Chair Ellis It is not a given to me that that puts the alternate provider as a competitor as opposed to a colleague collaborator.
- 32:08 M. Friedman Can I suggest why there is a problem?
- 32:08 Chair Ellis Okay.
- 32:12 M. Friedman What I have seen is that conflict cases are different. Generally what happens is the Panel is taking on the more difficult cases. They are taking on cases in which there has already been a prior attorney, there has already been some degree of representation. To be honest with you there is a certain amount of sourness on the system. Certainly, the run of the mill conflict cases where the PD looks at the case and they have represented someone or something else,

those aren't the issue. The issue is in the cases where something has occurred in the attorney/client relationship.

32:47 Chair Ellis

It is a substitution?

32:48 M. Friedman

The way we have it set up here in Lane County is if the case is not set for trial yet, we can do it by substitution. If the matter is already set for trial then it has to be a formal withdrawal approved by the court. I don't know if the process makes a huge difference but the net result is different. What ends up happening is the Panel is often dealing with a more difficult case. Then you start getting this whole issue of hourly versus unit-based. It is not uncommon that these are the cases that do run up significant amount of time. The attorneys are spending a lot of time dealing with their clients in terms of – I won't necessarily say undoing damage - but just basically coming to an understanding with the client so that there is a good working attorney/client relationship again. Oftentimes it's a situation where an offer has been made on a case, that offer has been rejected, and so now the new attorney comes along and is essentially working from scratch to either try and resolve a case or prepare a case for trial.

34:10 P. Ozanne

In most jurisdictions that I am familiar with there is this issue of conflicts and whether people are dumping them too late, are they cherry picking, etc. Whatever that argument is there is usually a way that the next attorney is selected, not just on a random basis but based on their skills to deal with that situation, their experience, etc. I am just wondering is that how you try to deal with it? Rather than just saying that you are next and you get this case, you try to direct it to somebody who by virtue of temperament or experience can handle those kinds of cases.

34:45 M. Friedman

When we get a heads up, either from the public defender's office or from the court directly, that there are difficulties, those are the cases in which the attorney is hand selected.

35:03 Chair Ellis

Do you have many co-defendant cases?

35:08 M. Friedman

We are the conflicts panel so we automatically get all of the co-defendant cases. Additionally, one of the things that the court has carved out is the ID theft type cases in which it was not uncommon to discover once the PD's office went through the case that they had witness conflicts in the case. They would withdraw, perhaps, in the eyes of the court late in the process. Those cases pretty much automatically come to the panel to avoid late withdrawals. We have a few little niches, aside from just the general conflicts, that have been carved out for the panel and come directly to the panel.

35:57 Chair Ellis

Is part of the problem the size of the panel? I will be honest 26 sounded like a big number to me. When you talked about the percent of their practice that the members of the panel are doing in defense work, 20 to 25 percent seemed like a low number to me. Would it, in your mind, address some of the concerns expressed in the draft report if you reduced the size of the panel? You are really managing a smaller group and can be more selective in the group.

36:45 M. Friedman

Can I answer that in two parts?

36:45 Chair Ellis

Sure.

36:59 M. Friedman

I am going to be absolutely truthful with you.

36:52 Chair Ellis

I assume so. My father used to have an expression that there are three degrees of honesty. You can be honest. You can be very honest or you can be very honest indeed. We expect you to be very honest indeed.

37:11 M. Friedman

Well that is what you are going to get. The volume of cases that we have is insufficient for the number of attorneys that we have. That said however, you need to understand that it truly

is the desire, and maybe it is a sacrifice that the panel attorneys, and I am talking about experienced panel attorneys, have been prepared to make to keep an open panel system. That sacrifice is they are going to make less money. They are going to get fewer cases and consequently make less money, but we are still providing the quality of representation. In answer to your question, "Do we have enough cases for the number of attorneys?" No, we don't. Let me put it this way; on the low end we have far too many attorneys. On the high end, I need more. When I get these cases, especially these difficult cases, and I am calling around whether it be the murder case or the truly involved Assault I or Rob I case, or more often than not a Sex Abuse I case, I am sometimes struggling to find somebody. Again, that is the good thing about the way we are set up is we do have that flexibility in that we have attorneys that will say, "Okay, for that case I will step in and take it, whereas I don't want to deal with the run of the mill," or, "I don't want to be on the regular rotation. I am just sort of there and available." That is where in terms of the size we have got that flexibility. I think if we had a smaller panel, a closed panel, I think we would run into problems. One of the things I can tell you about Lane County is that in the three and a half years that I have been doing this, I can only think of one case that we have had to send out to another county, when we have ever had to call Salem and say, "We don't have an attorney to handle this case."

39:10 Chair Ellis So what you are saying is the larger panel gives you capacity for overload, period. But the trade off, and the question I am putting to you is with the larger panel there is a dilution effect both on training, experience, all the things that go into it. Are we losing more in that trade off than we are gaining?

39:53 M. Friedman The reports that have been done about the panel are sort of a snapshot in time.

39:57 Chair Ellis Let me share something with you. We don't see the site review report. This may change later, but in the period of time we have been doing those site reviews with peer groups from around the state coming in., we structured that as peer to peer and it is not a report we see. We obviously have seen the draft report on structure. The Commission focuses on structure so you have seen some things we haven't seen.

40:39 M. Friedman I don't know how I can emphasize this but this perception that we are not providing the quality of representation that you would want, that a client would want, I just don't think is there. I don't think there is this overwhelming problem. I think we are providing very qualified attorneys and good representation. We may not always be winning brownie points with the court in doing what we are doing, but I think we are there. I don't know, again, I don't know what the numbers are on this, but I don't know if there is any higher percentage of post conviction relief coming out of panel cases, perhaps, than public defenders or anyone else in the state for that matter. There is this notion that there is something fundamentally wrong or that there is a problem.

41:36 S. McCrea Okay, wait. Marc, how many attorneys are only misdemeanor qualified of the 26?

41:40 M. Friedman Three.

41:48 S. McCrea So that is on the bottom end. Why don't you go through with us the breakout so that we know – because I think what the Chair is asking you is about the people on the bottom end, and we only have three that are misdemeanor qualified. Are they not getting cases because you were saying the people on the bottom end aren't getting enough and the people on the top end you don't really have enough lawyers for that? If you can help us with that aspect. I am wondering because we have had this discussion in the Oversight Committee. I am wondering if it gets back to the issue that we have discussed in the Oversight Committee about a possibility of going to OPDS and asking for compensation for mentors so the people who need more experience can work on cases that they wouldn't be qualified for otherwise to be able to get experience. Then we are not asking senior attorneys to be constantly donating their time. Can you help us with those numbers?

42:51 M. Friedman We have 14 attorneys that are currently Measure 11 qualified. Of those 14 attorneys, some of them have chosen to simply do Measure 11 and murder and nothing else. Those are the ones that sort of fall into that special category on an on call basis. We have 17 attorneys that are major felony qualified. Again, some of those attorneys – essentially the way the system has been set up is there are some attorneys that have said, “I will take whatever comes in the door, misdemeanors, lesser felonies, major felonies, Measure 11s.” Some attorneys have said that “I will only do this.” The issue that Commissioner McCrea is addressing is kind of that fundamental problem we have here in that we are asking attorneys to work for free in terms of the mentorship. It is sad the level of compensation that people are getting on these cases as is, but then to sort of go the next step and ask them to co-counsel or work with somebody else.

44:07 Chair Ellis I will tell you around the state an awful lot of defense lawyers donate their time to help other defense lawyers. That is not unique to this county. To me it is one of the hallmarks of this piece of the legal profession in the state. I have said it in a lot of forums. I commend the defense community for their vision of recognizing that helping their colleagues is the right thing to do. I am not saying my mind is closed on compensation, but I don’t think you ought to portray it as somehow unique to Lane County.

44:55 P. Ozanne Marc, I would like to ask you, and please excuse the interruptions but we have time and we are very interested. I know you had a presentation and we want to get it. We spent a lot of time here and in other parts of the state discussing this. In large part it has kind of passed, but it may not have here, the question of hourly versus case compensation. Just speaking for myself, and even when I was the administrator, I find that argument illusory and I will tell you why. Probably those of you who practice like me and use billable hours know there are lots of jokes about that. A lot of them are at the pearly gates. Saint Peter sees Peter Ozanne at the pearly gates and he says, “I expected to see you a lot earlier than this. Looking at your billable hours it looks like you are about 200 years old.” There is a problem that we all have as lawyers. Everybody has a limit, though, whether it is a client or some agency like ours. It is a commendable thing that collectively here the community has decided that they wanted to preserve the panel and have more people. It puts you individually as lawyers in a situation where we are using these really low rates. By the way, the main problem is we don’t have enough money for everybody. You can’t really get enough cases. I know there is a downside to unit work. We have found that generally, with the shortage of money we have, that people who are experienced can make choices about which cases require a lot of attention and which don’t. When they have a sufficient volume of cases and you know all this and everybody in the audience does, but you can make a living, not an adequate living we recognize, but there is a way to do it. When you take one or two cases at \$45 an hour it is a public service. I am troubled by the fact and I respect and admire the instinct behind it from the group, but I am troubled by the fact that it doesn’t work economically. There is a question working in here. One is, inevitably when you submit hours whether it is to us or somebody else, somebody says, “Wow, wait a minute here. This case is worth this not the hours you put into it.” My question is, with your experience here when lawyers submit hours, and I assume this is the case and tell me if it is not, that there is a limit and going rate of what your colleagues can expect to be paid for a particular case. In all jurisdictions we have flexibility. Our agency, our folks, will take into account a particularly complex case and maybe increase compensation, but generally isn’t there a kind of established rate for some cases? Somebody asks the attorney, “Gee, why did you spend a 1000 hours on a DUI?”

47:50 Chair Ellis Related to that, when you review bills what are you reviewing for?

47:56 M. Friedman I am reviewing them for the number of hours that people put in.

48:03 P. Ozanne You apply that screen?

48:03 M. Friedman I do. I am the one that is applying that screen.

48:06 P. Ozanne So when people say, as they do around the state, that it is a really a great thing to have the hourly rate because then I can work as long as I want on a case, that is really illusory.

48:20 M. Friedman One of the difficulties that we have had in terms of figuring that out, there is a perception that Lane County is a bargain. I believe that is true - what the panel is being paid for handling cases.

48:43 P. Ozanne I agree.

48:43 M. Friedman When I look at these cases, the bills that come in, I am well aware that there is a spectrum in terms of the types of cases, the work that is involved, the motions practice that has been involved in the case and whether the case has gone to trial. I kind of have a general notion of what is in order and what is not. If a bill comes into me that looks unusually high, I will then request that that attorney provide some explanation. If there is a bill that comes in that after the explanation is provided still seems inordinately high then I will make an adjustment. I will ask the attorney that submitted the bill to make the adjustment before it gets submitted to Salem. Bottom line is that I think we are generally a bargain, but at the same time – again maybe the structurally difficult question is this: there are those cases that come in where somebody puts in hundreds of hours and they are absolutely justified. They have gone to trial and it is a long trial and involved. On the unit based, and I understand that there are certain criteria, I suppose, for asking for an increase over and above the unit base. I suppose if something were to be addressed here in Lane County, and I guess I am sort of jumping ahead of myself in terms of my proposals, it would be that Lane County be able to maintain the open system that we have and for various good reasons, but that we be able to address this if ultimately, the Commission says we want to see a contract issued, that we be able to address this in some way that will provide a mechanism to the Lane County attorneys to be fairly compensated, at least to have some differential built into the compensation system. I am not absolutely sure what that is at this point. I have had some conversations with groups around the state about how they are or aren't doing it in terms of that equalization.

51:11 Chair Ellis Let me ask this question. I think I hear you saying that from your point of view there are insufficient cases for the lawyers that you have on the panel to achieve the level of specialization, the level of income that you think would be appropriate. There are obviously two ways to address that. One is you could do the difficult task, and I remember the testimony from four years ago, lawyers in this community really didn't want a reduced level panel, but that would be one. Or, you may be asking us to shift caseload from Lane PD to the panel. That would be another approach. Are you advocating one or the other of those?

52:08 M. Friedman I guess what I am saying is that we have a system right now that is working. Let me just talk about one thing that we haven't talked about at all. The huge advantage of the open panel – the fact is - and I know that this has been a concern of the Commission about the graying of the bar. That is not a problem here in Lane County. We have the law school and we have a system that is in place that has allowed many new incredibly qualified attorneys to come and work their way up the panel, some of whom are here today and will want to speak to the Commission. The bottom line is this, in a system that is closed these people would not have that opportunity.

52:55 Chair Ellis Or somebody would.

52:55 M. Friedman Somebody would, yes. It has worked remarkably well in terms of being able to foster these new attorneys and allow them the opportunity to advance. If push comes to shove, and the question is, "Is every single attorney that has come onto the panel as well qualified as some of the other people?" No. Is there a need, at some point perhaps, to do a certain amount of weeding out? Yes. That has been a process that we have been engaged in. Overall the fact that we have had this open system, this balance between allowing this open system, allowing

this new blood to come in, with new ideas and experiences, to come in, and basically closing the door. What I am saying is essentially I think we have, I believe we have, a well qualified bar here. We have well qualified attorneys that are, at least at this point in time, willing to accept the perhaps disparity in pay from what they might otherwise receive with another system. They are prepared to do that. Are there little tweaks that could be provided to the panel system? Absolutely. I think that is probably true with any group, but I don't know that there is necessarily a need for a fundamental change. If the Commission ultimately says that you are dissatisfied with the hourly pay system for whatever reasons.... Again, it seems to me that there is a perception that going to a unit based system with a smaller group automatically guarantees more qualified attorneys. I am not sure that that is true.

- 56:56 Chair Ellis I would keep the two issues separate. I doubt you are going to find this group is hung up on the hourly versus case rate. I think you will find this group is very focused on quality. We have got some other people that we want to hear from. Any suggestions you have, assuming we retain the basic structure that we now have how we could do our end of that job better or things you would like to see done?
- 55:25 M. Friedman Can I ask this? There are a few people from the panel here that I would just like you to hear from briefly and then I will provide some closing remarks. Would that be okay?
- 56:17 D. Kruse Thank you for hearing from me. My name is Dan Kruse. We have discussed a bit about the decision to have an open panel and how that has resulted in young and new attorneys being able to practice in criminal defense.
- 56:33 Chair Ellis How long have you been a lawyer?
- 56:34 D. Kruse Three years. I graduated from U of O in 2006. I am here, I think, as a representative of that group of beneficiaries of the open system, of young attorneys who have had the opportunity to get involved in the criminal defense bar. It has generally worked out well for me. I have had a great opportunity.
- 56:59 Chair Ellis Are you a sole practitioner?
- 57:00 D. Kruse I am. To give you a little background about myself, I work part-time for a non-profit organization doing environmental litigation. I have a sole practice doing exclusively criminal defense. When I started out I sort of specialized in everything that I could and anybody who came to the door. I have had the benefit of being able to confine my sole practice even though it is only half of my overall practice to criminal defense.
- 57:22 Chair Ellis Judge Tanner used to describe the specialty of general practice.
- 57:32 D. Kruse Yeah. Right now I do two things: I do environmental litigation through a non-profit organization and I do criminal defense on my own. My criminal practice is mixed between panel cases and retained cases. One of things I would like to talk about a little bit, and I will get to this in a minute, is how my participation in the panel has enabled me to do other public interest work, namely the environmental litigation that is not as regularly funded or sometimes not paid at all. I have actually been invited to speak at a number of conferences and panels about the way I run my practice and how I have this kind of joint legal practice, encouraging people to get involved generally in public interest law and one of the avenues to do that is to take criminal defense cases for the panel or for some other similar group as a way to have a regular source of income, work in the public interest, and then also do something else that is not necessarily as reliable. Things have worked out. I have had the benefit of a number of mentors. Some on the panel and some not. I know Robbie is here, and Becky Davis, and some other lawyers that worked in the building that I worked at for several years. They were very helpful in mentoring me and were very generous with their time. From just

very simple, random questions that took 30 seconds, to helping me prepare for some more involved issues.

- 59:06 Chair Ellis Did you have the chance to be second chair on any cases?
- 59:15 D. Kruse I did not. I did when I was in law school. There was a clinic through the public defender's office and I had the opportunity to do that, but since graduating and going out on my own I have not done that.
- 59:30 Chair Ellis Would that help? Is that something we ought to try to see ...
- 59:33 D. Kruse I think it absolutely would. I think Marc raised a good point that misdemeanor cases these days are few and far between. They are even less likely to go to trial in many ways than other cases.
- 59:48 Chair Ellis What level qualification are you?
- 59:52 D. Kruse I do misdemeanors, lesser felonies, and major felonies, but not Measure 11 felonies. The way it worked for me was I had to have done two misdemeanor trials in order to take on lesser felony cases and I think worked for a certain amount of time doing lesser felony cases before I could apply to do major felony cases. I have had an opportunity because of the way things are organized on the panel of having trial experience at every level. It took me a lot longer to go from misdemeanors to lesser felonies than it did to go from lesser felonies to major felonies. Once I got qualified to do lesser felony cases I started taking on a lot more cases that were available to me. I think having a system where misdemeanor qualified attorneys are working on lesser felony cases with attorneys who are qualified to do that would help get attorneys through that misdemeanor stage which tends to take the longest to get through.
- 1:00:55 Chair Ellis How much law school debt did you have when you came out of law school?
- 1:00:56 D. Kruse I owe about \$80,000.
- 1:00:58 Chair Ellis In the mix of practice you are doing with the public interest, environmental, and the public defense work are you able to maintain your debt service and live a life?
- 1:01:13 D. Kruse The important issue is the money, or the lack therefore. I as a 28-year-old with no kids and relatively little debt compared to people with big houses and children and kids who are going to college. I am a lot more capable of working for \$45 an hour than other people. I think it may be a reason why there are a lot of people qualified to do the lesser cases and not as many qualified to do the major cases. Right now I am able to get by and it is because I also do some privately retained cases that are going to get me by, but certainly working for the panel helps. It is a way to bring in an income without a lot of overhead. I don't have to pay for advertising to get cases. They are regularly funded. I don't have to worry about not getting paid after I do all that work. That is certainly a benefit. I would certainly advocate, and I don't know if this is the forum to do it in, but I would certainly advocate for a higher hourly fee.
- 1:02:22 Chair Ellis Duly noted.
- 1:02:24 D. Kruse To answer your question directly I can do it. If I have kids in the future and am trying to save for retirement it is going to be a lot more difficult.
- 1:02:40 Chair Ellis What percent of your day is typically public defense work?
- 1:02:46 D. Kruse About half of my day is doing criminal defense work and more than half of that right now is public defense. I would say about 30 or 35 percent of my overall practice is doing public defense work. It varies. I don't have to go into too much detail but I have gotten a number of

very involved cases lately. I have asked Marc's office to stop appointing new cases until some of those get resolved and he has been accommodating. I can sort of regulate myself that way. Right now it hasn't been a problem getting enough cases because I have this other half time job. If and when I have these really involved cases that take longer I am able to bring that to Marc's attention. I make sure that I have enough time to work on those cases so that I can meaningfully represent the client.

- 1:03:37 Chair Ellis As a sole practitioner do you have staff? Do you have technology? Do you have rent? Overhead?
- 1:03:50 D. Kruse Yes, I pay rent which includes staff. I work with another attorney and pay him rent and he takes care of hiring the staff which is just one person, a receptionist, and it helps me out of lot.
- 1:04:07 Chair Ellis What about IT?
- 1:04:06 D. Kruse I kind of had an initial investment. I bought a computer, printer, copier, fax and all that stuff. I have been fortunate enough to not have to repair or replace it recently. There are some resources through the Professional Liability Fund, some software that I have taken advantage of, some more that I suppose I could take advantage of.
- 1:04:32 P. Ozanne In these involved cases, related to the question that I asked Marc earlier about limits and hours, what is your expectation in terms of getting compensated for the hours you have put in? Are you aware this is a burglary and burglary cases have generally gone for this but it is more involved and I am going to ask Marc for more. What is your expectation in those involved cases?
- 1:04:56 D. Kruse Throughout the case I keep track of my time pretty closely. I, in a lot of ways, sort of self-regulate myself to make sure that I am not doing more than is necessary for a particular type of case while still doing everything I can and should be doing to represent a client. The question you asked before begs a response in some ways that there are cases that you expect to work a lot more that you end up working a lot less on as well. For every case that I work more than the average on there are an equal or greater number of cases, I think, that I work less than the average on because there is an offer that is made early on, or we can stop the investigation because we have reached a conclusion.
- 1:05:36 P. Ozanne So you are back to the point that I was making earlier about the inability of an hourly rate attorney to get enough cases. You are feeling like that – again, no suggestion that you or anyone else is triaging and not doing adequate work, but if you have an array of cases some are going to take less time. Are you feeling that works internally for you? Your portfolio of cases?
- 1:05:51 D. Kruse Yes. I feel it works well for me. I have somewhat of a unique situation having a salary position with a non-profit so that I am able to get by with fewer cases.
- 1:06:07 Chair Ellis If you could direct the world to be what you want it to be would you like a lot more cases than you are getting?
- 1:06:16 D. Kruse No, but if you had asked me that two years ago I would have said yes. I think that when I first started I was looking for more cases, more experience, more opportunity to work, and now it seems like more often I am asking for a break so that I can finish the caseload that I have.
- 1:06:32 Chair Ellis You have followed a career path that I admire because frankly it is the most vulnerable and high risk that you could do, to leave law school and start practice alone and try to gain the experience that way. The more typical path for lawyers on the private side or on the defense side is to go to an organization, whether it is a law firm or a PD, and spend several years in a more structured environment and get the experience, then come out and maybe be solo or a

- small group but don't become independent until after they get the experience. I commend you. That is not an easy path you have followed.
- 1:07:24 D. Kruse I have taken a lot of other people's time, though.
- 1:07:28 Chair Ellis Congratulations to you for making it work. It is not easy. Any other questions for Dan?
- 1:07:34 J. Potter Just a follow up on your mentoring comment. Do you go and talk to the judges at any point after a trial and get their reaction or have judges wanted to chat with you?
- 1:07:44 D. Kruse Yes, I have done that. I have gotten some very good feedback from judges. I have been in certain circumstances, and I don't think it is the judge but more of the circumstance of the case, where there is a likely appeal or something of that nature pending where there is less openness after the trial. There has to be that formality if there is a pending appeal.
- 1:08:08 J. Potter There was a little bit of a discussion earlier about possibly paying mentors that would help folks like you that were starting out. Do you think that would make any differences or did you find that the system without pay worked?
- 1:08:21 D. Kruse I was very fortunate to have a number of mentors that helped me. I would feel a lot more comfortable asking them more questions if I knew that they were getting paid. I honestly would. There was a certain hesitation on my part to ask Robbie the sixth question of the day when he had his own work or other people that I was working with in the same building. I, as a younger attorney seeking mentorship, would be a lot more comfortable asking questions if they were paid.
- 1:08:47 Chair Ellis As a grizzled veteran of three years are you now functioning as a mentor for others?
- 1:08:55 D. Kruse I am. I recognize my own limits. I often give the people the best advice that I can and then suggest that they talk to another attorney as well. Yeah, I definitely feel like what I have been given over the past year three years is worth giving back to other people and I try to do that. I think it would be nice to be paid for that too.
- 1:09:21 Chair Ellis Other questions for Dan? Thanks.
- 1:09:33 M. Friedman This is Robert Rainwater and I think he is our newest panel member.
- 1:09:36 R. Rainwater Yes, and I am probably at the opposite end of the spectrum from the last person who testified. I came here about a year ago last May after practicing for 33 years in California.
- 1:09:58 Chair Ellis We welcome refugees.
- 1:09:58 R. Rainwater I was actually born and raised here. I went to the University of Oregon. I went to law school in California and just didn't come back until a little while ago. Thank you anyway but I am not really a refugee. I didn't even intend to be on the panel when we came here. My wife met Marc at a symposium and I think they were on a panel together. He was telling her about how they needed good attorneys on more serious cases. She teaches at the law school and then, of course, used my conscience to get me to apply for the panel because they needed people to represent clients in serious cases. I have been doing criminal law exclusively for 33 years. It is something I enjoy and feel strongly about so I applied for the panel. I think I actually started in March. I have been working on the panel since then. One of the things about the open system personally is that I wouldn't be in the system if we had a closed system with a contract. I wouldn't have that opportunity to get involved.
- 1:10:55 Chair Ellis That doesn't necessarily follow does it, that somebody wouldn't be on it. I will agree that you appear to be experienced and qualified. I am not saying I am headed in a different direction.

I wouldn't presume that someone with your experience and background coming to a community couldn't find a significant role in a structure that had a limited group.

- 1:11:38 R. Rainwater That is possible in that sense. The other sense is I don't want to have an extensive role in the group. I was a public defender in both state and federal systems for 33 years. I don't want to work as a public defender again full time. I have retired several times. I want to have the freedom to work a portion of my time on Lane County cases. I wouldn't want to be involved in a contract situation where I am working full time again. In that sense I wouldn't be involved in that.
- 1:12:22 Chair Ellis In our models you could be.
- 1:12:22 R. Rainwater There are models ...
- 1:12:23 Chair Ellis Consortia doesn't require full time.
- 1:12:29 R. Rainwater There are models. I think it is more likely that the panel system fit into my viewpoint about criminal defense. Over my career, when I first started, almost all representation was on an hourly basis. I have seen a lot of people and places go to contract systems. In my opinion the quality of representation has been a disaster in most of those systems I have seen, which is not to say that over the years I haven't seen a lack of funding for public defense systems which has affected their quality also. Perhaps one of the reasons that I became a federal defender at some point in my career was that the funding is there to provide the quality of representation that I think is important.
- 1:13:13 Chair Ellis Have you played the mentor role with some of the other lawyers?
- 1:13:16 R. Rainwater I haven't been involved in any mentoring here, no. I do talk to other people. I have struck up a friendship with some of the younger public defenders. I know a couple of them are relatively new out of law school and I have talked to them several times. I have been mentored by a lot of the panel members myself. While I have done criminal law for a long time there are little differences in Oregon law and procedure and I go to people and ask them. They have been very willing to give of their time and advice.
- 1:14:05 Chair Ellis Any other questions for Robert?
- 1:14:07 R. Rainwater Thank you.
- 1:14:23 M. Friedman This is James Von Boeckmann.
- 1:14:50 J. Von Boeckmann Marc asked me if I would have a few words to say as one of the younger group of panel members. I am actually a 43-year-old man and have three kids, one of whom is going to go to college next year, but I was a carpenter for 10 years before I became a lawyer. I have been a lawyer since 2003 when I moved to this community. My first experience doing indigent defense was when I moved here I didn't know anybody. I hung out my shingle. I never applied for a single job. I just took out an ad in the local paper. Then like Dan Kruse before me I would do literally anything that came through the door. In trying to figure out how to get some criminal work I came upon the conflicts route to getting clients. My first experience working with Salem was pre-public defense panel. That was a time – I think I had made a phone call up north and somehow got on a list and would occasionally get the phone call that said I had a client. I would send my bills directly to Salem. When that model went away I chose not to apply to get on the panel. That is because by temperament and practice, whatever, I am just the sort of man who doesn't like to fill out job applications and go jump through hoops in order to get where I need to be. I found that having made that decision I effectively wound up doing very little criminal defense work. That was an unacceptable

outcome to me. So hat in hand I went to Marc and got on the panel I don't know how long ago. I started out doing misdemeanors at the ground floor again. I have now worked up to where I do major felonies and Measure 11 stuff. In fact, the more complex stuff is most of what I do. In addition to criminal defense I am an immigration lawyer. I like to say it is about 50/50 of what I do.

1:17:37 Chair Ellis

Sometimes those two fields overlap.

1:17:41 J. Von
Boeckmann

I find that they do. They compliment one another very well. I often get calls from colleagues and people at the public defender's office who call me up and ask me about the immigration consequences to certain convictions, how to craft a plea to avoid detrimental consequences.

1:18:00 Chair Ellis

Are you bilingual?

1:18:02 J. Von
Boeckmann

I speak a little bit of three languages, mostly curse words. I don't have any doubt that the concerns about the panel and about the delivery of quality criminal defense services to the citizenry of the State of Oregon is of paramount importance here because you have to decide how to accomplish that and how to make the money go the furthest.

1:18:41 Chair Ellis

With the right quality.

1:18:47 J. Von
Boeckmann

Right. Everybody who winds up getting a ticket somehow winds up qualifying for public defense counsel. I don't see too many private pay people out there in the world. I don't know how the bigger names in the community do it. I guess it is advertising or something. So the public, me and you and everybody, is bearing the cost of public defense it seems to me more and more. I don't know if that is the truth but it seems to be. The question then becomes how are you going to do that? How are you going to ensure that the people who are providing that are doing an adequate job? My experience, I can only say, is I have never wanted for advice from colleagues. When I first moved to town practically no one would talk to me. I was taken in and befriended by a gentleman named Jay Frank. He doesn't do any of this kind of work. When I could afford it - I started working out of my house - I moved into his building and then I happened to be around Robbie Manders. Dan Kruse was in there for a while. Jay Frank is in there. We formed a sort of think tank within the group. We all help each other out and I can say that public defense lawyers here in the county are always generous with their time. Mentoring and assistance has never been a problem for me. I don't know that it is a problem in practice here in Lane County. I think as professionals we are bound to zealously defend. We have a built in responsibility to do that. I think over the course of time if you don't study, don't know the law, aren't working hard, you are going to be winnowed it seems to me.

1:21:06 Chair Ellis

Other questions? Thanks a lot.

1:21:07 M. Friedman

I just have a few more people that are sort of on the other end of the spectrum, the experienced attorneys from the panel.

1:21:17 R. Manders

I am at the other end of the spectrum. By the way, I will preface my statements, having talked to talk to Ross Shepherd, by saying that I think we have one of the best criminal defense organizations in the country. I really do appreciate that.

1:21:43 Chair Ellis

Ross had a major role in creating the Commission on which we all now serve. He was vice-chair of the Study Commission 10 years ago that proposed, and the legislature passed, the bill that created this Commission. We all owe him a debt. I didn't get your name?

1:22:16 R. Manders Robbie Manders. I have been doing criminal defense for 20 years. I would say it is probably 95 to 98 percent of my practice with anywhere from 30 to 65 or 70 percent being public defense, depending on what the retained work is. I can say that while it would be nice to get another increase in pay, the system has been good to me. It has allowed me to be a criminal defense attorney and not to have to take on divorce work and everything else, which to me is something that I just can't handle.

1:23:14 Chair Ellis Did your practice change with the implementation of the panel system that we adopted

1:23:22 R. Manders Percentage wise?

1:23:21 Chair Ellis Right, or is it about the same?

1:23:30 R. Manders I would say that it has changed somewhat. In the ebbs and the flows of it all it is difficult to say. I think it hasn't changed that much. I think that as my retained work has increased it is not very often that I have to call Marc and say, "I need to stop taking court appointments." I am very satisfied with the system the way that it is. Like Marc, and some of the other attorneys who have spoken before you, I don't really believe, having been part of the this system for 20 years, that the percentage of difficulties with attorney's abilities has changed very much over the 20 years.

1:24:46 Chair Ellis Which suggests that the new system isn't very much of a change from the old system.

1:24:47 R. Manders I think it is endemic in a system unless you want to cut out certain people. Has it gotten any better? I would say that the answer is probably no. Would I say to me is that I think the Commission is asking the wrong question. I think the question is why are we losing the ones at the top? The ones who are better qualified? You may have done that and spoken with attorneys who are no longer on the panel and doing indigent criminal defense. Maybe it is because of the people who I sit down and have coffee with over the years. Money has only been one of the issues. It is not the only issue. It is not that they are not getting paid enough and it is not that they are getting too much work. Many, many times over the years it is how they perceive they are treated by the system and the bureaucracy that they have to deal with. I think answers ...

1:25:58 Chair Ellis Are you talking about slow pay or arbitrary review of hours?

1:26:04 R. Manders I think at one point, and it is not the issue anymore, but at one point it was the slowness of pay. Part of it, and I still hear it from time to time, but feeling like they are second class citizens in this court in Lane County by specific judges.

1:26:28 Chair Ellis We may not be able to do much about that. What about the range of issues we can do something about?

1:26:30 R. Manders From my perspective getting new blood into the system has a price. That price, I think, is that you have to continually figure out how to deal with people who need more practice or should be winnowed out. I can tell you that I have been a mentor for a number of attorneys over the years and it has been great. I am not even asking to get paid for it. I figure part of my practice is pro bono and that is fine with me. I don't think that would make a difference to me. I really don't see that there is a problem that we have now that is sufficient to change the system as we now have it.

1:27:19 Chair Ellis Okay.

1:27:17 R. Manders I guess what I would say is that over the years I don't think that there was a perceived problem with the system as far as abilities until, it must be about 15 years ago, when an attorney challenged the Lane County courts about being called to the mat for not being up to

snuff. Since then there has been a difficulty about how to deal with it. The court was struggling with that before we went to this system. Short of not giving new lawyers an opportunity to step in and see what they are worth, I think that that is a major mistake. I think going to contract is a major mistake. At heart I am a farmer. I like my individuality. I like my independence and there is a cost for that. I think the positive side of that is you get innovation. It doesn't get stagnant. I think the lawyers in this community also value their independence. Yes we can hopefully do better in training but I think we can handle that.

- 1:28:42 Chair Ellis Okay. Other questions?
- 1:28:42 J. Potter Robbie, twenty years ago when you started how much were you getting paid an hour?
- 1:28:50 R. Manders It was either \$35 or \$40.
- 1:28:52 J. Potter It is now \$45?
- 1:28:55 R. Manders Forty-five and \$50.
- 1:28:56 J. Potter You say that money is not a big issue for you?
- 1:28:57 R. Manders No.
- 1:28:59 J. Potter But perception in the community that you are a second-class citizen may be? Is that perception exacerbated by low pay?
- 1:29:12 R. Manders Yes. It is. I hear over and over again I am not getting paid enough to take this. It is not from the clients. It is from the court. Right now the system is working relatively well. I don't have any complaints from my dealings with Salem or my dealings with Marc's office. At this point, I don't see a reason to change it.
- 1:29:53 Chair Ellis Thanks a lot.
- 1:30:00 M. Friedman One last panel member. Laura Fine.
- 1:30:02 L. Fine Good morning. I am more at Robbie's end of the spectrum. I started in Lane County as a legal aid attorney, very committed to working for those who couldn't afford counsel. After five years maxing out at \$21,500 annual salary I moved over to public defense and found my calling. I knew I was born to be a criminal defense lawyer. I had the privilege of working here for six years under Ross Shepherd's guidance. It was the most amazing experience. I left, however, because I recognized that the deluge of cases that people were handling was crushing. I wanted to try to experience providing more service to each individual client. I opened my own office and I rented space from Marc Friedman who helped mentor me in how to be a solo practitioner. I kept my overhead low. I took court appointed cases and I also had the benefit of picking up a contract at the University of Oregon where I did student legal services part time. That gave me a baseline of income. I still have that. It makes me financially very stable because I have that. I grew my practice initially by taking any and every case that I could get on the old court appointed system where the court was calling me and giving me cases. I also was asked by a judge, Judge Merten, to start taking the mental commitment cases which I found enriched my abilities as an attorney to understand my clients. It educated me about the psychological issues and aspects. I continue to do that as well. Because of the experience and reputation that I gained doing all this court appointed work, I was able to apply for and be accepted on the federal panel. I am in a situation where my income is off a broad base. At this point, Marc knows that he can call me on court appointed cases for the mental commitments and the murders. That is what I do for the panel. If Marc is in a situation where he is struggling to find an experienced attorney to handle a complicated Measure 11, his office has called me and my response has always been, "I would

rather not, but if you can't find anybody else I am going to be there." In a way, I think, I am a little part of the safety net for the panel to make sure that cases can get handled, but the panel is a safety net for me as well. If my position with the University ended, or if somehow the federal cases dried up and I felt like I had enough to take another case, I am in a position where I could contact Marc and make myself available to take the cases. For me as a lawyer that kind of freedom and flexibility is essential. It makes my practice diverse. It gives me at the same time the freedom to devote as much time as necessary. I did do a misdemeanor case last year for the panel. It was a very high profile misdemeanor case prosecuted by the senior district attorney in Lane County. I think I have the distinction of submitting the largest bill on a misdemeanor case ever submitted out of the panel. I had walked that bill over to Marc's office and sat down and we went through it together to explain and justify what I had done. In addition to that Marc requested that I write a letter. I felt really supported by Marc but at the same time I felt accountable to him. Because I wasn't required to take a certain number of cases as a member of some consortium, and because of how I have structured my practice, I was free to give that case all the time that it deserved.

1:33:43 Chair Ellis

You are an example of a career path that is quite different from our younger witness, Dan. You got your training at Lane PD. You had that six years of experience. Then when you went into private practice you were already equipped. How do you see it working for a new entry lawyer who doesn't have that experience? Do you think this panel system can work?

1:34:19 L. Fine

I do. I am a huge proponent. I was involved in meetings with Peter, Marc, and Dorothy Morey when we first envisioned the creation of this panel. I was a big advocate for it. I have seen in the three and a half years of the panel that we have grown some amazing trial lawyers. You met Dan. He has got the goods and he is not alone. At the same time we have had a few others that have come in the door and the door has now closed behind them and they are gone. They didn't cut it. At some point whether you are in the wonderful structure of the public defender's office, or whether you are on your own, your own personal strengths and vision are going to make you the lawyer that you are. Dan had the strength and vision to seek out the right kind of guidance. I am a mentor also. I am available to mentor people and Marc knows that. I found people, and met people, and befriended people at the courts and provided guidance. The ability of people to come into the panel and practice with this open door that we have is important. You directed some comments to Mr. Rainwater who is an excellent attorney. We are so fortunate to have him. If he had come into town, and we had a couple of consortiums who had bid the conflicts from public defenders, those consortiums would have bid those contracts based on the number of people in their consortium, the number of cases they were taking, and the amount of money they each intended. They wouldn't be open doors to say, "Mr. Rainwater welcome to town." Because he would be new in town and not able to get court appointed work, his ability to even gain the recognition to be known by them, I think, would be limited. I don't know that a person of his quality and breadth of experience could walk into town and get court appointed work if we were reduced to a series of closed consortia. We would be the poorer for that loss.

1:36:21 Chair Ellis

Any questions for Laura? Thanks a lot. There are some others here that we want to hear from.

1:36:32 M. Friedman

I know. Do you want me to just give you some final comments?

1:36:30 Chair Ellis

Yes, and I will say I am very impressed with the people you brought here.

1:36:44 M. Friedman

Thank you. They are impressive people. It is pretty clear that there is a preference for maintaining an open panel system. I fully recognize and I think the attorneys on the panel and I know the Oversight Committee recognizes that there are limitations. Those limitations are based upon some of the financial issues that are out there. The fact is that there is a general preference, at least here within the panel, for the hourly system over the unit based system. I think that preference is based upon the underlying notion that at least people are guaranteed

that the work – even though the hourly rate they are getting is a pittance, but at least they are always ensured that the work that they put in is going to be fairly compensated.

1:37:32 Chair Ellis

Let me shortcut that. If we stay with the panel system, I am not sure I see how a case unit compensation structure would work anyway.

1:37:50 P. Ozanne

I would be very troubled, and maybe you can look into it if, somehow Lane County work, and I don't believe this is the case, is somehow being paid less. On the other hand, I would be troubled if it was paid more. We have an interest across the state to ...

1:38:02 M. Friedman

I think we have that same interest. We would like there to be parity. My perception, and this is based upon some conversations that I have had, is that whether it is the Commission or the staff or whatever, the basic reasons why there is this preference for a unit based system is that it certainly provides an ease of administration. You have one contract and you don't have somebody out there that needs to write checks for every attorney in the panel. That is certainly something that is of a great benefit and you sort of pass that administrative cost down the line. I certainly understand that providing a contract provides a predictability of costs. The only thing that I can say to that is that at least with regard to predictability, I think we would be capable, the panel is capable, with probably coming up with a reasonable guesstimate, based upon the number of cases we are taking, what our costs would be on an annual basis. We have actually never been asked to provide that. We are probably now at the point where we have gathered enough statistical information to do that. I haven't put that together but I think it is possible. The only difference I would say is that the way we track cases is by the case as opposed to the units. I know that has been one of the issues. What I would suggest is that, again, recognizing that the panel perception is that there is this difficulty in equalizing time and payment for a large group, if so directed by this Commission what I would be prepared to undertake on behalf of the panel, and again, whether it remains as this entity or something else would be a determination of other ways to pay the bills. In other words, if you ultimately said that there needs to be a contract with the group that is capable of handling all of the conflict cases, we would undertake to figure out a system; again, as I said I had some conversations. I spoke with Judge Lipscomb and understand how MCAD is doing it now, but to figure out a way of coming up with a system that will work for the attorneys here in Lane County, a way that would equalize that disparity and whether that would be some kind of pool of funds paying the attorneys on case by case, paying them some kind of contract basis, all of that. Additionally, what we have already done is increased and improved our methods of mentoring attorneys. We don't have a formal apprenticeship system, but that is not something we are opposed to. We just don't have the structure at this point to do it in terms of bringing new people in. What we would certainly undertake at this point is to educate the attorneys on the panel as to the benefits of unit versus hourly and some kind of transition. I would undertake, if I were to remain as the administrator, to become a more proactive administrator. That would certainly be something that ultimately you folks are the ones that hired me so you could choose. Ultimately, if the determination was that there had to be some kind of new entity, again, a new entity that is based upon an open model, my suggestion would be that we establish that group. There would be a board and the board would ultimately choose the new administrator. One of the other things I just wanted to say, because I know there is a bid out there, a small consortium from Lane County has made a bid, all of whom are members of the panel. We would hate to lose them, but I would say more than anything else is they are not equipped, this new small group is not equipped to handle the volume of cases that the panel currently does. I don't think that you want to create a situation where you have got essentially the PDs, a small group, and then some other entity whether it be the panel or something else providing services. I think a model that works in Lane County, and has always worked well in Lane County, is the two systems, the public defenders and the alternate, the panel. I would end with is that we should build on what works and fix what doesn't. That is what the President said last night and I think he is right. I think it applies here as well.

1:43:02 Chair Ellis Thanks. Other questions?

1:43:04 J. Potter I think during the jack hammering, Marc, I missed this.

1:43:08 Chair Ellis Was it the jack hammering or the chair collapsing?

1:43:10 J. Potter One or the other. You started to answer the Chair's question, and I started to write it down, about the amount of time that you spend – I wrote down 10 to 15 percent on cases. The administration was a number that I didn't hear but you were saying that your assistant was 60 to 40 percent and then there are other things you do. Can you tell me the percentages? Ten to 15 percent on cases and how much on administration and how much on other stuff?

1:43:40 M. Friedman I would say it breaks down to three elements. There is my case time, there is the administrative time which includes everything other than dealing with the attorney bills, and then the attorney bills provide that third component of my time. I would say the attorney bills take probably 15 to 20 percent. I don't think that adds up to 100.

1:44:04 Chair Ellis Or in Peter's case it would add up to 120.

1:44:04 M. Friedman Mine doesn't. It is roughly ...

1:44:11 P. Ozanne You are half-time?

1:44:13 M. Friedman I am half-time.

1:44:12 P. Ozanne So you are saying those percentages relate to the half-time.

1:44:18 M. Friedman Exactly. Just so we are clear, if I take a case I get to bill that case separately. My contract is for the work that I do for the panel. If I end up essentially being appointed to a case that gets billed separately.

1:44:40 Chair Ellis Okay. Thank you. I believe Judge Bearden and Judge Vogt are here. If either of the judges would like to step forward and share their thoughts that would be good.

1:44:52 J. Bearden Judge Vogt has been here. She has been here the whole time. I haven't so I will yield the floor to her. I am happy to answer any questions. I talked with Ms. Swenson when she was here before. I am on the Oversight Committee so they kind of know where I am coming from. I am happy to take any questions. I am sure Judge Vogt has some thoughts.

1:45:36 J. Vogt From our perspective all we can really give to you is anecdotal information from things that really happened in court or our contacts with Marc and the panel members. If you want to ask questions about those things we can do that. We gave a lot of that information already and it is in the information you got in writing. I think that we have a lot of really good lawyers in Lane County. I think that we have had a lot of questions about the panel and, frankly, Marc has answered a lot of them today. I was not aware of how people are getting on the panel and how the Oversight Committee looks at each of those individuals before they are approved for the panel. A lot of the things we see on the criminal team, our criminal team is a four judge team and when people first get on the panel some of the first appearances they have are in front of the criminal judges only because they come to arraignments, they come to probation violation hearings and those types of things. Potentially those four judges see a lot more of the blunders initially that don't always get to Judge Bearden on the trial docket right away. Judge Merten, who is the senior judge on our bench, had questions about the old standard of how people qualified for court appointment prior to PDSC or

1:47:05 Chair Ellis What we used to call the rolodex.

1:47:12 J. Vogt He talked about how you had to second chair two cases before you got appointed to your own and those type of standards. He questioned whether those were still there because we haven't been informed of that. Those were kind of some of the things I have been listening for this morning just to see what that procedure is because that is a procedure that has caused us some concern. Otherwise, it is really anecdotal information that we can provide to you and to let you know that whatever you decide for the future of the panel or consortium or beyond, the court is willing to help in any way, also mentoring. We have had a lot of talk about mentoring this morning. What is really interesting to me, and I talked to Ingrid about this a little bit, is that defense attorneys for the most part do not come in for critiques the way prosecutors do. I don't understand that. Especially newer attorneys when they are in court I take notes on all the attorneys when they are in court before me – "Just why did you ask that question" strategy questions, for both sides. If a defense attorney, a newer panel member or otherwise, asked a prosecutor in this county if they had permission after a sentencing or after the case was done to come in and have a critique with me, almost all of those prosecutors would say of course because they also want that courtesy.

1:48:51 Chair Ellis So you actually offer and it is declined?

1:48:56 J. Vogt No. They know that they can come in. They just have to get permission from the other side. The prosecutors always come in and I take notes on their performance and I ask them about things and things that didn't go as well. "When you asked that question it was objectionable." They didn't object. You need to know that it was objectionable. Any of those things I take notes on. Sometimes I will have five pages of notes on an attorney and if they don't come see me in six months I throw it away. Also, and I will tell this to Marc, as the chief criminal judge I have the team leaders in the DA's office who are doing evaluations on their attorneys come and see me all the time and ask questions for their evaluations to see what their lawyers are doing in court. I haven't seen Marc in that context. I don't know if that is just something that he hasn't thought about doing. Those team leaders come down and ask me all the time about what is happening with their team members. They ask me to brutally honest with them and we try and do that. We try and do it because for both sides of the spectrum in this system, we want to have the highest quality folks we can have. Otherwise it is just not fair. When it is just not fair that is when we feel in a bad position. We offer that. Judge Merten has been on the bench 34 years. All you have to do is tell him before the trial, "I want to come back for a critique." He is going to take notes and he will sit down with you and go over all of them.

1:50:40 J. Potter This is an important area for me, at least, because it has been raised before about defense lawyers not talking to judges. So for me to understand, the DAs will come in and talk to you and the defense doesn't?

1:50:52 J. Vogt For the most part. I have had the newer members, or younger members, however you want to say it, of the public defender's office. Several of those have come in to see me. I haven't had any panel attorneys come in to see me.

1:51:08 J. Potter So explain the process to me. If a defense lawyer wants to go they talk to the prosecution and say that they would like to talk to you about the case after the fact?

1:51:17 J. Vogt Yes.

1:51:14 J. Potter Vice versa if the prosecutor talks to the defense? So then the defense lawyer knows that the prosecutor is going to go in there and still they are not taking advantage of that or using that to jog their memory that maybe they should do that ?

1:51:31 J. Vogt Correct.

1:51:29 Chair Ellis That makes no sense to me.

1:51:34 J. Vogt What is really interesting is if the prosecutor and the defense attorney – we are really friendly in Lane County. I know that in some other places I have heard that they aren't as friendly between the two. What is really interesting is if you get both of them to come in and talk to you at the same time. Then I can say, "You did this. Why didn't you do that?" They can learn from each other. I have found it to be pretty educational for me as well.

1:52:07 J. Potter We are talking about panel lawyers here but what about public defenders? Do public defender lawyers come in and talk to you?

1:52:10 J. Vogt Newer ones come in and talk to me.

1:52:21 P. Ozanne Not team leaders or supervisors?

1:52:21 J. Vogt I haven't had supervisors in the public defender's office come and ask me about their folks.

1:52:27 S. McCrea How long have you been on the bench now?

1:52:28 J. Vogt Three years. Time flies when you are having fun.

1:52:35 J. Bearden Judge Vogt is more conscientious than some, but you just need to let the judge know in advance. The judge isn't going to spend all their time taking notes about the lawyers if they don't think the lawyers care or will come by and talk. If they know that in advance they will take notes and they will pay attention more to when objections weren't made. Mistakes made in whatever stage of the trial and can give some positive feedback. I don't know if the lawyers don't think of it or they are scared, but we really are not all that scary.

1:53:13 Chair Ellis Maybe not to you.

1:53:17 J. Bearden Merten has been around so long I was a young lawyer practicing in front of Merten asking him about advice 30 years ago. I think any member of the bench would be happy to do that if the lawyer asked in advance. I think that is a good idea. I wanted to say one thing about administration. I did talk with Carmen Phillips at some length and I have talked with our trial court administrator, Liz Rambo. Whatever you do we can work with it. It is not really a big deal in terms of administration whatever plan you choose.

1:54:01 Chair Ellis I was going to ask you because you were here in those years before we went to this system.

1:54:10 J. Bearden Yes I was.

1:54:09 Chair Ellis I am guessing that administratively you welcome that this has taken a burden off the court.

1:54:20 J. Bearden Yes.

1:54:19 Chair Ellis Hopefully they are there at arraignment and things are working smoothly that way.

1:54:24 J. Bearden Yes.

1:54:21 Chair Ellis Do you have any broader observation on whether there is any improvement in the general quality of the group we are talking about? Is it about the same? What is your sense?

1:54:36 J. Bearden We are always going to struggle with quality when the payment structure is so low. Every time an experienced lawyer leaves the panel we cringe. The ones that we have there now, the experienced lawyers that we have there now, who really have no good reason to be doing the work other than dedication to our system, we worry that they will leave as well.

1:55:15 Chair Ellis If we went more toward a contract with a smaller group, would those experienced, departed panel members be likely to join that group.

1:55:23 J. Bearden I don't know. You would have to talk to them. I don't really know what is motivating them. I think a lot of the experienced lawyers who are out there doing criminal defense work, Shaun would know this better than I now since I have been out of the practice of law for 11 and half years, almost 12. I assume that the lawyers who have left are doing enough retained and other work that they might be tough to get back.

1:56:04 Hon. Elizabeth
Welch I just wanted to make an observation. I have never met either one of these judges. I know there is nothing more popular in Lane County than hearing how things are done in Multnomah County. It is really interesting to hear some of the comments that the people on the Commission have made today and some other participants. It is my opinion that input from judges is absolutely critical for the evaluation of attorney performance. I don't see that there is anything that comes close to being as helpful as judge input. It is interesting to hear what you all say about your experience because it is very, very similar to mine. The public defender is consistently asking for evaluations on their people. I am not going to go through all the law firms, I promise. The district attorney's office is more consistent than the public defender's office in exactly the same way that you described. There isn't anybody else that is going to step forward and say anything substantive. To have an adversary who thinks that a lawyer did a crummy job, to say anything or do anything about it is such a remote possibility that it isn't really worth mentioning. How is it that anybody who is evaluating attorney performance knows anything? Its from judges. The only thing that you all haven't mentioned today is if you got really irritated, really concerned, or if there were a pattern, wouldn't you call the boss?

1:58:05 J. Vogt We have.

1:58:11 J. Bearden I am sure Marc cringes when he sees I am on the phone.

1:58:11 Hon. Elizabeth
Welch This is the way to find out whether the lawyers are doing a good job. Having one lawyer go and sit in the courtroom to watch another lawyer, in his or her firm, and make any kind of evaluation about their performance I don't think is very useful. I am not saying it shouldn't be done. I don't mean it that way. It is from judges that you find out that people are doing a good job. There are lots of lawyers who don't try cases. They go to court. They are good lawyers. This is true of prosecutors and defense lawyers. They resolve things. Talking about trial techniques is something that comes up pretty rarely everywhere. I wasn't really going to say anything great about Multnomah County doing a much better job of this. I threatened it but I didn't really mean it.

1:59:07 J. Bearden I talk with your PJ all the time about how you guys do everything great. I am totally up to speed.

1:59:18 P. Ozanne Judges, both of you, I don't know your background in law practice but I do know something about Judge Bearden's. I was in a staff position with this Commission before and was down here for it. I respect, and I practiced here for a number of years, and I know many people of the bar, it is not a question of the quality of the bar. For me it is a question of what structure over time with different lawyers makes the most sense. I discount this notion of any particular structure as doing a wonderful job with young lawyers and bringing them in. I think the fact is that there are enough of us who wanted to live in Eugene, I didn't go to law school here but I was teaching here and stayed and practiced as well. But they are going to be here anyway. Often there is no real law market. What we did when we developed the system was to simply honor the preferences of the lawyers here who I respect and whose motives I

respect. One of the concerns that I have, both when I worked as a staff and now when I am on the Commission is there is so much talk, and we do respect, support, and pay for the lawyers, but it is really all about the clients. That is who I feel my fiduciary duty is to, so what system over time is going to provide the best defense structure? You can dodge this question, and perhaps it isn't even appropriate to ask judges officially, but I have to say that I am troubled by this panel structure and was before. Marc knows and we have talked about it. I don't see how a lawyer can make a living, or even a partial living. I worked for a while and then I taught half time and then I practiced law. Eventually I went into full-time teaching. The people we heard from here today most of them, I think, had another job, took a vow of poverty, like the young man here who I know will get mentoring. He is going to seek it out, which is the probably the most important thing for lawyers anyway. I wonder if you would be willing to comment, Judge Bearden. You were in a consortium.

2:01:30 J. Bearden

I was.

2:01:20 P. Ozanne

I just don't see, given human nature and the realities of raising a family and everything, that you can get, over time, the quality of the service with this panel. We have gone through it here before you arrived. Experience, enough cases, oversight by somebody is, I guess, what it boils down to in my mind. And certainly I will defer to my colleagues on the Commission who have labored a lot in Lane County here on the system. Does it continue to be worthwhile for the interest of the client, to defer to the preferences of the bar down here? That is the thing that I am struggling with. If you can help me with that on the structural issue, fine. If you don't want to comment...

2:02:20 J. Bearden

I share your concerns. I think that Marc can back me up here that most of the time when I am calling him it is because I am worried about a client of the panel. A client who I don't see as being well represented for whatever reason and that, of course, involved a lawyer who is on the panel and having some problems. I am sure you are all aware that Marc and I dealt with a lawyer who was having serious problems here. I was just in a position where I could see it because we do have sort of a unique view. If there is a lawyer who is not consistently making their court appearances and not getting their paperwork in, those kinds of things, that is going to come to the attention of the presiding judge more quickly than to any other judge. They are going to have experienced a smaller number of events with that person than I am. Usually when I call Marc, other than if we have some terrible problem finding a lawyer for somebody, usually it is because I am concerned about a client. I totally share your concern. That is my only real interest. That is why I am on the Oversight Commission, because is I am always concerned about the clients. That is why I did the work in the first place. That is why I did criminal defense work. That is why I stayed involved in this process. I think the Chair, Vice Chair, and whoever else was on the Commission when I testified last time, whenever the heck that was ...

2:04:00 Chair Ellis

Four years ago.

2:04:00 J. Bearden

Four years ago when you set up it. I wasn't hot on the idea for just the reasons that you have set forth. I think if we stay with the panel idea it is just a nod to the bar in this county and their strong feelings about it. I have been both ways. When I started practicing law in 1978 it was an open system for court appointments. I was part of that out at the juvenile court and part of it downtown with criminal cases. I started dropping out of it as my practice grew and flourished, but I did stay with the juvenile consortium once it started up. When I first started there was no juvenile consortium. I had a long association with the juvenile consortium for many years. I don't even remember when it started so I can't tell you how long it was, but it was many, many years. It wasn't a perfect system either. There isn't one. They continue to have some growing pains in dealing with it. They are a very graying group, so they are now dealing with bringing in a lot of new lawyers and reconfiguring that group. I share your concern. I am dodging your question. My concern is if we are going to stay with an open system then there is that danger. There is a greater danger that the clients will not be well

served and that is my biggest concern. I am not against. I am on the Committee for crying out loud. I enjoy that role of helping to try and figure out who are good people to bring on or not bring on. I think it is kind of an unwieldy system and I think it needs a lot more oversight. I think we ask an awful lot of Marc for the amount of time that he is paid for. If you are going to have an administrator who really needs to administer a group that large, then they need to be doing a whole lot more work in that regard. I have colleagues who as recently as this year said to me well I didn't know I could complain about it if I had an incompetent lawyer in front of me. I didn't know I could call Marc.

2:06:56 Chair Ellis The question was raised earlier. Just to put it in context, when this Commission was established eight years ago part of the argument in the legislature was that it was unfair to the judges to have them so involved in selecting counsel for one side of the case, that they were supposed to be neutral arbiters on. The question was raised whether we should continue to have you, or one of your colleagues, on the Oversight Panel, given that issue. On the other hand, I certainly listened respectfully and with obvious interest to both of you saying you are in a better position than almost anybody to evaluate lawyers because you are there. You see them. Marc is not in the back of the room on all those cases. What is your feeling? Are you comfortable being on that Oversight Panel? Do you think there is a tension there? How would you answer that?

2:07:59 J. Bearden If there is tension there they are hiding it from me well. I don't feel that. If anybody is uncomfortable with having me there that is fine. I think there needs to be a lot of judge input. I totally agree with what Judge Welch said. I don't think there is any other way you are going to get good, constructive, neutral feedback except from the bench. I urge Marc to get a lot more of it. You look at what went out for trial last week and if you have lawyers you are concerned about go talk to the judge yourself about the lawyers and how they did. I think most of them will be quite honest.

2:08:46 Chair Ellis I know nothing about the panel participants. If there is a panel participant that in court you think is below the standard of quality that you think ought to be there, do you take that to the Oversight Panel? Is there a process to review continuing qualifications of people and a process to reduce the participation in the panel?

2:09:17 J. Bearden Yes. There is. Usually what will happen first, especially if I am worried about it on a more immediate basis, I will call Marc and I will just say we are having a problem with Joe Smith and these are my concerns. I will list out what my concerns are and especially if I have heard from one of my colleagues who I know to be one of those people who isn't going to call Marc, then I will call Marc and say, "Hey I just talked to Judge X. He or she told me blah, blah, blah about this person. I think maybe you ought to pay the judge a visit and talk to him or her about it."

2:09:53 Hon. Elizabeth Welch How often do you have to call?

2:09:56 J. Bearden I don't know.

2:10:00 Hon. Elizabeth Welch Is it a frequent thing?

2:10:00 J. Bearden Several times a year.

2:10:06 J. Vogt Judge Bearden doesn't appear at arraignments and pvs. Those are the places where we are getting the new folks. Sometimes I am hearing from the other criminal team members about new people. Then we watch for the same mistakes repeated to see if we have improvement or we don't have improvement before we make that call. Some of it is just inexperience and it comes along within time. Sometimes it doesn't come along and it should. That is when that

call needs to be made. We give it some time depending on the frequency of the events and whether they are the same.

- 2:10:52 Chair Ellis Any other questions?
- 2:10:52 P. Ozanne It sounds like somebody, whether it is the Oversight Panel, Marc, the Commission, the public defender, ought to send a letter to all of the judges saying we are interested in the quality of our defense services. You are free to call X when you have a concern. Does everybody now know it? You were indicating earlier that they didn't know what to do.
- 2:11:12 J. Bearden I think they know now.
- 2:11:16 J. Vogt I think they know, they just sometimes don't do it.
- 2:11:21 Chair Ellis Marc, I hope you will send a letter to the 26 panel members saying, "Hey, the judges have expressed not just a willingness, but a desire to have the chance to help."
- 2:11:29 M. Friedman I will inform them. I have informed them before, because I have had this conversation with Judge Vogt, and encouraged the panel members. I know that they have been reticent to do it. I think what would certainly be useful at this point is a reminder to all of the panel members and a reminder to the judges to contact me. That really has been one of the difficulties. I have heard from Judge Bearden.
- 2:11:59 J. Vogt That is because I report to her. We compare notes before we decide we have to call. She usually makes the call.
- 2:12:09 Hon. Elizabeth Welch I think you need to assume that this is a universal problem. In my experience the kind of things judges call providers, service providers, for are usually pretty egregious. The other kind of input that requires you to go see the judge is the periodic, "Come in, talk to me about my people, do you have concerns?" There you are not looking for the bloody knife, so much, as you are looking for the sort of chronic inadequacies, things like I used to complain to Ann Christian about - lawyers who appear not to have spoken to their clients prior to the hearing starting, particularly in juvenile court. That kind of stuff isn't something we call about because if we were calling on that stuff we would be on the phone a lot.
- 2:13:20 J. Vogt Those are the things I am getting from the team leaders from the DA's office. When they come and ask about their folks on their team, they are not just asking about trial work. We have settlement conferences in Lane County every Monday, Wednesday and Thursday on every case that come through a 35-day call if they haven't settled it. Those team leaders are also asking how they are performing in the settlement conferences. Are they being reasonable? Are they taking unreasonable positions? Do they make offers? Do they know the market value? They are asking those questions as well.
- 2:13:50 Chair Ellis Is the frequency of the calls to Marc - I want to get a comparison - similar to calls you make to Lane PD?
- 2:14:05 J. Bearden No. More to Marc. I want to say that one of the reasons that I have stayed on the Oversight Committee - and again, I would be happy not to have another meeting every month or so if they want to kick me off that is fine - one of the things that we do talk about, and one of the things that I can bring to them either through being on the Committee or another way, are ideas that just come to me. At the last meeting I said to Marc, and I had already talked to him about it once because it had just occurred to me a few days before, you have just got to impress on your lawyers that they have to have somebody covering their cases when they are gone. This is crazy that we have a standard of professionalism that is so low that I will have lawyers not present for court appearances and nobody is there to cover their cases. I wasn't

born yesterday. I practiced law for 20 years before I went on the bench. I think one of the things that our bench offers is most of us had healthy, long years in practice and have a lot of practical experience. That is not true across the board but it is pretty much true of our bench. We have a lot of good ideas about how you do things. Some of us are a little old-fashioned, but I don't think it is old-fashioned to take care of your clients. One of the things you do to take care of your clients is if you are out of town or ill or whatever the situation is, other than emergencies which we all understand, you have somebody else covering for you. I was not in solo practice. I had a partner, but there were times when neither one of us could make an appearance or both of us were out of town trying a case in another county, whatever, and we always had a stack of substitution forms and staff to take care of it, and a lawyer on board who would run over to court if one of my juvenile clients got picked up and had a detention hearing the next morning or whatever the situation might be. It is unprofessional and it doesn't serve the client, more importantly back to Peter's point. I just think that it is critical and I find it appalling that lawyers don't think of that. I had a lawyer yesterday who didn't show up for arraignments. I just found out serendipitously because Judge Vogt was walking by when I was complaining that the same lawyer didn't show up for 2:30 call on the same day, different clients. He had one client in jail that was a retained case and a case in front of me at 2:30. The client had driven over from Florence and had no idea why the lawyer wasn't there.

2:17:07 S. McCrea

Was that a panel lawyer?

2:17:05 J. Bearden

It was not, but I have had panel lawyers - that is a fair question - but I have had panel lawyers. Most of the lawyers that I have who go out of town without arranging for somebody to cover their cases are panel lawyers. They have the kind of caseload where they know, or should know, things happen. We don't have enough jail capacity to hold anybody. Their clients are getting arrested all the time because they have been let out and shouldn't have been. They get rearrested and there is a court appearance and maybe a quick set second appearance right after that. If they are gone for a week or two they could miss two or three court appearances. There is the poor client just hanging out there.

2:17:45 P. Ozanne

Does your lack of available jail space deter you from holding a lawyer in contempt?

2:17:53 J. Bearden

I am going to take the Fifth.

2:18:05 J. Vogt

This is a very small thing. It would be very, very helpful to the judges to be informed when there is a new panel lawyer and who they are. One of their first appearances is in arraignments and when you are up there and you look out to the world and you think you see no panel lawyer there who is supposed to be there for arraignments, your first thought is I have to call Marc because somebody is not showing up for the panel. Then somebody stands up who you are never have seen before, you haven't been introduced to, you don't know their name, you did not know that they are a new panel lawyer. That has happened repeatedly. Just an introduction of them. I was kind of chuckling because the first time Mr. Rainwater appeared in front of me I didn't know he was a panel lawyer - I don't know if he is still here - and I didn't know who he was. I wanted to find out who he was so I looked up his website. That is how I found out who he was.

2:19:04 P. Ozanne

Judge, I am surprised with Mr. Rainwater's experience and his practice in a lot of places. When you go to a new court you always go and knock on the clerk's door and introduce yourself. This is about lawyer responsibility. Young lawyers don't know that and they need mentoring.

2:19:26 Chair Ellis

Do the PDs tell you about the new lawyers?

2:19:27 J. Vogt

They actually walk them around to all of the judges and introduce them. Just so we know who they are because part of the thing with the client, and it goes back to like Judge Bearden was saying, it is the client, part of it is the client being confident in their counsel. That comes

with the perception when you are in court and the judge knows who you are and calls upon you and asks for your feedback. I think that the client's perception on how the court is dealing with you is very important.

- 2:19:57 P. Ozanne Excuse me, Judge, were you going to demur to my question about structure?
- 2:19:57 J. Vogt Yes, because I don't have an answer. The reason I don't have an answer is because I was not in a consortium and I was in the DAs office. I can't tell you better or worse, this way or that way. I can only give you the information that I have from this perceptive.
- 2:20:20 P. Ozanne It has been controversial but we have always asked DAs about performance. Do you still think that is useful to do as a former DA?
- 2:20:27 J. Vogt Yes.
- 2:20:29 Chair Ellis I think DA Gardner is here.
- 2:20:35 J. Bearden Our elected district attorney is present. I have had many conversations with deputy district attorneys over the years, candid conversations, about cases after they are done, of course. "I had to settle that case because there was post conviction relief written all over it." I know from knowing former district attorneys and current district attorneys that often people in Mr. Gardner's office are taking action on cases in a defensive mode and basically trying to do the defense attorney's job for them. That too cannot be good for clients.
- 2:21:20 Chair Ellis That used to be what happened in the '60s. That shouldn't be happening today at all.
- 2:21:25 J. Bearden Again, I think that we have a situation where we pay poorly. I think I am going to get this right, Judge [inaudible] always use to say, "You don't always get what you pay for but you never get what you don't pay for." I think that is true. Back to Peter's question, if we had a closed group I agree with the bar that there needs to be a very open door and a good way to get in. It shouldn't become exclusive. If we have an open panel it needs a lot of structure. There needs to be a lot of expectations and I think, again, back to you don't get what you don't pay for. We need to pay for that if we are going to get that, if Marc is going to be expected to have regular visits with judges and go around and talk with them, and meet with, and set out expectations and make sure they are being met, like, does every attorney have a backup system for what happens when they are out of town, a system for monitoring phone calls and emails when they are gone? That is structure and it is a big group. It is a lot of work. I don't think it is undoable. I think you could manage it either way. What really always got to me, and when I testified four years ago I didn't understand why they didn't want to bid per case and have sort of an open door consortium but not an all inclusive consortium. I never understood that from a business point of view. That is my bias as a business person speaking, not my bias as a judge. It doesn't really matter from this side. What matters is that there is structure and quality control so that the clients are well represented. That is really all I care about. I don't have a dog in this fight other than that.
- 2:23:44 Chair Ellis Thank you both. DA Gardner do you have any thoughts you want to share with us?
- 2:24:01 A. Gardner It seems from the little bit that I have been able to hear there are several different questions. One of them concerns mentoring. One of them concerns whether everybody who should know has an accurate appraisal of how competent the defense bar is. My sense is that everybody knows who the strong lawyers are and who the problem lawyers are. My sense is we have consensus on that.
- 2:24:33 Chair Ellis If there is consensus on who the problem lawyers are, why are they still getting cases?

2:24:38 A. Gardner Exactly. I am sort of looking around the room to see if there is disagreement on this. It is not like the DA thinks these folks are the good defense attorneys and the defense bar thinks these folks are. I think we have about a 95 percent overlap, and the five percent difference I explain by looking at the different marketing abilities of the five percent that we disagree on. There are some folks who are very good war story tellers who can always sort of characterize the fight that they have been in with the DA's office as extraordinary. They can always underestimate the strength of their case and overestimate the strength of the DA's case. They tell great stories and so they are held in higher esteem by some of their peers than they are by some in the DA's office. That is a small subset, but for the most part we agree on the strong ones. I think the difficulty is that it is very hard to turn on people you may be fond of.

2:25:50 Chair Ellis The phenomena in Lane County, and I will say that I think it is stronger here than I have seen anywhere else in the state, is that good lawyers are unwilling, and they tell us this, to support a closed panel or a reduced panel because they don't want to hurt their peers. It is a remarkable. In some ways it is benevolent. In some ways it doesn't make our job very easy, but I have seen it elsewhere in the state as strongly as you see here, the brotherhood protection.

2:26:37 A. Gardner I did almost the first 10 years of my career in Roseburg. I just passed Greg Hazarabedian a note a few minutes ago, because Greg was there for sometime as well, asking him if he thought the sort of average competence level of the private defense bar wasn't quite a bit higher than it is here. He agreed that it is. It is very small, little jurisdiction down there, but they seem to be very good at policing themselves. There seems to be very effective peer pressure. I don't know why it is but it is a very strong private defense bar that does a significant percentage of the cases down there. We have some incredibly talented folks here, but you are right, we don't self-police very effectively. There have been several people that have been so bad that it has overcome the reluctance. I will say that there is a sense among many of us that nothing happens when we do identify it. I will tell you that there was a capital murder case not too long ago. The defense lawyering in that case was some of the worst lawyering I have ever seen. It was sufficiently disturbing so that I talked to the judges, I talked to Greg Hazarabedian, and I talked to a bunch of people about how we can prevent this from happening in the future. The message made it to your group. It was disturbing to find out that there was absolute consensus about at least half of that team, and yet that person ended up on a capital murder case. It was appalling to me. In my opinion, neither of those people is qualified to be anywhere near a case like that. I was incredibly anxious and uncomfortable and you didn't have to sit through the trial to watch that. You could sit through two hours. It didn't matter whether it was jury selection or closing argument, it was profoundly, grossly incompetent.

2:29:02 S. McCrea That wouldn't have been somebody on the panel?

2:29:06 A. Gardner They were appointed.

2:29:14 M. Friedman By Salem.

2:29:14 A. Gardner I am just saying ...

2:29:20 S. McCrea So what you are saying, Alex, is that we have bad lawyers everywhere.

2:29:25 A. Gardner What I am saying is we are not good as a group at self-policing. There should have been a lightning bolt that excised those people from the practice of criminal defense. That is just my view. We have had a number of people come through our system here, who have been getting court appointed work, who are very bad and will continue to do court appointed work for 18 or 20 months before they get bounced, and it is not because there isn't consensus about there level of competence.

- 2:30:04 Chair Ellis Do these tend to be at the young end of spectrum? There used to be, and in the sixties I know it was true, older lawyers who were frankly not competent but hung around the courthouse.
- 2:30:16 A. Gardner I think it is kind of a mixed bag. I think very often when folks who go out on their own have great difficulty because they don't benefit from that apprentice relationship that builds good lawyers. We always have that in the DA's office and folks who grow up in a public defender's office always benefit from that. I will say I go to the public defender's office at least once a year and have a "complain to Alex" session, a sort of tomato throwing session where everybody can tell me what we are doing poorly.
- 2:31:02 Chair Ellis We call that a Town Hall meeting.
- 2:31:03 A. Gardner Without the food fight. Anyway, we have a great feedback loop there. It helps me identify folks in my office who are struggling. It is very easy to talk to Greg candidly about that stuff, in part because he has direct responsibility for those people. It is a little different, very different, for Marc because he, as I understand it and correct me if I am wrong, but I understand that Marc is sort of an air traffic controller. He is sort of making the assignments but he is not supervising people. That is a different relationship. My sense is I could complain to Marc and he wouldn't necessarily be in a position to fix it. I would just be sharing my discomfort. I don't know if that is accurate.
- 2:32:02 P. Ozanne Is that based on your assumption about the air traffic controller?
- 2:32:11 A. Gardner I have a great relationship with Marc, I think. We have worked on system issues in terms of how the court processes cases. We do some things differently in Lane County for a variety of reasons. It is just my sense that it is a different relationship than the one that the director of a public defender's office has. His relationship to his people is a little bit more like mine is to my employees. I can do things to correct behavior and try.
- 2:32:47 Chair Ellis Other questions for the DA? Thank you. We have been going for two hours and forty minutes, minus eight minutes for jack hammering. We will take a short recess. Let's take five minutes.
- (Recess)
- 2:42:41 Chair Ellis Greg Hazarabedian?
- 2:42:42 G. Hazarabedian Thank you, Mr. Chair, Commissioners. I will be quite brief. I just wanted to give a short statement about the current relationship that we have with the public defender services, with Marc and his panel. We have a good working relationship administratively. His legal assistant or office manager, Alex, is very efficient and the workings between our staff and his staff are good. Things move smoothly with substitutions and handing over discovery on substitutions and those kinds of things. We do have a lawyer on the Oversight Committee. There was some mention earlier about whether that was appropriate. I don't have a view one way or the other. Janise Auger, who I asked to be on the Oversight Committee did because she is a person invested in systems if you will. She was formerly on the Board of Bar Governors and that sort of thing. She is not my delegate on that oversight group. I don't talk to her about what happens at those meetings. She is her own person. She is simply from our office. We are happy to continue in that supportive role if that is deemed appropriate. I am not real attached to having a person on there if there are people who think that is not appropriate. As Marc mentioned briefly
- 2:43:54 Chair Ellis Pause a minute because I raised the question with Marc does he view the relationship with your group as competitive or collegial? I am not sure I understood his answer. It was skillfully presented. I think the answer was yes. How do you view it?

- 2:44:16 G. Hazarabedian I certainly view it as collegial and not competitive at all. I don't think we are adversaries. I don't think we are competitors. I don't think we are against each other. I think we are supporting each other. If I am missing some animosity that exists, I am missing it. In fact, we work well together both administratively and in the Oversight Committee.
- 2:44:44 Chair Ellis Are there many alumni from Lane PD that now function as private lawyers?
- 2:44:47 G. Hazarabedian We have alumni from our defense clinic of third year law students that I know are on the panel. Dan Kruse is one that you heard from today. I don't know that we have alumni from the office. Certainly we do. Mike Buseman, Laura Fine are two that come to mind that have worked for us, so, yes, there are some of our alumni who participate in the panel. Last year Public Defender Services started CLEs every other month. We do that in conjunction with Marc and the panel. We have a good turnout from panel attorneys. Tom Fagan, our education director who puts together the CLEs, talks to Marc about what would be some topics that would be timely and relevant for local practitioners. We have expanded beyond just our lawyers and the panel. In fact, under the auspices of OCDLA, we invite every criminal defense lawyer who is an OCDLA member in Lane County to come to those CLEs. Those have been good.
- 2:45:46 J. Potter Greg, before you move on could you just step back a minute on the non-competitive clause that you referred to. The Chair had mentioned earlier one of the potential solutions was putting more cases into the panel system. More cases would come from the PD's office.
- 2:46:02 G. Hazarabedian That would change my answer to that question. The current situation is that the panel takes cases that we don't, rather than takes cases that we would otherwise take. Therefore, I don't view the panel as a competitive body. Certainly if Mr. Potter's remarks were followed up on then I would view it differently.
- 2:46:26 Chair Ellis I think I detect you would not favor a larger percentage of the caseloads being handled away from your office?
- 2:46:33 G. Hazarabedian I would favor a continuation of the situation that currently exists which is the policy of this Commission, and has been stated repeatedly by you in other documents, and that is that full-time public defender offices do provide the best representation for Oregonians accused of crime. I understand that that is the policy of this Commission and you have gone to the effort of creating public defender offices since your existence.
- 2:47:03 Chair Ellis You enjoy a higher percentage of market than I think the PDs in the other large counties do.
- 2:47:13 G. Hazarabedian I am not sure that is correct. We have been around for so long that we have such a huge conflict database that they are getting something like a little bit over a third of our cases, I believe.
- 2:47:25 Chair Ellis He said 30 to 40 percent.
- 2:47:27 G. Hazarabedian I am thinking that is the accurate number in a ballpark way. We have been around for over 30 years and have represented a lot of people. Our conflict database is huge and we do get off of a lot of cases. Maybe in other jurisdictions, where the public defender office is newer or possibly in some jurisdictions where they don't do as extensive or rigorous a conflict analysis as we do, that percentage could be lower for those reasons. I don't know those numbers.
- 2:47:58 Chair Ellis Are you able to identify those conflicts early, or do you have many examples where it surfaces later and, if so, why is that?
- 2:48:06 G. Hazarabedian The large majority of our conflicts are caught early enough that a trial date has been not set and the substitution with the panel lawyer is done administratively. The presiding judge here

has told all of us that if a trial date has been set, then a motion to withdraw and to substitute counsel needs to be done through the court process. If a substitution needs to happen before a trial date has been set, then it doesn't need court approval. We handle it administratively between our two groups. The vast majority are handled in the administrative manner. That tells me that we are not withdrawing late very often. Obviously sometimes when you are preparing for a trial you discover a witness that was previously unknown to anybody. That witness presents a late conflict for you and you have to get out late. We are pretty good about doing our conflicts work here in a fairly timely way. I participated several years ago, maybe three or four years ago, when Ann Christian was contracted by you to do a conflicts work group in Multnomah County. I was pretty new on this job here and I asked if I could participate in that and Ann welcomed me to it, so I was able to see how conflicts were done in other places and I looked at those numbers out of Multnomah County and compared them to our numbers here. I realized that we were not out of line at all in that regard. It was very instructive to me and that was why I wanted to participate on that. I don't think that is a big issue. There have been occasions where we have withdraw from a case late because a lawyer in our office didn't check conflicts, didn't go through their conflict analysis in a timely way, and that has been dealt with by me with those lawyers in various ways. One of the lawyers who had a problem with that no longer works for my office.

2:50:06 Chair Ellis

Marc described the caseload they get, which is all conflicts. In other words, it is a default caseload characterized by harder, more difficult cases. The implication was that the clients are more difficult and therefore the work is more difficult. Do you agree with that?

2:50:28 G. Hazarabedian

Partially I agree with that, Chair Ellis. I don't know the numbers, but off the top of my head my guess would be that the majority of their cases is probably a large number of co-defendant cases. Those cases don't present any particular difficulties. They are just that we can only represent one when a bunch of people are arrested for the same thing. My guess is that would be a pretty large percentage of the work that the panel gets, although I have not looked at those numbers specifically. Certainly in other cases there is simply going to be an ethical conflict where we represented in a witness in a case, or we represented an alleged victim as a client before or something. It is a technical, ethical conflict and those cases don't, by definition, have to be any more difficult. The remaining group of cases are often more difficult cases. If I were guessing I would say that it is maybe 20 or 25 percent of what we give the panel although I don't have any particular basis to rely on those numbers. That is certainly something we could find out. I have been asked by many people, both panel lawyers, other lawyers, lawyers who are part of the consortium bid that is before you, and Ingrid, and other people about what is my opinion about whether you should grant this contract for this consortium proposal or whether you shouldn't. I guess I come out not having a dog in the fight or a point of view. The reason I don't is that I am not convinced, I have not been convinced by arguments one way or the other that the structure of the body who does the conflicts cases in this county is going to address the quality concerns one way or the other.

2:52:16 Chair Ellis

Let me just ask on that. One of the reasons consortia exists in so many parts of the state is it is a way for lawyers to be compensated more than under the fixed hourly rate. Those who argue that the quality tracks with compensation would argue, I think, that consortia structure because it does allow a higher level of compensation would be beneficial to the quality point of view.

2:52:52 G. Hazarabedian

I am not going to argue that higher compensation would attract the kind of lawyers you want to do the work, I am not convinced that you need to go to a consortia model to increase what you pay the panel on an hourly basis. There has been talk about paying people to do mentoring. There are ways for this Commission to funnel more money into the panel, if that was the sole factor that you were considering in terms of quality issues. We all know that there are consortia in Oregon providing public defense work in other jurisdictions that are doing pretty poor jobs. We know that some of those consortia no longer exist. We have had quality problems, we, collectively, for public defense in Oregon in all manner of

organizations. We have had problems with non-profit public defender offices. We have had problems with consortia. There is now a perceived problem with the panel.

2:53:46 Chair Ellis I think everybody here is going to agree that structure alone won't make the difference.

2:53:49 G. Hazarabedian That is the only point I am trying to make. If there are quality issues that need to be addressed, Public Defender Services doesn't see that structure alone will solve those problems or contribute to those problems. I am not here telling you I think you should keep the panel. I am not here telling you I think you should get rid of the panel. I guess the only point of view I have is I think there should be some sort of open panel if there is also going to be a consortium because of what has been talked about with others and covered in a way, and I don't need to repeat it is about the graying of the bar and the chance for the young lawyers to get a start in this town. Other than that, I don't have any opinion. I do want to say that my ambivalence about whether or not the consortium ought to be contracted with in no way reflects on my opinion of the four lawyers who are part of that bid and the quality of their work. That is not issue in my view. I believe everybody in town would agree. Those are four capable lawyers who have put in a competing bid, if you will.

2:54:54 Chair Ellis Let me ask if of the roughly 35 percent conflict caseload, if - I don't know what the number would be - half of that were contracted to a consortium group, do you think there is enough left that makes the panel system viable? Is there a critical mass requirement for a panel system?

2:55:18 G. Hazarabedian I don't know how to answer that because I honestly don't know - I don't know what kind of income the panel lawyers make by being on the panel. In other words, I don't know how many of them depend on the panel work to sustain a part of their law practice where it would be unworkable to continue if they got less work. I don't know how much they are individually making from that. I understand your question. I just don't have a way of answering it. I didn't have anything else to share with you unless you have more questions?

2:55:54 Chair Ellis Any cross-examine?

2:55:58 G. Hazarabedian One thing I would like to comment on unconnected, sort of, is to solidly agree with Judge Welch's comment that when you talk to judges about lawyers you get comments that would not cause the judge to call somebody about the lawyer's performance. I spend time regularly meeting with Judge Bearden and other judges. I certainly hear things about my lawyers when I ask about them that would not be egregious - I believe that was a word the judge used - that would not be egregious enough to cause a judge to pick up the phone and make the phone call. I strongly endorse that sentiment.

2:56:31 Chair Ellis Okay. Thank you very much. Any other presenters on Lane County? This is not the day we will discuss all this, but thank all of you who did present for sharing your thoughts with us. We do have Doug Fischer here from Umatilla. We would welcome you if you want to comment on the report. That would be helpful.

Agenda Item No. 3 Update on Service Delivery in Umatilla and Morrow Counties

2:57:13 P. Levy I know you don't want to hear much in the way of introduction, if anything, but I just wanted to clarify. We, unfortunately, gave you the wrong draft in your materials. The final report went to Doug and also to the administrator of the consortium there. You have what is called a draft and it has some track changes showing in it. That wasn't the document you were supposed to get. I won't summarize. I had some additional comments about our visit that I was going to add to what is in the report, but in the interest of time I think we can just hear from Doug because he ...

2:58:15 Chair Ellis Because he has come a fair distance. Go ahead.

2:58:17 D. Fischer I came more prepared to join in a discussion regarding the evaluation. I hope that the Commission appreciates, to some extent, the uniqueness of our firm and our location and the challenges presented by that. I think it is a somewhat challenging location to run a public defender's office.

2:59:00 Chair Ellis Just because of the distances and the prison facilities?

2:59:05 D. Fischer Because of the location. It is not the type of locale that attorneys go to law school anticipating practicing in. I think Pendleton has music in the streets and festivities on into the evening for four days a year during Roundup. The rest of the time they roll up the sidewalks at 8:00. Bringing attorneys into that area, which we have now been doing for 15 years, is often a challenge.

3:00:04 J. Potter Do the DAs feel the same way?

3:00:06 D. Fischer For some reason they seem to have less trouble. I think it is in part that recruitment is more of a system wide process among the district attorneys. Certainly Pendleton or Umatilla County is not a prize location within the district attorney's realm either, but somehow they are able to fill slots quicker.

3:01:01 J. Potter Do the DAs stay longer? Is the retention period longer than you are able to retain people after you get them there?

3:01:08 D. Fischer Not noticeably so. There is generally someone in the process of leaving or looking for other positions continuously, but I think it has been our experience that one of the things that we promote that makes our office attractive to new attorneys is a collaborative office atmosphere.

3:02:10 Chair Ellis Remind me of the size?

3:02:13 D. Fischer Seven and a half attorneys, eight attorneys.

3:02:19 Chair Ellis And the experience level range is what?

3:02:24 D. Fischer Currently we have three attorneys with bar numbers in the low '90s, 1990s. The rest have been attorneys for three to four years.

3:02:53 Chair Ellis One of the observations in the report related to training and supervision of that younger group that you just described, and suggested use of the MPD in Portland as a mechanism of jump starting that training. Where are you on that?

3:03:16 D. Fischer I fully endorse it.

3:03:23 Chair Ellis To be honest I wrote the word "excellent" with an exclamation point in the margin at that part of the report. It is exactly the kind of resource sharing that this Commission and what flowed from it hoped to produce.

3:03:35 D. Fischer Absolutely. It is certainly true that when we are looking for attorneys and when we bring in a new attorney we are under staffed. It is in response to someone leaving, generally. In an office as small as ours, having to absorb the leaving attorney's caseload among the other attorneys creates an untenable situation. The sooner that we can bring a new attorney up to speed the better off we are. I have always felt, or certainly have long felt, that the public defenders within the state and like organizations, private firms who contract solely to do public defense work, would be better off to be working more closely and collaboratively together in sharing resources to the extent that a large firm like MPD can absorb our input.

3:05:24 Chair Ellis Can we take that as a commitment that the younger lawyers in your office will attend the MPD program and get that training?

3:05:35 D. Fischer Yes, you can take that as a commitment that that will happen. I would also encourage OCDLA to continue with their trial practice programs. We had two attorneys attend last year's program. Both of them said it was excellent.

3:06:06 Chair Ellis The other kind of programmatic recommendation I saw in the draft was the addition of another attorney. Your caseload is too high and you need an addition."

3:06:25 D. Fischer We either need an addition or less cases. We have an overage at this point and it is my understanding that we will be compensated for it. That will certainly encompass a new attorney.

3:06:50 Chair Ellis So is that also a "yes" that we can expect that you will, either by reducing the caseload you contract for or by adding a new provider, address that comment on page nine of the report?

3:07:06 D. Fischer I truly hope to add a new attorney.

3:07:12 Chair Ellis That sounds like a little "yes" rather than an unqualified "yes."

3:07:16 D. Fischer We have to assume that we are going to be able to afford it and that the caseload will support that new attorney now as it has over the past year or so.

3:07:34 P. Levy Mr. Chair, if I may, part of our recommendation was that a new body would add capacity not just to relieve caseload but to allow for more effort to provide actual oversight and training within the office.

3:07:56 Chair Ellis Your envisioning a lateral, it sounds like. Someone with experience?

3:07:59 P. Levy Yes. Designating someone who could then have a reduced caseload and take on perhaps some additional supervision, training, and mentoring. I know this is in the report and Doug knows this, during our visit we actually received very complimentary remarks about the work of his firm, particularly in criminal cases and also in their delinquency representation. We were told that at this stage they are pretty much out-lawyering the DA's office and the DA's office is having its own staffing problems. They had about one lawyer left, but our real concern is when he loses his experienced people, which will happen. We were told repeatedly that people don't like to stay in Pendleton. With all due respect to Doug he sort of lives in the worst of all worlds. He is out there in the fresh air but it not really near the great recreational opportunities.

3:09:13 J. Stevens There is a casino nearby.

3:09:16 Chair Ellis Other questions for Doug? Other comments you want to make, Doug? Mine is called a draft, but apparently there is another one not called a draft.

3:09:32 P. Levy It is very close. If you took off the word "draft" you would have the final product.

3:09:38 Chair Ellis Any other comments you want to share with us?

3:09:38 D. Fischer I think that the evaluation has identified a direction that we should be moving toward - a more formal education process. I continue to believe, however, that the desire for this office to function as a whole, as a collaborative whole, is really something that we need to maintain.

3:10:24 P. Levy That is why I have urged Doug a number of times to talk with his colleagues, directors of other public defender offices in both populous and less populous areas, where he may find

that he is not really all that unique - that you can continue a collaborative, welcoming, friendly office environment and also have some structure even in smaller public defender offices.

3:10:45 Hon. Elizabeth Welch

I do want to talk about some of the juvenile issues that are covered in this report. I do not necessarily have a concern about your office. When we visited you a couple of years ago, this issue about the number of children who are appointed counsel who are charged with crimes, was a pretty important piece of information. In the interim there was a follow up that indicated that apparently some consciousness raising occurred, or something, and there was an uptick. Now Paul's report tends to suggest that there wasn't an uptick or that it is down again. I am not trying to put you on the spot. Why is that happening? Why are children not being given attorneys?

3:11:51 D. Fischer

I have to confess that I am probably not the person to ask. We don't see the kids that aren't appointed counsel. If I had to hazard a guess it is that the counselors - these are the juvenile counselors that are presenting kids and their parents with the option of requesting counsel - are discouraging it.

3:12:40 Hon. Elizabeth Welch

Another question along those lines. I think this was a comment about your colleagues, on dependency representation for parents.

3:12:53 P. Levy

They represent very few children.

3:12:54 D. Fischer

That is true.

3:12:54 P. Levy

They do represent parents.

3:12:56 Hon. Elizabeth Welch

These concerns were more with Blue Mountain. I'm sorry.

3:13:07 Chair Ellis

Thank you.

3:13:11 D. Fischer

Thank you.

Agenda Item No. 4

OPDS Monthly Report

3:13:16 Chair Ellis

Do we want the staff report? Should we pick up lunch and just keep talking?

3:13:25 I. Swenson

I think that would make sense, Mr. Chair. We do have to arrive at some decisions, if possible, about some of the topics we discussed yesterday if we are going to allow Kathryn and her staff to go forward at this stage.

3:13:42 Chair Ellis

I understood that.

3:13:44 I. Swenson

We can minimize the length of the staff report.

3:13:44 Chair Ellis

Why don't we pick up our sandwiches and just keep chugging.

(tape ends)

[The tape recording ended before the meeting was adjourned. PSDC staff in attendance at the meeting provided the following summary of the balance of the meeting.]

The Commission made the following decisions regarding how OPDS staff should approach current contract negotiations.

One of the Commission's original priorities had been to mitigate rate differentials among similarly situated contractors. While in some instances, it may be impossible to mitigate rate differentials if the rates proposed vary significantly, Commissioners agreed that rate differentials are acceptable as long as all bids are carefully reviewed to determine whether the prospective contractor could provide quality representation at the rates proposed.

Regarding counties in which there are multiple providers and where the public defense caseload has declined, the Commission discussed whether all providers should be offered a reduced caseload or whether some providers should be preserved at the expense of others. A concern was expressed that if providers were eliminated now when the caseload is down, there could be a problem if and when the caseload increased if those providers were no longer available. The Commission decided that in counties with declining caseloads, reductions should be applied to all continuing contractors in order to preserve those who provide quality representation and whose services may be needed in the long term.

It had been reported to the Commission that many consortia representatives objected to the case rate differential that currently exists between public defender contracts and consortium contracts. Under current contracts, public defender rates are approximately 20% higher than non-public defender rates. Public defender contractors provide additional services and benefits such as investigation, training, stability, institutional presence and community participation; in addition, public defenders have fixed budgets and are unable to supplement their income with non-contract work. Staff testified that the investigation costs alone would require a 10-14% differential. Based on the needs of the public defense system as a whole for these additional services the Commission approved continuation of a rate differential between public defenders and non-public defenders.

The commission also decided that contracts for juvenile cases would require agreement that attorneys working under a contract would be obligated to complete the number of juvenile CLE credits required under the Oregon State Bar's Performance Standards during the two year period of the contract. The Commission further agreed that all court appointed attorneys in state court juvenile proceedings would be required to observe the other of the provisions of the performance standards as well. -

Peter Gartlan reported that the Appellate Division has five arguments before the Oregon Supreme Court this month. Four of the cases are being argued by attorneys making their first appearance before the Supreme Court.

Becky Duncan reported that the division is responding to HB 3508, which, among other things, provides for increased earned time (from 20% to 30%) for certain inmates. To receive the increase, an inmate must be resentenced. DOC is identifying the inmates eligible for consideration for the increase and notifying the inmates, the DAs, and the courts of the inmates' eligibility for consideration for the increase. Once DOC files a notice with a court, the DA must notify the victim (if there is one) to determine whether the victim objects to the increase. If the victim objects (or the DA objects), the DA must notify the court of the objection. A court may also object on its own. If no one objects, no hearing is held, and the court simply signs a supplemental judgment (prepared by DOC) authorizing the increase. If anyone objects, the court must schedule a hearing and appoint counsel for the inmate.

OPDS will work with the courts to make the appointments. OPDS and the courts would like the attorney who handled the original sentencing to be appointed if possible. The attorney will be compensated for the representation; it is a resentencing, for which payment rates already exist.

At the hearing, the inmate will appear by phone. The evidence is limited to that available at the time of the original sentencing. Under the statute, a court shall grant the increase unless it finds "substantial" reasons not to.

If a court denies the increase for an indigent inmate and the inmate wants to appeal, the Appellate Division will initiate an appeal. The division does not know how many appeals will arise. DOC has determined that approximately 800 inmates would be released in the three-month period from August to October 2009, if given the increase. DOC will send notices to those inmates, a subset of those will have hearings, and a subset of those will be denied the increase. It is the last subset that might appeal.

Because HB 3508 was enacted as a cost-savings measure and the default is that the increase is that courts should grant the increase, the Appellate Division hopes there will not be too many of these appeals. But, that depends on whether there are objections and how the courts rule in response to those objections. Paul Lipscomb of MCAD reported that the Marion County DA's office had two different deputies review the cases where inmates were eligible for consideration for

the increase. One deputy recommended objecting in 30% of the cases, the other in 50% of the cases. Lane Borg of MPD reported that the Multnomah County objection rate was 30%.

Becky Duncan also reported that HB 3508 has another provision that relates to the deportation of inmates and that OPDS is working with the governor's office to determine how that will be implemented. The intention of the provision is to allow persons who would be subject to deportation to stipulate to their deportation and be removed from custody (and the country) before the completion of their DOC sentence. The deportation would occur only when the inmate has six months or less to serve in DOC custody. OPDS is working with the governor because one condition of the "stipulated deportation" the governor intends to require is dismissal of any pending direct appeals.

[The meeting was adjourned.]

Attachment 2

LANE COUNTY SERVICE DELIVERY REVIEW

October 23, 2009

1. The following information was provided to the Public Defense Services Commission prior to its meeting in Eugene, Oregon on September 10, 2009 in preparation for its review of the delivery services by its conflict provider in criminal cases:

At the conclusion of a Quality Assurance Task Force evaluation of Lane County criminal defense contractors which began with a three day site visit to Lane County in September, 2008, the site team, chaired by Jim Hennings, recommended that OPDS/PDSC review its decision to contract with the Lane County Public Defense Panel (the Panel) as the conflict provider in Lane County criminal cases.

Set forth below is a brief description of the background and history of the Panel and a summary of comments received from judges, the district attorney's office and others in recent interviews regarding the operation of the Panel.

A number of witnesses plan to testify about the Panel at the September 10, 2009 PDSC meeting.

At the conclusion of this review Commissioners may decide to leave the existing service delivery plan in place or may authorize OPDS to consider contract proposals from other potential contractors as well as from the Panel.

History and Description of the Lane County Public Defense Panel

The Panel is a product of the Public Defense Services Commission's 2004 service delivery review of public defense in Lane County, a process that involved a preliminary OPDS staff inquiry of local public safety officials concerning the delivery of public defense services, public testimony before the Commission from some of those same officials and public defense providers, and a final public report with recommendations adopted by the Commission. The Lane County report, which accompanied a report on Benton, Linn and Lincoln Counties, was the Commission's first service delivery review.¹

In its Lane County review,² the Commission heard many complaints about the "system" for making "private bar" appointments to financially-eligible defendants in criminal cases—that is, appointments in those cases that could not be accepted, usually because of conflicts of interest, by Public Defense Services of Lane County (PDS), then the only public defense contractor for Lane County adult criminal cases. The Commission found uncertainty about who was or was not on a list of those lawyers available to be appointed, that more than one list was thought to exist, that anywhere from 30 to 60 lawyers were said to be on the list, and that appointments were thought to be influenced by favoritism. In addition, judges and prosecutors who spoke to the Commission uniformly observed that a substantial number of the private bar attorneys appointed in criminal cases were ineffective and inefficient, and that some were not competent to practice criminal law.

¹ The report may be found on the OPDS website at <http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

² A transcript of the February 12, 2004 PDSC hearing in Lane County can be found on the OPDS website at <http://www.ojd.state.or.us/osca/opds/Agenda/index.html>.

Because of these concerns, the Commission considered alternatives to the existing list system, including the creation of a consortium, which would consist of a limited number of attorneys who specialize in criminal defense but don't rely exclusively upon court-appointments as their only source of income. OPDS staff described a "model consortium" for Lane County with features that included many of the "best practices" now recommended by the Quality Assurance Task Force,³ including a board of directors, a formal administrator with authority to hold member attorneys accountable for lapses in performance, standards for membership and retention, internal training and mentoring programs, and quality assurance mechanisms such as periodic performance evaluations and a process for removing underperforming members.

During the Commission's deliberations on public defense in Lane County, most of the private bar attorneys who spoke to the Commission opposed the formation of a consortium. They argued that a consortium would unfairly reduce the opportunities for attorneys in the county to practice criminal defense, that the process of establishing a consortium would breed divisiveness and competition within an otherwise collegial and collaborative legal community, that a consortium would curtail opportunities for newer lawyers to enter criminal defense practice in the county, and that the list system could be reformed to address most of the concerns that the Commission had heard.

The Commission was ultimately persuaded to adopt a revised list system. Two of the Commissioners, both residents of Lane County, echoed some of the arguments made by the private bar attorneys and proposed a new list system with quality assurance mechanisms and a strong administrator with "real authority" who would be willing and able to do "the dirty work" of ensuring that only trained and qualified attorneys were appointed by the court. The proposal gained the tentative endorsement of some of the existing list system's strongest critics.⁴

The Commission implemented the new system by directing the establishment of an oversight panel that, in conjunction with OPDS, would develop written policies and procedures for the administration of a private bar list and recruit and select participating attorneys. Meanwhile, OPDS took the lead in recruiting and selecting an administrator for the system, ultimately reaching a contract with Eugene attorney Marc Friedman to perform that role. Finally, the Commission directed that it review the new system two years after it was expected to commence service. The Commission conducted that review at a meeting in June, 2006, at which time it received a written report from Marc Friedman and testimony from him, detailing the smooth operation of the new appointment process. The Executive Director of PDS, Greg Hazarabedian, also stated at the meeting that the Panel was working well with his office in managing the private bar appointment process.⁵

Administration and Structure

The formal policies and procedures, forms, mission statement and other information about the Panel are available online at the Panel's website, <http://cpdp.org/index.html>. These documents describe a system along the lines envisioned by the Commission's consideration of a "model list." For example, the Panel's "policies and procedures" explain that admission to the Panel and an attorney's qualification level shall be determined by an Oversight Committee, subject to approval by OPDS. The Administrator is directed to "continuously monitor the legal defense work of Panel Attorneys," observe court appearances and trials of Panel Attorneys "from time to time," receive and investigate complaints and concerns about Panel Attorneys, and, at the direction of the

³ For the list of best practices, see:

<http://www.ojd.state.or.us/osca/opds/CBS/documents/best%20practices%20list.pdf>

⁴ For some of the PDSC debate on the formation of the Panel, see the transcript of Commission proceedings for June 17, 2004, at: <http://www.ojd.state.or.us/osca/opds/Agendas/index.html>.

⁵ The Commission discussion on the performance of the Panel appears at pages 14 to 21 of the transcript of the June 15, 2006 PDSC meeting which may be found at the OPDS web site referenced in footnote 4 above.

Oversight Committee and subject to the approval of OPDS, take corrective or disciplinary action, including reducing the level of case-type qualification, requiring mentorships and other supervision, and suspension or removal from the Panel.

The Administrator, according to the policies and procedures, is required to schedule regular continuing legal education programs for Panel Attorneys and coordinate mentorship opportunities, which experienced Panel attorneys are asked to provide and those in need “encouraged” to accept. Panel attorneys are required to maintain regular email and telephone contact with the Administrator, and to maintain office space suitable for confidential client communications and the secure maintenance of client files. Panel attorneys are also required to abide by Oregon State Bar ethical requirements and other performance expectations. Panel attorneys are required to sign a document agreeing to accept and abide by the Panel’s policies and procedures.

The Panel is described as an “open list” system, meaning that there is no limit on the number of attorneys who can be on the list, and that applications and approval to join the list can occur at any time.

As mentioned above, the Panel Administrator contracts with PDSC to perform his functions. Panel attorneys, however, are paid on an hourly basis, receiving \$45 per hour for all Panel work except Measure 11 cases, in which they receive \$50 per hour. Panel attorneys send their statements electronically to the Administrator, who reviews them, makes any adjustments that he concludes are necessary, and then faxes them to OPDS for processing and payment. When Panel attorneys need non-routine expenses for case preparation and presentation, they request preauthorization directly from the staff at OPDS.

Case intake and distribution

Panel attorneys are scheduled to appear at both the daily morning (out-of-custody) and afternoon (in-custody) arraignments. The attorney who is present for arraignments will usually be assigned to represent the financially-eligible defendants who are not appointed an attorney from PDS, except when that attorney lacks the qualifications to handle a particular case type. Outside of arraignments, Panel attorneys receive appointments when PDS attorneys withdraw from representation, usually because of a conflict of interest discovered after arraignment. Occasionally, these later “hand offs” occur at 35-day call, but often they happen without the necessity of a court hearing if a trial date has not yet been set in the case. In any case, when a Panel attorney is not present in court at the time of the appointment, the panel administrator or his assistant will email the assigned attorney shortly after receiving notice of the appointment from the court or PDS. The Panel expects to receive a confirming email from the assigned attorney no later than 24 hours after the assignment.

Case Management and Support

Other than the requirement that Panel attorneys have a phone, email, and a private and secure place to meet clients and maintain files, the Panel has no other requirements concerning attorney support.

Community Involvement

The panel administrator is a member of “the Lane County Circuit Court procedures committee,” which includes the presiding judge, other court staff, the DA, and PDS. The group meets periodically, when convened by the presiding judge, to discuss changes in procedure for criminal cases.

Summary of Comments received from Criminal Justice System Representatives

During the third and fourth weeks of August, 2009, OPDS Executive Director Ingrid Swenson met with Presiding Lane County Circuit Court Judge Mary Ann Bearden; Debra Vogt, the Chief Criminal Team Judge; Karsten Rasmussen, the previous Chief Criminal Team Judge; Mustafa Kasubhai, one of the newer Lane County judges; Alex Gardner, the Lane County District Attorney, Commissioner Shaun McCrea, the PDSC representative on the Panel's Oversight Committee; Commissioner John Potter and Marc Friedman, the Panel administrator. They reported the following information.

While the judges and the district attorney believe that the panel has been an improvement over the previous list, quality control remains an issue. The Panel recently dismissed some attorneys or reduced the level of cases they were approved to handle, but there remain attorneys on the Panel who are not competent to do the work. Some questioned how attorneys are approved for Panel work and said that, had they been asked, they would have told Mr. Friedman that these attorneys should not be approved. If contacted by the court Mr. Friedman will always respond but he does not seek information from most of the judges, has not asked the district attorney for input, and is rarely seen in court observing the work of Panel attorneys. New attorneys just appear in court without any introduction and some seem to be handling their first appearances and trials without the assistance of a mentor.

Some commentators said that there are still some excellent attorneys who are part of the consortium but that some experienced members have left because they do not receive adequate compensation at the hourly rate.

Two commentators said that Mr. Friedman may not have the right personality for his role. While a gentleman, he is not a "team captain." He seems reluctant to keep poor lawyers out.⁶ As a result the judges have to spend an inordinate amount of time monitoring and reporting poor performance. Mr. Friedman does respond when they report problems but is not proactive. He may need more explicit criteria regarding the selection of new lawyers and he needs to monitor them more closely once they are approved. All of the commentators expressed a need for stronger leadership and more direction for the administrator, either from the Oversight Committee or from PDSC. The Panel tends to be a "loose confederacy" where you can do poor work and continue to get cases.

Some said that they would support a consortium if it could exert more control over quality even though consortia tend to become exclusive, not allowing for the entry of new attorneys. Case rates, rather than the hourly rate, should also be considered. One of the judges urged PDSC to be more proactive and, rather than rely on bids in response to its RFP, to directly recruit a respected criminal defense attorney in the county to form a new consortium.

Commissioner McCrea and Judge Bearden both reported that the Oversight Committee has been having regular meetings, more frequently in the last year. The group includes a PDS attorney, Janise Auger; and a private bar attorney, Tony Rosta. A fifth member, Liane Richardson, resigned and has not been replaced. All applicants are initially reviewed by the panel and if accepted are placed on the list for which they are qualified. Some attorneys have been removed from the felony list and placed on the misdemeanor list. If an attorney is having problems, Mr. Friedman notifies the board. Some of the issues that need to be addressed are the need for regular CLE sessions, a means for Panel members to communicate more readily with each other, a better definition of the administrator's role, and review of the membership of the Oversight

⁶ He received praise, however, for the sensitive manner in which he was able to deal with an attorney who was no longer able to do the work.

Committee, which might include adding a public member.⁷ Panel members also need to have a plan for covering their caseloads when they are not available, such as when they are in trial or on vacation. Both Judge Bearden and Commissioner McCrea consider the Panel to be a mostly successful experiment.

Marc Friedman said that members of the Panel are approved by the Oversight Committee and must reapply every two years. He said that there is no limit on the number of attorneys who can be included on the Panel. Most of the new attorneys have participated in the public defender clinic so they already have courtroom experience. Panel members are told to expect that no more than 50% of the work they do will be public defense work. Mr. Friedman understood this to be one of the Commission's requirements. The majority of members are sole practitioners. In June PDS and the Panel provided their first co-sponsored CLE and plan to do them on a regular basis. One of the challenges for new defense attorneys is client management and that may be a topic for a future CLE. Panel attorneys are not satisfied with the current hourly rate but still prefer the being paid by the hour to implementation of a case rate system because they believe they "get paid for what they do." Mr. Friedman said the PDSC should either fix the Panel or create a group that is not just a conflict provider but has its own share of the caseload, an equal partner with the public defender.

2. Minutes of the testimony presented at the September 10, 2009 meeting regarding Lane County service delivery:

Chair Ellis discussed the Commission's previous meetings in Lane County and its decision to establish a panel of attorneys to handle conflict cases from the public defender's office, replacing the traditional court appointed attorney list which had previously been in place. The Commission hoped the panel would allow new attorneys to enter the practice but under appropriate supervision and monitoring. The Commission has now returned to hear how that system is working after several years.

Marc Friedman thanked Commissioners for coming to Eugene to review the work of the Lane County Public Defense Panel. He noted that there were a number of panel members at the meeting. The panel handles 30 to 40 percent of the caseload. One criticism that has been raised is that he as the administrator may not be harsh enough to handle problems. But the question for the Commission is whether the system itself is flawed. Another separate issue is the perceived desire on OPDS's part to end the hourly system. Panel members urge the Commission not to establish a unit based system as proposed by one group of lawyers. The open panel system itself is not flawed. Perceived quality of representation issues are not unique to Lane County.

There are currently 26 members of the panel but there have been as few as 24 and many as 32. There is no limit on the potential number. The panel has an application process that includes a background check and contact with references. Some attorneys join the panel directly out of law school. The Oversight Committee decides whether or not to admit new applicants. Attorney assignments are made from lists of attorneys qualified for misdemeanors, lesser felonies, major felonies, Measure 11 felonies and murder cases. The Oversight Committee decides who is qualified for each list. Qualifications are reviewed every two years.

Cases are assigned from each list on a rotation basis. Some cases are individually assigned if the client or the case is particularly demanding. Approximately 3 or 4 applicants have been rejected for panel membership. Some have been approved for a lower level of cases than they applied for. Some lawyers have been removed from the lists. Before being removed attorneys

⁷ As valuable as it is to the Panel to have the Presiding Circuit Court Judge serving as a member of the Oversight Committee, if the administrator were able to meet with her and the other judges more regularly, it might prevent the need for her to actually sit on the Committee and would allow the court instead to designate a non-judicial employee to serve as a member.

are offered the opportunity to work with a mentor who does not get paid for his or her services. Sometimes this has worked out, other times it has not. The panel's system for training and supervision of new attorneys could be better. The principal problem is that new attorneys come in qualified to handle only misdemeanors but there are very few misdemeanor cases in the county. Besides the mentorship component, the panel co-sponsors a CLE seminar with the public defender's office every two months. The percentage of each panel attorney's time that is devoted to criminal cases varies but no member spends more than half of his or her time on them. Most of the cases assigned to the panel are conflict cases and the attorney that appears at arraignment with the defendant generally keeps the case unless it is a case type for which the attorney is not qualified. People handling the more serious cases tend to be criminal law specialists some of whom may take only the occasional appointed case. Mr. Friedman takes some panel cases himself, often those on which there has been a late substitution of counsel and which other panel members decline to accept. He spends approximately 10 to 15% of his professional time handling panel cases and approximately 50% managing the panel, which includes reviewing attorney billings and other administrative responsibilities. He has a staff person who devotes 70% of her time to panel administration.

Mr. Friedman described the Oversight Committee that was established by the Commission. It currently includes Commissioner McCrea, Judge Mary Ann Bearden, Janise Auger from the public defender's office and local attorney Tony Rasta. There is one vacant position. The committee decides who is admitted to the panel and when attorneys need additional mentoring or removal from one or more lists. The group is hoping to increase the frequency of its meetings to once every other month.

Commissioner Ozanne asked whether the Commission's expectations of Mr. Friedman had been unrealistic. Mr. Friedman said they had. He does not have sufficient time to observe panel attorneys and has depended on others to alert him to problems. He needs to be more proactive in contacting the judges. While input from the court is needed he is not certain that a judge should serve on the Oversight Committee. He also questions whether a public defender should be on the committee. If the current panel is not meeting the Commission's needs it might be appropriate to consider a group that is more on par with the public defender, not just a conflict provider. The cases received by a conflict provider are often cases in which the attorney-client relationship is already strained. With respect to the size of the panel, the current volume of cases is not sufficient. Fourteen of the 26 attorneys are Measure 11 qualified, three are only misdemeanor qualified and the others are in between. There are too few attorneys to handle the more serious cases and far too many attorneys available to handle the less serious cases. Panel attorneys continue to support an open panel, however, which means they will each have fewer cases. New attorneys are in need of mentoring but experienced attorneys are being asked to provide mentoring without compensation.

Commissioner Ellis said that defense attorneys around the state donate their time as mentors.

Commissioner Ozanne inquired whether case rates rather than hourly compensation wouldn't be a better business approach.

Mr. Friedman described the process he uses to review attorney billings. He said that even if a unit rate were implemented in Lane County the attorneys would still want it to be an open system. The current system is working, however. Some attorneys had to be removed and the system could be further improved but major changes are not needed.

Chair Ellis said that the Commission is not focused on any particular method of compensation but is focused on quality.

Dan Kruse said that he completed law school in 2006. He works approximately half time for an environmental organization and has a sole practice in criminal defense. His criminal defense

practice includes retained cases and public defense cases from the panel. His panel work, which is approximately 30 or 35 percent of his overall practice, has allowed him to continue doing public interest work in the environmental area. He is 28 years old and does not have children or major debts beyond his education loan debt so he is better able to work for \$45 per hour than older colleagues. He shares office space with another attorney. He participated in the public defender clinic in law school and has had a number of mentors but did not have the opportunity to co-counsel on any cases before taking on panel cases. He would have felt more comfortable asking his mentors for additional help if they were getting paid for their time. He currently handles misdemeanors, lesser felonies and major felonies from the panel. He said it took a lot longer to qualify for minor felonies than to move from minor felonies to major felonies. He recommended that misdemeanor attorneys be permitted to work on lesser felonies under the supervision of qualified attorneys. Currently he is getting more than enough cases from the panel and is able to mentor newer lawyers on some cases.

Chair Ellis congratulated Mr. Kruse for his courage in making a solo practice work directly out of law school.

Robert Rainwater is a new member of the panel. He practiced in California for 33 years before returning to Oregon. He was told of the need for more experienced lawyers to handle panel cases and applied for membership. He said he would probably not be involved in defense in Lane County but for the open panel.

Chair Ellis said that an attorney with his experience might be able to find work in counties with other models as well.

James Van Boeckmann testified that he is one of the younger members of the panel. He is 43 and has three children. He has been a lawyer since 2003. He took public defense cases through the list that predated the formation of the panel and then applied for panel membership. He is now Measure 11 qualified. Half of his time is devoted to public defense, the other half to immigration law. He was mentored by a number of local attorneys and members of this group of lawyers now help each other out.

Robbie Manders has been practicing criminal defense for 20 years. It is approximately 95 to 98% of his practice. The public defense portion varies from 30% to 65 or 70%. He is very satisfied with the way the system works and doesn't see it as any different from what was in place 20 years ago. Things have probably not gotten any better under the panel but the question the commission should be asking is why experienced lawyers are leaving the panel. Money has not been the only reason they leave. They feel that certain Lane County judges treat them as second class citizens. Maintaining an open system has a price in that it requires you to be constantly dealing with new people. He believes that part of his practice should be pro bono so he doesn't mind not being paid to mentor other lawyers. He doesn't see a reason to change the way public defense cases are handled in Lane County.

Laura Fine started her legal career as a legal aid attorney and then moved to public defense. She spent six years at the public defender's office but wanted to be able to devote more time to her cases so she began her own practice. She continues to handle University of Oregon legal aid cases. She handles civil commitment cases and Measure 11 cases from the panel and also serves on the federal panel. She handled a high-profile misdemeanor case for the panel last year and likes the flexibility that the panel provides. She has been an advocate for the panel from the beginning. The open panel has allowed people like Dan Kruse and Robert Rainwater to handle public defense cases.

Marc Friedman said that while inadequate compensation is part of the problem the group would still prefer the hourly rate to case rates. Chair Ellis said that he did not see how a panel system could work on a case rate basis.

Mr. Friedman said he would like for there to be parity for panel attorneys. He said that the panel could provide information to OPDS that would make the cost of panel cases more predictable since that is one current benefits of a case rate system. He said that the panel has already improved its mentoring program but they are just not equipped to establish an apprenticeship system. He is willing to become a more proactive administrator. The group that has submitted a consortium bid is not equipped to handle the full panel caseload and the model that has worked best in Lane County is a two provider system.

Judge Debra Vogt said there are a lot of really good lawyers in Lane County. The four judges on the criminal team see attorneys at their first appearances since they handle arraignments, probation violations and similar matters. They see more of the blunders made by new lawyers than the trial judges do. The judges are not aware of what the requirements are for new attorneys. She and the other judges have indicated a willingness to provide feedback to lawyers on their performance in court but the panel lawyers don't ask for it. The prosecutors often come in for such feedback. The District Attorney's office also inquires of her how their newer attorneys are doing. Mr. Friedman has not asked about the performance of the panel lawyers.

Lane County Presiding Judge Mary Ann Bearden said that quality of representation would always be a problem as long as compensation remained too low. The court cringes whenever they lose an experienced lawyer from the panel.

Commissioner Welch said that input from judges is absolutely critical for the evaluation of attorney performance. An administrator can't sit in the courtroom often enough to really evaluate the lawyer and most lawyers spend very little time in trial. The judges observe them resolving cases and making other appearances.

Commission Ozanne said that the panel system was adopted to honor the preference of the Lane County lawyers but the important issue is whether the clients' interests are being protected. The question is what system over time will provide the best defense structure? Can the panel provide the experience, a sufficient number of cases, and the necessary oversight?

Judge Bearden said she shared his concerns. To stay with the panel is just a nod to the bar and their strong feelings. She has looked at it both ways. When she was part of the juvenile consortium it wasn't a perfect system either. There isn't one. There is a greater danger that clients will not be well served with the panel, however. By serving on the Committee she has been trying to make it work but it is an unwieldy system and needs a lot more oversight. She calls Marc Friedman if she becomes aware of a concern by one of the judges about a panel attorney. This occurs several times a year. She makes more calls to Marc Friedman about panel attorneys than she does to the public defender's office.

Commissioner Welch said that judges don't usually initiate a call to a contract administrator unless the circumstances are egregious. If they called about all of the things that concern them they would be calling all the time.

Judge Bearden said that another area of concern is that panel attorneys don't always arrange for another attorney to cover their cases when they are unavailable.

Judge Vogt said that it would also be helpful for panel lawyers to introduce themselves to the judges before appearing in their courtrooms. She sometimes looks around and doesn't believe a panel lawyer is present to appear on the panel cases and then finds that a new lawyer she has not met is representing the panel clients. The public defender's office is good at introducing their new attorneys.

Judge Bearden said that in her conversations with deputy district attorneys over the years she has learned that they sometimes have to settle cases to avoid what they believe would be certain post conviction relief when defense attorneys don't do their jobs. If the Commission decides on a

closed group there would need to be an opening for new lawyers to come in. If the Commission continues to have an open panel it needs a lot of structure and either way it needs to be paid for. She thinks an open door consortium with a case rate makes better business sense than the current structure.

Lane County District Attorney Alex Gardner said that both DAs and defense attorneys would agree on who the problem lawyers are in the county but it is hard to turn on people you may be fond of. He spent the first ten years of his career in Roseburg where he believed the average competence level of the private defense bar was quite a bit higher than in Lane County. He said there are extremely talented people in Lane County but they don't self-police effectively. There is a strong sense that nothing is done when concerns are expressed, as in a capital murder case his office tried which he discussed with OPDS. There was profoundly, grossly incompetent representation by the non-panel counsel in that case. There have been a number of panel attorneys coming through the system. Some of them do court appointed work for 18 or 20 months before they are removed from the panel. Most of them have not had the benefit of the kinds of apprenticeship training that DAs and public defenders get. Marc Friedman's role is different from his role and from Greg Hazarabedian's role at the public defender office. Marc is more like an air traffic controller than an employer. He can make assignments but not supervise people.

Greg Hazarabedian testified that he has worked well with Marc Friedman in the administration of the public defense system in Lane County. He does not view the panel as being competitive with his office. The panel includes lawyers who participate in the defense clinic at the public defender's office and lawyers who were employed by the office. The public defender and the panel co-sponsor CLE sessions every other month. He would like to see the panel or its successor continue to take only the conflict cases that they are currently taking. There is a large conflict caseload since the public defender office has been in operation for many years and has represented many clients. The large majority of conflicts are identified early in the process. The substitution process is handled informally if no trial date has been set. A motion and order for substitution is required in cases that have been set for trial. He estimates that only 20 or 25% of the cases involve clients who may have issues that make it more difficult to work with them. He does not have a position on the structure of the group that handles conflicts in the county and is not convinced that a consortium model is necessary to increase compensation. Some consortia have quality issues too. The four lawyers who submitted a consortium bid are capable lawyers. He would like to see the openness of the panel continue.

**OPDS's Report to the Public Defense Services Commission:
The Results of OPDS's Investigations in Service Delivery Region 4
(Benton, Lane, Lincoln & Linn Counties)**

**Part I: Lane County
(February 2004)**

Introduction

Since the completion of its Strategic Plan for 2003-05 late last year, the Public Defense Services Commission (PDSC) has focused on strategies and initiatives to accomplish its primary mission of ensuring the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing legal error and the resulting delays, appeals and other costly remedies, the Commission has concentrated on strategies that will improve the quality of the state's public defense delivery system and the legal services it delivers.

Foremost among those strategies is what the Commission refers to as its "service delivery planning process." This report represents an initial step in that process. It is the first part of a two-part report on the condition of the local public defense delivery systems in Service Delivery Region 4 of the state, which includes Benton, Lane, Lincoln and Linn Counties.

The Commission's next monthly meeting will be held in Eugene on February 12, 2004 for the purpose of hearing from all interested parties regarding the state of the public defense delivery system in Lane County. Therefore, this part of OPDS's report on Region 4 focuses on OPDS's findings and preliminary recommendations regarding Lane County. Part II of this report will be released in early March and will focus on the service delivery systems in Benton, Lincoln and Linn Counties, in preparation for a meeting in Corvallis that is tentatively scheduled for March 11, 2004.¹

PDSC's service delivery planning process has four steps. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by its staff at the Office of Public Defense Services (OPDS) and a report like this, which will be provided to public defense attorneys, contractors and other interested members of the criminal justice system in the region under review, the Commission will review the condition and operation of local public defense delivery systems and services in a region, including holding public meetings in the region to provide opportunities for all interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report, any responses to the report and input from its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may simply confirm the quality and cost-efficiency of the

¹ This introductory section of Part I of OPDS's report on Region 4, along with the next two sections in Part I, will apply equally to Part II of this report.

public defense delivery system and services in that region. It may also take advantage of opportunities for change or for confronting specific challenges in the region in order to improve the quality and cost-efficiency of the region's public defense services. In any event, the Commission's Service Delivery Plans will (a) take into account local conditions, practices and resources unique to a region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, revise relevant terms and conditions in public defense form contracts. Finally, at the direction of PDSC, OPDS will implement the strategies or changes proposed in a plan on a specific timetable that will depend on the content of that plan.

Because critical steps in PDSC's service delivery planning process have yet to be completed, this report's findings and preliminary recommendations may be reconsidered or revised, depending upon new information presented to the Commission at its February meeting in Eugene or over the coming months, deliberations and decisions of PDSC following its meetings in Region 4, and any additional research and investigation that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops over the coming months in Region 4 will not be the "last word" on the service delivery systems in that region or on the quality and cost-efficiency of the region's public defense services. The state's current fiscal crisis and resulting limitations on PDSC's current budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the scope of this first round of the planning process in Region 4, or in any other region of the state. Indeed, PDSC's planning process is an ongoing and dynamic one, calling for the Commission to return to each region of the state over time in order to develop new Service Delivery Plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to take advantage of unique opportunities or address acute problems in the region.

Background

The 2001 legislation creating the Commission was premised on a policy, supported by most judges and the defense community, that the public defense function should be separated from the judicial function. This approach, considered by most commentators and authorities across the country as a "best practice," is intended to avoid the inherent conflict in roles when a judge, who serves as the neutral arbiter of legal disputes, also selects and evaluates one side in an adversarial proceeding. Thus, under the 2001 legislation, the Commission, not the courts, has the primary responsibility for the provision of competent public defense counsel. As a result, the Commission is committed to undertaking strategies and initiatives to ensure the competency of legal counsel.

However, in the Commission's view, minimum competency of public defense counsel is not enough. As it declared in its mission statement, PDSC is dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

PDSC's range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies that PDSC has undertaken in recent months to promote quality and cost-efficiency in the delivery of public defense services. However, it is by no means the only strategy.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of the heads of public defense contractors from across the state. The group is advising OPDS on the development of standards and evaluation methods to ensure the ongoing quality and cost-efficiency of the services and operations of public defense contractors, and to improve those services and operations through peer review and technical assistance processes. The Contractors Advisory Group is also participating in the development of a new process for qualifying individual attorneys throughout the state who wish to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations, management practices and legal services of those offices.

Indigent defense task forces of the Oregon State Bar have repeatedly highlighted unacceptable variations across the state in the quality of public defense services in juvenile cases. As a result, PDSC has commenced a statewide initiative to improve juvenile law practice, in collaboration with the state courts. The Commission recruited an experienced juvenile defense attorney to serve as OPDS's General Counsel and to take the lead in this initiative.

OPDS, in accordance with PDSC's Strategic Plan, is examining options for a systematic process to address complaints about the performance of contractors and the legal representation of attorneys, as well as for a new organizational structure to deliver legal services in Post-Conviction Relief cases.

The Commission is also concerned about the "graying" of the public defense bar in Oregon. Due to the commitment of those engaged in this work and an increasingly competitive legal market over the past several decades, more and more lawyers are spending their entire careers in public defense law practice and in the private practice of criminal, juvenile and family law. In some areas of the state, most members of the defense bar are approaching retirement, with no process in place for finding replacements. As a result, PDSC is seeking ways throughout the state to attract and train younger lawyers in public defense practice.

"Structure" versus "performance" in the delivery of public defense services. OPDS submits that PDSC's service delivery planning process is aimed primarily at reviewing and improving the "structure" for delivering public defense services by selecting the most effective combination of organizations in a county to provide those services. On the other hand, most of the Commission's other quality assurance strategies and processes,

described above, focus primarily on “performance” in the delivery of legal services in order to ensure that lawyers and managers in public defense organizations are delivering those services efficiently and effectively. This distinction is not always easy to make, since the concepts obviously overlap and influence each other. For example, nearly everyone agrees that the quality and cost-efficiency of public defense services depend primarily on the skills and commitment of the attorneys and staff who perform those services, as well as on the provision of sufficient public resources to attract such talent. However, experienced public defense managers and practitioners and the research literature on “best practices” recognize that attention to the structure of service delivery systems contributes significantly to the quality and effectiveness of public defense services.²

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles and responsibilities of PDSC, OPDS and public defense service providers in this planning process—and in the overall management and operation of Oregon’s public defense system. A collegial, volunteer “board of directors” like PDSC, whose members are chosen for the variety and depth of their experience and sound judgment, and who conduct their business in public meetings with the support of professional staff, is best able to address systemic, “macro” policy issues, like the proper structure of state and local service delivery systems. OPDS, on the other hand, is frequently in the best position to address performance issues, under the direction of the Commission. Performance issues usually involve individual lawyers and contractors, specific management practices and unique circumstances that raise operational and management questions, rather than policy issues. Public defense providers have committed themselves to assisting OPDS and the Commission in the development and implementation of credible standards and processes to ensure performance. As independent contractors, they are in the best position to manage their offices’ specific methods of service delivery and ensure the quality of the legal services they provide.

Because of the significance of the distinction between structure and performance, and the differing capacities of PDSC, OPDS and contractors to resolve questions involving the two concepts, this report will usually recommend assigning PDSC the task of addressing structural issues with policy implications and assigning OPDS the task of addressing performance issues with operational implications. The report will also identify the issues that call for the input and assistance of contractors and practitioners.

The organizations operating within the structure of local public defense delivery systems. The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for “public” defenders and the advocates for “private” defenders. PDSC has repeatedly emphasized that it has no interest in joining this debate. Instead, it wishes to concentrate on finding the most effective combination of organizations for each region of the state from among those types of organizations already established and tested in Oregon.

² Indeed, debates over the relative effectiveness of public defender offices and “private appointment” systems have gone on for years. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

The Commission is also not interested in developing a “one size fits all” model for organizing the delivery of public defense services in Oregon. Instead, the Commission recognizes that the local organizations currently delivering services in Oregon’s counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has often been struck locally among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of scarce taxpayer dollars for public defense services. Therefore, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to proposals. As one of the largest purchasers and administrators of legal services in the state, the Commission is committed to ensuring that both PDSC and the taxpayer are getting competent legal services at a fair price. The Commission does not see its role as simply continuing to invest public funds in whatever local delivery system happens to exist.

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

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of the relative advantages and disadvantages. This discussion of the relative features of these organizations is by no means exhaustive. It is simply intended to highlight the kinds of factors that the Commission is likely to take into account in reviewing the structure of any local service delivery system.³

³ Although OPDS solicited input regarding these descriptions of public defense organizations from our Contractors Advisory Group, we did not receive that input in time to include it in this report prior to the release of Part I of the report. OPDS expects that members of the Advisory Group and others in the defense community will have additions or amendments to these descriptions to propose, which can be included before the release of Part II of this report.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys or the offices in which they work are independent contractors operating under contracts with PDSC, including the following types of public defense organizations:

- Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of its public defense services. The offices share many of the attributes one normally thinks of as a "Public Defender Office," especially the "defining characteristic" of a public defender office: an employment relationship between the attorneys and the office.⁴ The attorneys in these offices in Oregon are full-time specialists in public defense, who are dependent on this work and not allowed to engage in any other form of law practice. However, the state's public defender offices are not government agencies staffed by public employees. They are not-for-profit corporations overseen by boards of directors and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in populous counties of the state, others are located in less populous counties. In either case, OPDS expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, and to administer specialized internal training and supervision programs for attorneys and staff and provide effective defense representation in each forum in which they practice, including specialized court programs such as Drug Courts and Early Disposition Programs. As a result of these expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations in their counties, including paralegals, investigators, automated office systems or personnel hiring and management processes.

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

Due to the frequency of cases in which public defender offices have conflicts of interest resulting from cases with multiple defendants, involving former clients or for other reasons, no county can operate with a public defender office alone.⁵ As

⁴ Spangenberg and Beeman, *supra* note 2, at 36.

⁵ *Id.*

a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other providers who must operate effectively in their counties.

- Consortia. A “consortium” refers to a group of attorneys or law firms who agree to submit a proposal to OPDS in response to an RFP and to handle a public defense caseload together if they are awarded a contract with PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 lawyers or more. The organizational structure of these consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with group practice, without the interdependence and conflicts of interest that arise from membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for membership, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as provisional membership and apprenticeship programs for new attorneys.

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

In addition to this access to experienced public defense lawyers, consortia offer OPDS and PDSC several administrative advantages. If the consortium is reasonably well-organized and managed, OPDS has fewer contractors or attorneys to deal with and, therefore, can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys in the county who can handle the cases. Finally, if a consortium has a board of directors, particularly with members who possess the independence and expertise of directors on public defender boards, then PDSC can realize the same benefits described above, including more opportunities to communicate with local communities and access to additional management expertise and quality assurance processes.

The participation of law firms in a consortium may make it more difficult for an administrator or members of a consortium to monitor and manage cases and the performance of lawyers in the consortium. This potential difficulty stems from the

fact that internal assignments of a portion of a consortium's workload among attorneys in a law firm may not be evident to the consortium or within its ability to influence. Finally, to the extent that a consortium lacks internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services a consortium delivers, such as (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) PDSC's certification process to qualify for court appointments.

- Law firms. In addition to participation in consortia, law firms handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defenders offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals to OPDS in response to an RFP. Furthermore, law firms generally lack features of public accountability, like a public defender office's board of directors or the more arms-length relationships between independent consortium members. Thus, PDSC may have to rely solely on its own assessments of the skills and experience of individual law firm members, along with the external methods of training, standards and certification mentioned above, because the management structures, organization and operations of law firms are relatively inaccessible to public scrutiny.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. The observations simply suggest that PDSC may have less influence on the organization and structure of this type of provider for the purposes of ensuring quality and cost-efficiency as easily as with public defender offices and well-organized consortia.

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

- Individual attorneys under contract. Individual attorneys efficiently provide a variety of quality public defense services under contract with PDSC, including in specialty areas of practice like aggravated murder cases and in geographic areas of the state with limited supplies of qualified attorneys. Given the potential influence stemming from the power to evaluate and select attorneys individually, and the one-on-one relationship and direct lines of communications between the attorney and OPDS inherent in this contractual arrangement, the Commission can ensure meaningful administrative oversight and quality control over individual attorneys under contract. Those advantages obviously diminish as the number of attorneys under contract with PDSC increases.

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

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as “overflow” from other types of providers. However, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, closely monitored and administered qualification process for court appointments, which is capable of verifying the attorneys’ satisfaction of requirements for relevant training and experience.

OPDS’s General Observations in Region 4

During December 2003 and January and February 2004, OPDS visited all of the counties in Region 4 at least twice, Benton County three times and Lane County five times. Members of OPDS’s staff met with virtually all of the public defense contractors and other interested public defense attorneys in each county of the region. Since PDSC’s foremost obligation is to ensure the cost-efficient delivery of competent legal services to public defense clients, OPDS also sought relevant information in each county from as many credible sources as possible, including judges of the Circuit Court, attorneys in District Attorney’s Offices, staff of local probation or community corrections offices and representatives of Citizens’ Review Boards.

As a result of those visits, OPDS is able to offer the following general, though not particularly surprising, observations:

- Public defense caseloads, with increasing numbers of more serious felony cases, have become more demanding and complex over the past several years,⁶ making public defense practice an increasingly difficult way to support a law practice.
- Prosecutors’ charging and negotiation policies and practices vary widely from county to county, making the level and variations in public defense expenditures dependent on these policies and practices, as well as on crime and arrest rates.
- The nature and extent of the courts’ docket management practices vary from county to county, affecting the time and expense involved in handling public defense cases.
- Everyone we interviewed in the four counties of Region 4 expressed appreciation for the visits by OPDS and the special attention from the Commission that those visits represented, making this effort worthwhile for its own sake.

⁶ This trend, reported by most public defense attorneys in the region, is independent of a similar development caused by cuts to the 2001-03 indigent defense budget and the resulting actions by the Chief Justice and his Budget Reduction Advisory Committee during the last four months of the 2001-03 biennium.

A Demographic Snapshot of Lane County

With a 2001 population of approximately 326,000, Lane County is the fourth largest county among Oregon's 36 counties.⁷ As the home of the University of Oregon, the county's residents are relatively well-educated, with 16 percent of its adults over 25 years old possessing a Bachelor's Degree, 10 percent with post-graduate degrees and 46 percent of its high school graduates enrolling in college. As a result, Lane County has had a relatively low unemployment rate over recent years, comparable to Multnomah County's and the state average in 2000, and below the unemployment rates of 26 other Oregon counties. It also has a relatively high proportion of professional, scientific and management workers in its workforce (8.7 percent, compared to Washington and Multnomah Counties with 11.9 and 11.4 percent, respectively) and the seventh highest per capita income in Oregon (at \$19,681, compared to Washington County at \$25,973 and Multnomah at \$22,606).

Lane County's population is not particularly diverse, with non-white and Hispanic residents making up 11.4 percent of its population, compared to 16.5 percent for Oregon and 23.5 percent for Multnomah County. However, the county has a relatively high percentage of individual residents living in poverty (14.4 percent, compared to 11.6 percent in all of Oregon and 12.4 percent in the United States).

With 23 percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Lane County's "at risk" population, which tends to commit more criminal and juvenile offenses, is not particularly large. On the other hand, the county had the third highest index crime rate in the state in 2000 (with 57.9 index crimes per 1,000 residents, compared to Multnomah County at 74.8, Marion County at 58.5 and the state at 49.2 per 1,000).⁸

The public defense caseload in Lane County is approximately 10% of the statewide total.

OPDS's Findings in Lane County

The Public Defender's Office. Public Defender Services of Lane County, Inc. is recognized across the state and by the Commission as one of the outstanding public defense contractors in Oregon. During OPDS's investigations for this report, nearly everyone we spoke with had positive things to say about the office, the competence of its attorneys and the quality of its legal services. The Public Defender's Office's reputation for providing

⁷ This demographic information was compiled by Southern Oregon University's Southern Oregon Regional Services Institute and appears in its Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

⁸ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

high quality legal services was recently confirmed by a positive evaluation from the National Legal Aid and Defenders' Association.

While there is always room for improvement in any law office, OPDS has no reason to recommend a review of, or any changes in, the organization or operation of the Public Defender's Office during this planning cycle. Moreover, any room for improvement in the office will be addressed during the assessment and technical assistance process currently under development by OPDS's Quality Assurance Task Force. The Director of the Public Defender's Office is a member of that task force and has volunteered to be among the first offices to participate in the task force's assessment and technical assistance process.

Juvenile law practice in Lane County. PDSC contracts with two public defense providers in juvenile proceedings in Lane County, the Public Defender's Office and the Lane Juvenile Lawyers Association. The Association is a consortium of 12 lawyers. Members of the private bar are occasionally appointed by the court from a list of qualified attorneys when the need arises.

The consortium and the Public Defender's Office received high praise from both the Juvenile Court Judge and attorneys in the District Attorney's Office. Attorneys in both providers' offices were described as highly skilled, result-oriented and not unduly adversarial. From the reports that OPDS gathered, it appears that the consortium is made up of qualified, experienced lawyers who monitor each other's work effectively.

OPDS concludes that the delivery system for public defense services in juvenile cases in Lane County is currently operating cost-efficiently and providing quality legal services. Therefore, no structural changes to this system are recommended during this planning cycle.

Public defense representation by the private bar. Most of OPDS's discussions with the criminal defense bar, judges, prosecutors and other interested parties in Lane County centered on the organization, operation and effectiveness of the process for appointing public defense attorneys in cases that the Public Defender's Office cannot handle, and the quality of the legal services that court-appointed attorneys provide. Apparently, those attorneys are ordinarily appointed from a list administered by court staff to whom the Circuit Court has delegated its authority to appoint public defense attorneys, as well as its authority to determine the terms and conditions of release from custody. However, it is not uncommon for lawyers to be appointed directly by judges as well.

During our first meeting with the defense bar in Lane County, with over 30 defense attorneys who are or have been on the court-appointment list in attendance, OPDS was informed that (1) the principal court-appointment list contains the names of anywhere from 30 to 60 lawyers, some of whom no longer practice criminal law in the county, (2) apparently, there is more than one list, (3) lawyers are uncertain about whether they are on a list, and which ones, (4) appointments from the list or lists appear to be neither random nor systematic, causing suspicion that some lawyers on the list are favored or ignored in the process, and (5) the list worked better in the past when the release officer appointed

attorneys from the list. The county's Trial Court Administrator, who was also in attendance at this meeting, voiced skepticism about some of the lawyer's observations and disagreement with others. He indicated that he would conduct his own investigation of the county's court-appointment process and report the results to the Commission. By its February 12th meeting in Eugene, the Commission should have a clearer picture of how Lane County's court-appointment process currently operates.

In any event, most of the defense attorneys we met in Lane County support the continuation of the county's court-appointment list or lists and the accompanying process. They also oppose the formation of consortia to handle some or all of the same caseload. Those attorneys did acknowledge the need for improvements in the current appointment process, including a more systematic, consistent and transparent selection process and more rigorous and verifiable qualification requirements to receive court appointments. They opposed consortia on the grounds that (a) opportunities for attorneys in the county to practice criminal defense law would be unfairly reduced, (b) the process of establishing and maintaining consortia would breed unnecessary competition among the county's criminal defense lawyers, pitting them against each other and destroying the unique "culture of collaboration" in Lane County, (c) the opportunity for fewer attorneys to practice criminal law would block the state's access to new legal talent and reduce the depth of legal talent currently available in the county, and (d) the current system has worked well for years, if not decades.

On the other hand, the judges and prosecutors we spoke to, without exception, supported the elimination of the current court-appointment process, along with the establishment of a consortium made up of a smaller, more qualified group of attorneys to handle the cases. The two groups' observations and reasons in support of their positions were nearly identical: The Public Defender's Office, in general, provides high-quality legal services efficiently. By comparison, a substantial number of the attorneys on the appointment list are ineffective and appear to spend too much time and energy on routine or inconsequential matters. From the perspective of these two groups, a few attorneys who currently receive court appointments in the county do not possess the necessary experience or legal skills to practice criminal law.

Years ago in Lane County, an attorney apparently prosecuted a successful lawsuit, claiming he was unlawfully removed from the court's appointment list. As a result, the Circuit Court is reluctant to remove any attorney from the list, even for incompetence, unless an attorney has failed to establish his or her qualifications in accordance with Oregon's "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (January 15, 2003).

During the fourth quarter of 2003, OPDS received proposals from Lane County attorneys to establish consortia in response to OPDS's standard RFP. However, consideration of those proposals was postponed until the Commission completed this review and developed a Service Delivery Plan for Lane County.

OPDS's contract negotiation process. During PDSC's December 2003 and January 2004 meetings, the Director of Public Defender Services of Lane County, Inc. expressed concern over his office's lack of access to information concerning OPDS's ongoing contract negotiations with another contractor in Lane County who was apparently competing with the Public Defender's Office for part of the same caseload. His point was that, in light of PDSC's commitment to a fair, open and consistent public defense contracting system, all contractors in the county should have access to the status of each other's ongoing contract negotiations with OPDS in order to ensure an equitable allocation of the county's public defense caseload. In response, the Commission's Chair and OPDS's staff confirmed that this current planning process would result in a Service Delivery Plan for Lane County that identifies the roles and responsibilities of the county's public defense contractors and the general nature and extent of their anticipated caseloads. However, they also expressed uncertainty about how individual contract negotiations could be conducted and managed, while providing other contractors access to the substance of those negotiations and the opportunity for input. OPDS asked the Lane County Public Defender's Office to present its concerns and recommendations in writing to OPDS in time for the Commission to consider them at its February 12th meeting in Eugene.

The delivery of public defense services in aggravated murder and murder cases. In years past, public defense attorneys in Lane County were appointed in aggravated murder and murder cases by the presiding judge from a list of uncertain length and content, and paid by the state on an hourly rate. More recently, OPDS's predecessor agency, the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office, entered into a contract for aggravated murder and murder cases with a qualified and experienced defense attorney in Lane County. IDSD concluded that handling aggravated murder cases compromised an attorney's ability to maintain any other kind of law practice. As a result, IDSD decided that supporting specialized aggravated murder and murder caseloads under contract would permit qualified attorneys to deliver these services effectively without the distraction of maintaining a collateral or supplemental law practice.

During OPDS's meeting with Lane County's defense bar, several attorneys voiced objections to PDSC's contracting process for aggravated murder and murder cases, for reasons similar to the ones expressed in support of the county's current court-appointment list. While no one criticized the qualifications or abilities of IDSD's or OPDS's contractors in the county, the attorneys who voiced objections to murder contracts expressed a preference for the old court-appointment list administered by the presiding judge. They stated their belief that the aggravated murder contract in Lane County blocked access to exceptionally qualified local legal talent and promoted rivalry and hard feelings within the county's defense bar. OPDS has also heard rumors and complaints that IDSD or OPDS had to recruit defense attorneys from other counties to handle Lane County murder cases due to the limited capacity of their local contractors, and in spite of the depth of available local talent in the county.

OPDS's Preliminary Recommendations

1. A court-appointment list, a consortium or both? The primary opportunity to improve the quality and cost-efficiency of public defense services in Lane County arises from the county's current court-appointment process for handling cases that the Public Defender's Office is unable to because of conflicts of interest or limitations on its capacity and resources. As the Oregon State Bar and the American Bar Association have recognized, participation by the private bar in public defense representation results in significant benefits for any jurisdiction, including a deeper pool of talent to draw upon and wider support within the legal community for the mission of public defense. However, the Commission must balance the benefits of widespread participation by the private bar with its interests in quality and cost-efficiency that may be served by narrower and more tightly managed participation by the bar.

With those considerations in mind, OPDS believes that the Commission has three options to address this issue: (1) replace the current appointment system with one or more well-organized, tightly managed consortia, made up of the most qualified criminal defense attorneys available, and overseen by an administrator who can effectively manage the consortium's quality assurance, training and business operations; (2) establish a court-appointment list or panel that is predictable, consistent and transparent, with a rigorous and verifiable certification process to qualify for participation; or (3) a combination of the foregoing options, with a plan to evaluate their relative effectiveness and revisit the options in future biennia.

2. Reconsider OPDS's contract negotiation process with contractors? OPDS anticipates that the Commission will receive written comments from the Lane County Public Defender's Office at its February 12th meeting regarding that office's concerns over access to information about ongoing contract negotiations with other contractors in the county. OPDS is committed to the Commission's goal of providing as much relevant information as possible to all contractors in every county about their respective roles, responsibilities, methods of compensation and caseloads through PDSC's service delivery planning process. However, we do not currently understand how OPDS's contract negotiations with competing contractors in a county can be conducted fairly and efficiently if those contractors are granted ongoing access to each other's negotiations and encouraged to give input during the course of those negotiations. Nevertheless, OPDS recommends that the Commission consider any feasible proposal by the Public Defender's Office that is likely to advance PDSC's commitment to fair, open and consistent business dealings between OPDS and its contractors.

3. Reexamine the contracting process for death penalty cases in Lane County? Based on the limited input received on this subject, it is difficult for OPDS to determine whether this is a "structural" issue (such as the choice between a court-appointment list and a consortium), which is appropriate for the Commission to address; or an "operational" issue, which should be left to the sound discretion of OPDS in the course of administering the state contracting process (such as taking into account the size of the county's death

penalty caseload, the availability of qualified counsel, and the cost-efficiencies involved in administering contracts as opposed to appointment lists).

In response to its inquiries into the reasons other qualified (and complaining) attorneys in the county had not submitted proposals in response to previous RFPs for a death penalty contract, OPDS was told that the RFPs weren't publicized, or that the contracts were an "inside deal." Whether or not there is any substance to these claims, the point for present purposes is that OPDS can avoid such claims in the future by administering the state's contracting process openly and consistently.

However, in the interest of confirming the Commission's commitment to maintaining open channels of communication with the criminal defense community, OPDS recommends that the Commission receive testimony from those Lane County attorneys who support changes in the process of delivering public defense services in death penalty cases. To the extent that this testimony presents persuasive and feasible alternatives, PDSC can reexamine the contracting process in Lane County and direct OPDS to identify available options for the Commission's consideration in the future.

Attachment 3

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Polk County
(August 2009)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through August, 2009, the Commission completed investigations of the local public defense systems in Baker, Benton, Clackamas, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the functioning of public defense system in Polk County undertaken in preparation for PDSC's public meeting in Dallas on Thursday, August 6, 2009, and some recommended areas of further inquiry for Commissioners at the August 6 meeting. The final version of this report will include a service delivery plan for Polk County.

PDSC's service delivery planning process

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

Second, starting with preliminary investigations by OPDS and the preliminary draft of a report, the Commission reviews the condition and operation of local public defense delivery systems and services in each county or region by holding one or more public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or region, PDSC develops a "service delivery plan," which is set forth in the final version of OPDS's report. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts.

Finally, under the direction of PDSC, contractors subject to the Commission's service delivery plans are urged to implement the strategies or changes proposed in the plans. Periodically, these contractors report back to PDSC on their progress in implementing the Commission's plans and in establishing other best practices in public defense management.

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

Background and context to the service delivery planning process

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

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Clackamas, Jackson, Jefferson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC undertook a statewide initiative to improve juvenile law practice in collaboration with the state courts, including the creation of a Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these cases. Those standards have now been approved by the bar's Board of

Governors and adopted by PDSC as the standards to be observed by court-appointed attorneys. The work group also made additional recommendations to PDSC for improving services in this area of practice. Those recommendations were presented to PDSC at its March 2009 meeting. A service delivery plan for post conviction relief cases is scheduled for further discussion at the May 21, 2009 PDSC meeting.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in those cases was approved by the Commission in June of 2007.

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “performance” in the delivery of public defense services.

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

Most of PDSC’s other strategies to promote quality and cost-efficiency in the

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

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

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

Organizations currently operating within the structure of Oregon’s public defense delivery systems.

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

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

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

public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide quality services in each region of the state.

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

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

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

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

² Spangenberg and Beeman, *supra* note 2, at 36.

by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured

³ Id.

organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

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

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

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality

and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

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

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

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

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

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

handle conflicts of interest associated with other types of organizations.

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

PDSC’s Preliminary Investigation in Polk County

The primary objectives of OPDS’s investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system’s structure or operation and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC’s assessment of the strengths and weaknesses of a local public defense system begins with a review of an OPDS report like the initial version of this document.

PDSC’s investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, create momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC’s investigations of public defense delivery systems can correct some of these local misperceptions.

In July 2009 OPDS Executive Director Ingrid Swenson visited with stakeholders in Polk County. In addition to talking to PDSC’s contractor in the district, she met or spoke by phone with all three of the Circuit Court judges; the trial court administrator and members of his staff; the District Attorney, his chief deputy and the deputy assigned to juvenile court matters; the Citizen Review Board coordinator; the Juvenile Department Director and a group of juvenile court counselors; the CASA director; DHS’s branch manager, Child Protective Services Supervisor and Permanency Supervisor.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most

important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area.

OPDS's Findings in Polk County

Brief Description of the County⁴

Polk County was created from the Yamhill District of the Oregon Territory on December 22, 1845. It became Polk County when President James K. Polk signed a bill establishing the boundaries of the Oregon Territory on August 13, 1848. The area of Polk County is 472,960 acres. It includes the cities of Dallas, Independence, Grand Ronde, Falls City and portions of Salem and Willamina. The major industries of the county are agriculture, forest products, manufacturing, and education. Western Oregon University in Monmouth is a major employer.

The Circuit Court, District Attorney and Police Agencies

There are three Circuit Court judges in Polk County.⁵ Judge William Horner is the presiding judge. The other two are Judge Charles Luukinen and Judge Fred Avera. The Trial Court Administrator is Gene Berg. All three judges handle criminal and juvenile cases. Each judge also does a six-week rotation handling the daily criminal docket in Courtroom 4 located across the street from the courthouse at the county jail.⁶ Judge Horner is the drug court judge. The present courthouse is comprised of a structure built in 1898 and an addition completed in 1965.

Stan Butterfield is the District Attorney of Polk County currently serving his first term in office. Prior to seeking the District Attorney position, he was in private practice and accepted court appointment in public defense cases. Sally Avera, formerly the Chief Defender at the State Public Defender (predecessor to the Appellate Division of the Office of Public Defense Services), is his chief deputy. There are currently six deputy district attorneys, one of whom handles only child support matters. The office would like to add another deputy.

The Polk County jail has 185 beds and is currently staffed at full capacity. Even misdemeanants may be held pretrial and early releases have not been

⁴ The information provided was obtained from Polk County's official website and from Wikipedia.

⁵ The workload of the judges in Polk County is significantly above average. In 2008 there were 3,031 cases per judicial officer filed in Polk County compared to a statewide average of 2,042 per judicial officer.

⁶ In custody defendants do not sit at counsel table but are confined in a glass enclosed structure in the courtroom. Since the defense attorney stands at counsel table there is a significant impairment of the attorney's ability to control statements made by the defendant. While observing proceedings in the court OPDS staff heard one defendant make statements that were potentially damaging to his case, which his attorney was unable to prevent from where he was located, had he been so inclined.

necessary. There are a number of police agencies in the county - the Polk County Sheriff's Office, the Salem Police Department, the Monmouth Police Department, the Independence Police Department, the Dallas Police Department and the Oregon State Police. A number of these communities have municipal courts that handle a variety of minor offenses.

Procedure in Criminal Cases

In both felony and misdemeanor cases, a pretrial conference is scheduled for two weeks after arraignment and trial for 6 or 7 weeks after arraignment. Arraignments are held daily, pretrial conferences are held on Mondays and Fridays, and arraignments on grand jury indictments and other criminal hearings are held on Thursdays. Criminal dockets move very rapidly in Polk County. A change of plea can be arranged within a couple of days. A written plea offer from the state is generally provided at the time of the pre trial conference.⁷ Discovery is generally available within 72 hours after arraignment. Some local police agencies are less prompt than others in providing reports to the District Attorney, requiring the DA to proceed on probable cause statements in some cases.

The drug court was initiated in 2003. As of July 13, 2009 there were fifteen clients in the program, three in residential treatment and six candidates under consideration. The court is open to any defendants with drug related offenses, including non-drug charges. Some clients also have open juvenile dependency cases. Defendants who elect to participate in the drug court must forego any legal motions in their cases and plead guilty. Upon completion of drug court, the charges are dismissed. Clients are encouraged to get driver's licenses, become voters, obtain GED's, go to school or get a job, attend their children's school events and engage in other pro social activities. Mr. Butterfield, when he worked as a defense attorney, provided representation in the drug court and was compensated on an hourly basis by OPDS.⁸

Attorneys are not present at arraignment in criminal cases unless they happen to be in court on other matters. The court appoints the Lillegard firm in all cases except co-defendant cases and cases in which the defendant has been determined to be eligible for drug court.⁹ Defense attorneys are present in felony cases for arraignment at the indictment stage. The court will entertain a motion

⁷ For incarcerated defendants, defense attorneys can initiate settlement discussions sooner than the pretrial conference.

⁸ This arrangement was not advantageous. He was not compensated for the time he spent attending "mandatory" conferences and the like and was not able to recommend to his business successor that she continue to provide this service. OPDS is currently exploring alternatives to representation in this court at the hourly rate.

⁹ Court staff expressed concern about the Lillegard firm receiving case credits for cases from which they later withdraw after discovering a conflict or, for example, finding out that a defendant who was first thought not eligible for drug court is later found to be eligible, requiring a substitution of counsel.

for release from custody at these arraignments. In other matters a release hearing can be scheduled for the following day if a request is made before 3 p.m.

Cases scheduled for trial are assigned to one of the three judges on a random selection system. The trial rates in Polk County criminal cases exceed the state average: In 2008, 7.4% of felonies were tried and 5.7% of misdemeanors compared to statewide averages of 5.1 for felonies and 3.9 for misdemeanors. Trial rates in Polk County were significantly above average in 2005 – 2007 as well.¹⁰

A significant proportion of the criminal cases arising in the county occur at the Spirit Mountain Casino. The most common offenses are trespass (by persons who have been excluded and asked not to return to the casino) and drug possession and delivery charges arising on casino property. The Confederated Tribes of the Grand Ronde, which owns and operates the casino, provides funding for the staffing of a sheriff's station in the town of Grand Ronde.

Procedure in Juvenile Cases

Each of the three Circuit Court judges has a juvenile docket. Judge Luukinen hears juvenile matters on Monday morning, Judge Avera on Monday afternoon and Judge Horner on Thursday. Subsequent hearings in cases initially heard by each judge are scheduled before the same judge. Both dependency and delinquency cases are heard on each day. While counsel is appointed at the time of the shelter hearing, unless the attorney is in court on another matter, the attorney will not be present for the hearing.

Dependency cases:

In Polk County the Juvenile Department prepares the petitions with direction from the district attorney's office. DHS rarely elects to handle cases on a voluntary basis according to one representative of the state and by the time the petition has been filed the child has generally been removed. The DHS Branch Manager for the area, Mike Williams, said that the total number of cases in Polk County has been declining over the last year, as has the percentage of removals. He said that the number of voluntary cases has been increasing under the current supervisor.

The district attorney handles dependency cases through disposition. DHS is represented by Department of Justice attorneys beginning at the permanency

¹⁰ These statistics are available on the Oregon Judicial Department (OJD) website. The Oregon Judicial Information Network (OJIN) records data reported after each judicial proceeding. Proceedings reported as trials include stipulated facts trials. With respect to trials that last multiple days, OJIN interprets each day of the trial as a separate trial, so that a trial lasting ten days would be recorded as ten trials. The number of actual trials is therefore inflated in the OJD statistics.

hearing stage. There is a model court team in juvenile court that holds planning meetings for the juvenile system and seeks to increase compliance with juvenile court timelines. Currently none of the defense attorneys are participating on this team.

Attorneys are not present at shelter hearings in dependency cases. A status hearing is held a month later at which counsel is present.

The Lillegard firm is appointed to represent parents in dependency cases. Children are not often provided with appointed counsel in Polk County. Other parties to these proceedings report that even when they request appointment of counsel for a child the court may deny it.¹¹ Counsel has been denied for teens as well as for younger children. When counsel is appointed, an hourly rate attorney, often from Marion County, receives the appointment.

Attorneys for parents are appointed to represent the client only until disposition on the petition. Although the court and the Citizen Review Board schedule regular review hearings after adjudication, parents must request that counsel be reappointed for these hearings. Many do not and thus are unrepresented at the hearing. Even those who seek representation for particular hearings have no representation between hearings.

Polk County has an active CASA program. Christine Olson is the CASA coordinator. There are 32 volunteers and four more in training. There are CASA volunteers available for about half of the children in DHS care. CASAs are appointed at the time of the shelter hearing.

Maria Chavez Haroldson is the CRB coordinator for Polk County. Defense attorneys rarely participate in CRB reviews.

Delinquency cases:

Trish Reding is the Director of the Polk County Juvenile Department. In addition the department has 4.5 FTE probation officers who carry caseloads. When police reports come to the department a lead worker reviews them and screens the youth and the offense for diversion eligibility. If diversion or some other alternative approach is not appropriate, the reports are sent to the district attorney for review and recommendation regarding charges to be filed. Petitions are filed in most felony cases but with DA approval some of these cases can be treated informally. Approximately 90% of youth against whom petitions are filed

¹¹ OPDS staff was advised by representatives of two parties to recent juvenile cases that they had asked the court to appoint counsel for the child but that the court had declined to do so, although ORS 419B.195 appears to make appointment mandatory under these circumstances: "Whenever requested to do so, the court shall appoint counsel to represent the child or ward in a case filed pursuant to ORS 419B.100."

request counsel. (Some youth also request and receive counsel to assist them in deciding whether to agree to informal treatment.) In probation violation cases, however, it is less common for youth offenders to request counsel. Juvenile Department staff believes this is because youth know they will not receive detention time. There is no detention facility in Polk County. The county contracts with Yamhill County for three of its beds and with Marion County for one bed.

One diversion program - the Sanction Court - is available in the Monmouth/Independence, Dallas, Grand Ronde and West Salem communities. The Sanction Court uses the Community Action Model in dealing with first time misdemeanors, violations and status offenses. The youth and at least one parent must appear to address the referral.

A Lead worker on the juvenile department staff handles the sex offense caseload. Approximately 20% of these cases are handled informally. Once a petition is filed, however, resolution on an informal basis is rare. Youth who are adjudicated are eligible to be considered for dismissal of the charges after completing the terms of probation. These youth are not required to register as sex offenders but their records cannot be expunged.¹²

Youth are represented at preliminary hearings if they have completed the request for court appointed counsel before coming to court. At the preliminary hearing a pretrial conference is scheduled within 30 days and trial within 60.

Public Defense Providers

PDSC contracts with a single provider for non-death penalty cases in Polk County, the Chris Lillegard firm. The firm contracts to handle 1,512 cases per year.¹³ There are currently three associates in addition to Mr. Lillegard who represent public defense clients.

In cases with co-defendants or multiple parties (such as juvenile dependency cases), additional attorneys are appointed on an hourly rate basis. There are few Polk County attorneys who accept appointment in these cases. Marion County attorneys are often appointed and occasionally attorneys from Yamhill and other counties.

Comments regarding Local Public Safety System and PDSC Providers

¹² Methods of handling juvenile sex offenses vary dramatically from one county to another. In some counties, for example, a juvenile's record is "shredded" upon successful completion of treatment and probation; in others judges permit the amendment of a delinquency petition into a dependency petition allowing the youth to avoid adjudication on a sex offense.

¹³ While previously under quota, that shortage has been made up and the firm is now significantly above quota for the current year.

Polk County may be unusual in the extent to which judges and prosecutors have previously served in other capacities. All three judges have both prosecution and defense experience, two of the judges having served as the elected district attorney in the past. The current district attorney previously worked as a defense attorney as did the chief deputy district attorney. One of Mr. Lillegard's associates was employed as a police officer by the City of Salem before attending law school. This breadth of experience may be one of the important factors behind the very close-knit legal community where representatives of each function appear to enjoy congenial relations with representatives of the others. Despite these relationships, however, people seem to speak with candor about what is working in the system and what is not.

Some of the comments provided to PDSC about the current system are set forth below.

Providers:

Mr. Lillegard's firm has been a PDSC contractor for a long time. He and his current associates and office staff are highly regarded in the local justice community. The attorneys treat court staff and other system partners with courtesy and respect. In the past, there have been associates about whom frequent concerns and complaints were made to Mr. Lillegard, who did not always respond, according to some commentators, in a timely way.

A second contractor is needed for conflict appointments in criminal and juvenile cases. Attorneys who have worked at PDSC's hourly rate in the past express concern about attorneys from other counties who have to drive from those counties to Dallas without any compensation for their travel time (other than mileage). Court staff sometimes has to make multiple calls in order to identify an attorney willing to accept cases in the county. Even though they have agreed to accept Polk County cases, some attorneys change their minds and do not notify OPDS. Some of the attorneys currently accepting hourly rate appointments are excellent and it is hoped they will continue to be available if PDSC decides to pursue additional contracts. Some stakeholders are concerned that the few attorneys who appear most often may be overworked and may be unwilling to continue if more attorneys aren't made available.

Criminal cases:

OPDS staff received reports that conflicts of interest requiring substitution of counsel are identified relatively late in some cases and that attorneys are not required to indicate the nature of a conflict before having their motions for substitution granted.¹⁴

¹⁴ While it would be important to insulate the trial judge from any disclosures that might prejudice the defendant's right to a fair trial, it is not apparent why the disclosure cannot be made to one of the other judges or redacted to protect the confidences and secrets of the defendant as

Motion practice in criminal cases is minimal.¹⁵ The motions that are filed tend to be routine rather than creative. Mr. Lillegard notes that defense attorneys generally discuss potential grounds for legal motions in settlement discussions with the state. If a suitable resolution is agreed upon, there is no need to file a motion.

Attorneys appear to be in good contact with their criminal clients and are reported to be prepared when they come to court.

Judge Horner would like to work with the district attorney's office and defense lawyers to find a way to manage the cases that don't require a lot of attention in a more efficient way. Although one of the principle motivations for creating an early resolution program is to relieve pressure on the county jail (which isn't an issue in Polk County), there can be efficiencies for the entire system, particularly if the process permits the resolution of a high volume of fairly routine cases, allowing all parties to focus their time and attention on those that have are more complex and that have genuine legal or factual issues that require more attention.¹⁶ The district attorney's office does not currently see the need for such a program in Polk County since criminal cases move relatively quickly in the county. Although there is no regular meeting of criminal court stakeholders at which such a proposal could be discussed, it is a small legal community and there is reported to be a lot of informal communication.

Juvenile cases:

The principal deputy district attorney assigned to juvenile court says that Lillegard firm attorneys know the law and fight hard on cases.

Juvenile Department staff members report having good working relations with the defense attorneys, both those with the Lillegard firm and the hourly rate attorneys. In general, attorneys provide good representation but motion practice

recommended in the best practices outlined on page 19 of the Report of the Conflicts Work Group which appears on the Public Defense Services Commission website under "Reports and Publications."

¹⁵ The trial rates in criminal cases are significantly higher, however, than the average trial rates in the state as noted above.

¹⁶ The Commission's guidelines for public defense lawyers in early disposition programs are available on the PDSC website:

<http://www.ojd.state.or.us/osca/opds/Reports/documents/EDPGuidelines.pdf> should the county decide to consider such a program. Of the EDP programs reviewed by PDSC, the Washington County program appears to be the most effective in promptly resolving cases. One feature of the Washington County program that has recently drawn criticism, however, is that the defendant and counsel are both required to certify that the district attorney's information regarding the defendant's prior criminal history before the court will accept a plea petition. This effort to shift the burden of establishing the defendant's criminal history to the defense negatively impacts the attorney client relationship and may create ethical dilemmas for defense attorneys. A legal challenge to the requirement is being considered.

is uneven. The most common motion filed is a motion to suppress; it is less common to file a motion challenging a youth's capacity to proceed.¹⁷ Youth report to their juvenile court counselors that they cannot reach their attorneys and attorneys do not appear to be meeting with incarcerated youth in the time frames set forth in the PDSC contract.¹⁸ It is rare for defense attorneys to obtain their own sex offender evaluations.¹⁹ They generally permit the juvenile department to have youth evaluated for risk of reoffending and appropriate treatment options. It does not appear that attorneys are often performing investigation in juvenile cases.²⁰

In dependency cases, it was again reported that there are good relations between the defense bar and the district attorney's office, the CASA program, and DHS staff. The parties usually come to agreement as to how cases are to be resolved. Attorneys are said to be very effective litigators but, as noted above, dependency clients have no one to advocate for them during the life of the dependency case.

Defense participation in Citizen Review Board hearings is minimal, probably because under the local juvenile court culture, parents are unrepresented at this stage unless they have sought to have counsel reappointed. Parent clients who attend CRB hearings appear to lack an understanding of the nature of the hearing and their role. Mr. Butterfield, before he became the District Attorney, attended CRB hearings with his clients. Some Marion County attorneys and one local attorney also appear.

Defense attorneys do not participate in the local Juvenile Court Improvement Project which does most of the planning for juvenile case processing in the county.

DHS's Permanency Supervisor in Polk County, Laurie Linn, believes that parents need representation throughout the life of the dependency case and that most children, if not all, need to be represented by counsel.

OPDS's recommendations for further inquiry at PDSC's August 6, 2009 meeting in Dallas

¹⁷ Defense attorneys ordinarily seek funds for an ex parte evaluation of a client's capacity to aid and assist before filing a motion or bringing the matter to the attention of the court. In 2008 there were two requests from Polk County for funds to obtain such an evaluation of a juvenile client.

¹⁸ PDSC's model contract requires that contractors, whenever possible, speak to and conduct initial interviews in person with in-custody clients within 24 hours of appointment or the next working day. Contractors are required to arrange for contact with out-of-custody clients within 72 hours of appointment.

¹⁹ No requests for authorization of expenses for a psycho-sexual evaluation of a juvenile client were received from Polk County in 2008.

²⁰ In 2008 there were five requests for funds to engage the services of an investigator in a juvenile delinquency case. All five requests were submitted by the same attorney.

Based on the information provided to OPDS during meetings and telephone conversations with justice system stakeholders, OPDS recommends that the Commission consider the following in developing a service delivery plan for Polk County.

The Structure

Under the system currently in place, PDSC contracts with a single law firm to handle criminal and juvenile cases in the county. Conflict cases are assigned to attorneys working at the hourly rate, principally from Marion County. Judges, court staff and others recommend that PDSC's service delivery plan for the county include an additional contractor or contractors to handle conflict cases.

The Juvenile Dependency System

While there may be other counties that follow a similar model, OPDS staff is not aware of another county in which parents essentially lack representation during the life of a dependency case. The bar's performance standards for attorneys in dependency cases²¹ assume that the attorney-client relationship continues during this period and that counsel is available to assist the client in accessing services, to represent the client at various agency-initiated planning meetings, to challenge practices that deny the client an appropriate level of visitation, to establish a lack of reasonable efforts to reunify the family, to initiate a request for a court hearing when the client's rights are being disregarded, as well as to encourage and support the client in following through on the parent's obligations. PDSC requires that public defense attorneys observe these performance standards.²²

The great majority of children receive no representation at all in dependency cases, regardless of age and regardless of the stage of the proceedings in Polk County. While CASAs are appointed for approximately half of the children in care, a CASA's role is entirely different from that of an attorney. CASAs do not represent a child's express wishes, regardless of whether a child is capable of considered judgment. The CASA has no obligation of confidentiality toward a child and statements made by a child to a CASA are not privileged. A CASA cannot cross examine witnesses, prepare and argue legal motions, pursue administrative or other legal challenges on behalf of a child.

²¹ The standards may be found on the Oregon State Bar's website: http://www.osbar.org/surveys_research/performancestandard.

²² PDSC's Qualification Standards for Court Appointed Counsel require that attorneys "Have read, understood and agree to observe applicable provisions of the current edition of the Oregon State Bar's Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases."

The Commission may want to consider what its role should be in identifying best practices, making recommendations regarding appointment of counsel or taking other steps to see that the needs of public defense clients in a particular county are being met.

Summary of Testimony Presented to Public Defense Services Commission in Dallas, Oregon on August 6, 2009

Chair Ellis welcomed representatives of the Polk County legal community to the meeting and noted that PDSC is not seeking to impose a single model of public defense delivery in every county but tries to be responsive to the needs of each community.

Chief Justice De Muniz discussed the 2009-2011 Judicial Department budget and said that even with revenue from HB 2287 and the expected veto of the Judicial Department disappropriation in HB 5054 the department will have to manage its resources very prudently. In a meeting with other chief justices at the National Conference of Chief Justices recently, he learned that many of them are experiencing similar fiscal challenges. As part of the planning and implementation of budget reductions in Oregon, Chief Justice De Muniz formed two committees, a Budget Reduction Advisory Committee ("BRAC") to identify core functions of the courts, and the Budget Reduction Implementation Committee ("BRIC") to implement the reductions. During the legislative session he met regularly with the Chairs of the Joint Ways & Means Committee but has yet to identify a legislator who will be a champion for the courts. His main goal in the legislative session was to maintain an open and accessible court system. Trial court judges will have a lot of flexibility in meeting this goal at the local level. A new approach to the funding of the courts is needed in order to avoid a continued cycle of feast or famine. Dedicated funding may not be the best approach. The Chief Justice also discussed a number of national developments, including a resolution by the Conference of Chief Justices that federal agencies administering drug court funds and the like, deal with the appropriate representative of the judicial branch rather than with individual judges, in recognition of the court's status as a separate branch of government. He reported that United States Attorney General Eric Holder is meeting regularly with the chief justices to address indigent defense and other important issues. He also described some of the practices being implemented by the Judicial Department to operate more efficiently.

Chair Ellis said that the group that was responsible for creating the unified court system in Oregon believes that Chief Justice De Muniz is fulfilling the role that they envisioned for that position.

Judge William Horner, the Presiding Judge in Polk County, welcomed the Commission to the county and noted some corrections to the draft report. With respect to the representation of parents in juvenile dependency cases after the

establishment of jurisdiction he said that the practice of discontinuing the appointment of counsel was established years ago but that if the Commission preferred that representation continue, that could occur. With respect to the appointment of counsel for children in dependency cases, he does not see the value in appointing counsel for infants. With respect to the number of cases in which attorneys find conflicts of interest, in some weeks there seem to be a lot of them. In the future he will inquire of the attorneys what the basis for the conflict is in cases in which he is not the trial judge. When there is a conflict the court generally must appoint an attorney from another county since there is only one criminal attorney besides the attorneys with the Lillegard firm in Polk County who will accept court appointed cases. He believes there are approximately 300 conflict cases a year in the county. For administrative purposes it would be easier for the court to assign cases to a consortium than to find individual attorneys for each case. Judge Horner said that all three of the Polk County judges had experience as defense attorneys as well as prosecutors before they became judges.

Polk County District Attorney Stan Butterfield said that he believes the criminal justice system in Polk county is working well from both the prosecution side and the defense side. He had practiced as a defense attorney prior to becoming the district attorney. He has a staff of 23 people, including six deputies. His office generates discovery in most cases within 72 hours so that conflicts can be identified early. His office has a good working relationship with the defense attorneys. Attorneys are generally free to come into the office and go directly to a particular deputy's office. The district attorney's office also works cooperatively with the attorneys who come regularly from Marion County. There has been a collegial culture between prosecutors and defense attorneys in Polk County for many years, even preceding the budget crisis in 2003. Mr. Butterfield described the county's drug court program. Since becoming the district attorney he has accelerated the process of approving defendants for drug court participation since research indicates that getting people involved in the program as early as possible is beneficial to their prospects for success. The court's caseload is above average in Polk County and the county is probably in need of another judge but cases are getting the attention they need and a lot of things are handled informally in the county. He said that there had been a recent incident with a private defense investigator who had not followed his ethical duties. This matter had been discussed with OPDS staff.

Judge Charles Luukinen said that the court, the prosecution and the defense had enjoyed a collegial relationship within the criminal justice community in Polk County for thirty years. The court's workload is relatively heavy and they may request an additional judge in the next legislative session. The system works efficiently, however, with experienced lawyers on both sides who understand the cases and the range of possible resolutions. He chairs the Local Public Safety Coordinating Council but before that council was formed there was a "Let's Build a Jail" committee including the defense, the prosecution, law enforcement and

members of the public who decided to seek voter approval of a bond measure to construct a new jail and an operating levy. Both were approved and a new jail built. It would be beneficial to the judges in Polk County if they had a known group of attorneys available to handle conflict cases in the county rather than to have a group like the Marion County Association of Defenders send over those of its member attorneys who were in need of additional cases. Judge Luukinen said that all of the judges in the county try to be culturally aware. They are fortunate to have two defense attorneys who are bilingual in English and Spanish. There is a Spanish language interpreter who is available for court appearances three days of the week. For other languages they often depend on the “language line.” The defense bar is “graying” but that is in part a function of the contract system. There aren’t cases available for the new attorneys.

Chair Ellis noted that the judges in Polk County prefer to see experienced attorneys with whom they are familiar to handle their conflict cases, rather than new, unknown attorneys from Marion County. Judge Luukinen said that they would be open to good, young lawyers starting on misdemeanor cases. Judge Luukinen said that the Court handles cases that arise at the Spirit Mountain Casino. Many of these cases are drug cases and motor vehicle offenses. The evidence in these cases tends to be very sophisticated because of the surveillance technology used by the casino. The Spirit Mountain Community Fund helps to fund law enforcement in the area. A lot of the offenses at the casino are committed by residents of other counties who are generally not appropriate for the drug court.

Commission Ozanne inquired about the trial rate in Polk County. Judge Luukinen said that it had varied over the years depending on who the district attorney was but that he thinks the attorneys in the county try the cases that need to be tried and resolve the ones that can be resolved. Ingrid Swenson said that the Judicial Department statistics indicate a higher than average trial rate in Polk County but that a “trial,” includes, for example, a stipulated facts trial. Judge Luukinen said that there are a lot of stipulated facts trials in the county.

Chief Justice De Muniz said that Judge Luukinen is being assigned to cases around the state as part of an effort to leverage experienced judicial resources. He is a role model.

Judge Fred Avera also thanked the Commission for traveling to Polk County. He noted that he and Judge Horner had been active in the defense attorney association that preceded the Oregon Criminal Defense Lawyers Association, along with Chief Justice De Muniz. He was a prosecutor for fourteen years, including twelve years as the elected district attorney of the county. He has been a judge for ten years. Judges Horner and Luukinen have similar backgrounds. The court has been able to handle a large volume of cases because lawyers exercise good judgment. In conflict cases it can sometimes be frustrating to try to find a lawyer on the court appointment list who is available and willing to take

the case. It would be good to have a group of the Marion County attorneys who come to Polk County regularly available for appointment rather than having MCAD select the attorneys. He will not appoint an attorney he does not consider qualified to handle the case. With respect to the trial rate in Polk County his impression is that the rate is probably about average or a little lower. Late discovery is not a frequent problem. Late conflicts occur when new witnesses are found or unusual circumstances arise.

Commissioner Ozanne asked whether there might not be a “culture of understanding” that would prevent new attorneys from challenging established practices in a community. Zealous advocacy might suffer in a community where everybody knows everybody. Judge Avera said that the county had a history of bringing in zealous advocates for clients but that sometimes he thinks they get along so well that zealous advocacy suffers. There was an attorney who no longer practices in the area who agreed to a guilty plea for a client who hadn’t committed a crime. Commissioner Ozanne said that the Chief Justice’s plan for moving judges around to other counties was a good one to address this issue.

Chris Lillegard said his office had provided indigent defense services in the county since 1984. Two of the attorneys in his office have worked there for many years, as have two of his staff members. He had to let another attorney go recently but was able to hire a Spanish speaking lawyer to replace him. Ninety percent of the firm’s work is public defense. He described his succession plan for when he decides to retire and described the firm’s system for identifying conflicts. He said that it has been efficient for the court and OPDS to work with his firm as the only public defense contractor in the county. Both have to deal with only one office. Dallas is only a fifteen minute drive from Salem and there has always been a group of attorneys from Marion County who have been available to handle conflict cases there. Mr. Lillegard said that he is not certain that there is any reason to keep dependency files open after jurisdiction but he is willing to continue representation if asked to. His firm still uses the investigator referred to by Mr. Butterfield, who was found to have misrepresented himself in a case, because he is a good investigator. He believes that they do try a lot of cases in Polk County, many of which are court trials. They also file a lot of motions but can often persuade the district attorney to make a better offer if there are grounds for a motion.

Commissioner Welch inquired about the representation of children in dependency cases. Mr. Lillegard said it is rare that children are appointed counsel. Commissioner Welch asked Mr. Lillegard if he felt there was a role to be played by counsel for parents after jurisdiction has been established and he said that his sense is that there is not a lot that an attorney can do for a parent at that stage. Commissioner Potter inquired whether Mr. Lillegard had ever experimented with a client satisfaction survey and he said he had not but that attorneys get a sense of their clients’ satisfaction with their representation from other defendants at the jail.

Sally Avera, the Chief Deputy District Attorney, said that she had previously served as an appellate defender and as a senior assistant attorney general. She said that clients of the Lillegard firm provide feedback on their representation by seeking to have the firm reappointed in future cases. Cases are handled efficiently in the county because of the experience level on the bench and in the bar and because of the level of trust between them. Prosecutors don't file cases if the admissible evidence is inadequate and defense attorneys don't file meritless motions. She thinks that the court and the district attorney are able to assert the best interest of children in dependency cases and that attorneys are not needed for children who can't speak. She said that attorneys who come from other counties to practice in Polk County need to realize that the criminal calendar moves quickly and trial dates are firm.

Service Delivery Plan for Polk County

[This portion of the report will be completed at the conclusion of the Commission's discussions and deliberation.]

Attachment 4

PDSC meeting schedule and tentative agendas

October 23, 2009 – Bend, Mt. Bachelor Village, 12:30 pm to 4 pm
Further discussion of Lane County service delivery plan
Discussion of Polk County Service Delivery Plan
Contract approval

November 12, 2009 – **CANCEL**

December 10, 2009 – Salem, 9 am to 3 pm
Contract approval
Drug court guidelines
Approval of updated strategic plan, biennial report, annual report
Discussion of proposed audit of OPDS

2010

January 28

Clackamas County – Update and approval of Service Delivery Plan
Initial information session on eligibility standards for public defense clients

March 5

Eligibility Standards – further discussion
Appointment and waiver of counsel in juvenile delinquency cases
Marion County update
Service delivery in appellate cases

April 22

Initial 11-13 budget discussion
Approval of amendments to eligibility standards
Recoupment of attorney fees – discussion, proposed amendments
Training of public defense lawyers

June 17 (Bend)

Contractor comment on budget priorities; final PDSC approval of Budget
Final action on recoupment
Service delivery plan in appellate cases
Deschutes County service delivery review

August 5

Service delivery plan for Deschutes County
Review of service delivery in civil commitment cases

October 22

Agenda TBA

Early December meeting

Date and agenda TBA