

Members

Barnes H. Ellis, Chair
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James M. Brown
Henry H. Lazenby, Jr.
John R. Potter
Janet C. Stevens



Ex-Officio Member

Chief Justice Wallace P. Carson, Jr.

Executive Director

Peter A. Ozanne

**Meeting of the Public Defense Services Commission
Thursday, November 18, 2004
1:00 p.m. to 5:00 p.m.***

Multnomah County Courthouse
Courtroom 318
1021 S.W. Fourth Avenue
Portland, Oregon

(Please note the new time and location)

Agenda

1. **Action Item:**
Approval of October Meeting Minutes
(Attachment 1) Barnes Ellis
2. The OPDS Status Report OPDS staff
3. **Action Item:**
Approval of a Proposed Contract
(Attachment 2) Kathryn Aylward
4. Blakely v. Washington: Should the
Commission take a policy position?
(Attachment 3) Peter Gartlan
Becky Duncan
5. Discussion of PDSC's Service Delivery
Plan for Multnomah County
(Attachment 4) Barnes Ellis
6. Status Report on Implementation of
the Service Delivery Plan for Lane County
Shaun McCrea
Peter Ozanne
7. Tomorrow's Retreat Barnes Ellis
Peter Ozanne

* **Lunch** for Commission members will be available at 12:30 p.m.

Next Meeting: Thursday, January 13, 2005, 9:00 a.m. to 12:00 p.m., in Salem, Oregon (location to be announced). **There will be no Commission meeting in December 2004.**

PUBLIC DEFENSE SERVICES COMMISSION

October 22, 2004
Kah-Nee-Ta Resort
Warm Springs, OR

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Janet Stevens
John Potter
Jim Brown
Chief Justice Carson

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Ingrid Swenson
Becky Duncan
Lorrie Railey
Caroline Meyer
Laura Weeks
Laura Anson

TAPE 1, SIDE A

Agenda Item No. 1 Approval of September, 2004 Meeting Minutes

- 001 Chair Ellis [Meeting called to order at 12:45 p.m.] The first item is approval of the minutes, Attachment 1 to the Agenda. I want to commend staff again. These are wonderful, detailed and really help bring back the whole meeting. Are there any additions or corrections to the minutes?
- 006 S. McCrea I have some. On page 6 line 344, where Ingrid is talking: the word in the minutes is "situations" and I think it should be "situation." On page 9 the second paragraph: it starts "and non-routine expenses." After the sentence that ends, "when will that forensic work be done," the beginning of the next sentence is "Not." I think it should be "Now." On page 11 line 11, the sentence that begins "And I know the defenders – add the word "at." So the sentence reads "And I know the defenders look at it." On page 35, correct the spelling of Paul Petterson's name.
- 023 Chair Ellis Thank you. Any other corrections?
MOTION: S. McCrea moved for approval of the minutes; J. Stevens 2nd.
VOTE: 5-0; hearing no objection the motion **CARRIES**

Agenda Item No. 2 OPDS's Monthly Report

- 032 K. Aylward There is not a whole lot to report from CBS. I think the big news as far as employees go, Billy Strehlow has left us. He is now working for the Department of Administrative Services at a higher salary and a job with more promotional opportunities. So we wish him well. We also had one of our accounts payable people move back to Idaho, so we are down a couple of people. We are not filling those positions immediately. Through the tremendous efforts and the good graces of the remaining people taking up the slack we are trying to fill a minor

budget hole. I think leaving those two positions vacant for at least a month or two will solve the problem. Other than that, I think things are going great.

041 Chair Ellis Have you guys moved?

041 K. Aylward Yes, we finished the move in mid-August and we are pretty well settled in. We still have some boxes piled up, but we are working on scanning them. We are starting to do some coordinating with LSD upstairs on certain things, but I'll let Pete go over those. So that is it. Everything is going great.

047 P. Ozanne I want to thank Lorrie Railey for her extra efforts during the move. I told her she has a career as a moving specialist. She has moved folks twice and is getting better each time. She had grid paper with scaled measurements and knew where every filing cabinet was going. Kathryn and her staff were creative enough to get the move done without a budget for it.

054 Chair Ellis Thank you, Lorrie.

055 L. Railey You're welcome.

056 P. Ozanne We just completed our annual Public Defense Management Conference. I think people are feeling pretty good about it. They are certainly feeling good about the Commission's directions and our contractors had positive things to say about OPDS' and our Contract & Business Services Division's work with them, along with Ingrid's work on the contractor site visits. One of the topics was to recruit more people to bring the contractor site visit process up to scale so we can ensure that the majority of contractors participate within a reasonable time frame. I spoke at the opening of the conference about management, accountability and credibility. Management by you as the system's board of directors, OPDS as the administrative agency and contractors through their peer review process and site visits. And good management means that we are holding ourselves accountable by managing ourselves on a personal and organizational level. Contractors certainly want to manage themselves effectively. And I think that effective management and accountability leads to credibility, particular with our stakeholders and legislators. Susan Morgan, a representative who has a little involvement with public defense who is on the Ways and Means and Legislative Audit Committees spoke at the conference. While she was not particularly optimistic about the state budget and the situation state agencies were facing, I think her comments reflected an appreciation for the work everyone is doing and the resulting credibility it produces. We also had breakout sessions at the end of the conference where a lot of good ideas came up. We had a panel discussion regarding technology, recruitment and performance measures as components of managing a law office. Becky Duncan did a marvelous job of presenting the concepts underlying performance measures in the setting of a public defense office. We wanted to convey the message: "Here is what we are trying to do in our office. Certainly some defenders have been doing this already, but here is what we are trying to do. Here is what we are learning as we go along and we would like you to consider a similar process." I think we are succeeding in implementing a new set of performance measures and an employee evaluation process for our agency, which could very well lead to performance measures and a process that local contractors should be willing to implement. I would say that the conference was a success and I certainly appreciate all the work that my colleagues at OPDS did to put it together. Most of them are here now. And I appreciate the commitment of all of the contractors who are really willing to step forward and participate in our efforts to improve public defense management, accountability and credibility. I suppose we all feel that, if we can avoid the fiscal calamity of 2003, we are really on our way to building an effective public defense system.

119 Chair Ellis Good. Pete?

- 119 P. Gartlan I'll start where Kathryn left off. Kathryn mentioned a new process with respect to getting counsel appointed on appeal. The process has been that we file a notice of appeal and then file a motion for appointment of counsel and preparation of transcript in the trial court. To switch to the new process, Kathryn and I met with court staff a couple of weeks ago. We will be filing our motion for appointment of counsel in the Court of Appeals, and the Court of Appeals will appoint us. Once the Court of Appeals appoints us, we will notify the transcript coordinators, so they can have the transcript prepared. This should streamline the process considerably by centralizing it, and improve the communication between the court and us with respect to being appointed so we can get the transcript processed sooner. Hopefully, this will speed up the appeal process.
- 132 Chair Ellis Will that throw a monkey wrench in your statistics because don't you measure caseload delay from the transcript settlement date?
- 133 P. Gartlan No, it will still be measured the same way. It will be the same starting time, while cutting down on the time between when we file the notice of appeal and notify the transcript coordinator to start the transcript. So we should cut down on some time there. With respect to how the Court of Appeals measures the briefing schedule, that will remain the same. We are hoping to cut down some time before that.
- The second topic I have is related to Blakely v. Washington. To give you some background on Blakely, it is a relatively recent U. S. Supreme Court decision.
- 144 Chair Ellis I know about it.
- 145 S. McCrea You gave us the background at the last meeting.
- 147 P. Gartlan As I mentioned, it has impacted our caseload considerably. For the months of July, August and September last year, we assigned 235 cases. For that same period this year – July, August and September – it was up to 427 cases. Most of the extra cases are non-trial type cases; those would be guilty pleas, no contest and probation violation cases. Those cases have been directly impacted by Blakely. So a direct way to measure the impact on our office is just to measure those numbers.
- 162 Chair Ellis I know the U.S. Supreme Court has pending cases relating to the impact of Blakely on the federal issues. Are there cases pending that also impact the briefs in the state courts?
- 167 P Gartlan Our Supreme Court has at least two cases pending now. We have two or three Court of Appeals cases dealing with Blakely issues. (inaudible). They have been reversed and the Attorney General's office has petitioned for reconsideration. I won't go into the details, but the Attorney General's office has contested the disposition. They are looking for ways that would make the guidelines consistent with the guidelines' presumptive sentences and effectively giving the sentencing court discretion. So that is the Blakely update.
- 197 Chair Ellis Will you be involved in legislative groups?
- 199 P. Gartlan There is a work group that is looking over some options for the Legislature. Its task is to report back to the Legislature with some options and assist the Legislature in picking out viable options. Bob Homan is on the work group and so is Brad Berry for the district attorneys. There are a host of other people on that group.
- 204 P. Ozanne Excuse me, Mr. Chair. The question really is whether the Commission believes it should be involved in the process of finding options for the Legislature. Pete has attended the work group meetings as a technical advisor to offer his perspective and experience. And, of course, we will report on fiscal impacts of any legislation relating to Blakely. But this matter raises the question that we discussed before the last legislative session: is the Commission going to

take positions on every issue involving criminal law or criminal defense? The Commission's answer so far has been "no." It won't be taking positions on every matter of substantive criminal law. OCDLA is capable of performing that function. What are the subjects that the Commission should take positions on in the Legislature? Perhaps Blakely is one. At least a discussion of this case, its implications and appropriate responses is a good "test case" to help identify the kinds of issues that the Commission should take positions on. I suggest that we discuss this question during our November meeting and the November Retreat. It will be important for us to determine when the Commission should take positions before the Legislature. Should it only be when an issue is related to the system of public defense? It seems to me that Blakely raises issues with systemic implications which would be appropriate for the Commission to address, as well as issues of importance to individual clients which may not be appropriate for the Commission to address.

- 227 Chair Ellis I think personally that this is the right way to go. Obviously, there is the client information. But in terms of actually asserting a position, I would like a little more thought given to that. Maybe the November meeting is the right place to do it.
- 229 P. Ozanne We will be prepared to brief you on the options then. We are struggling with the issues internally right now.
- 233 P. Gartlan The other major topic right now is the performance evaluations and I will let Becky speak to that.
- 235 B. Duncan As you know, we started our performance evaluations process last spring, which involved a self-evaluation by every staff member, followed by a meeting with every staff member. The idea is that the staff would then have six months to become familiar with the more formal process of evaluations. (inaudible) Right now, we are in the middle of those evaluations. In addition to the self-evaluations, the process involves an evaluation by the staff member's supervisor. For our attorneys, the supervisor is the attorney's team leader. For our secretarial staff, that is the secretarial manager, Laura Anson. Then after that, there is a management evaluation process. So each staff member will have three written evaluations. In addition, we will be reviewing samples of the attorneys' briefs. (inaudible).
- 255 Chair Ellis How is this being received?
- 256 B. Duncan It has been a lot of work for our staff. They are taking it very seriously and it is a fair amount of work (inaudible). For the attorneys, we have also given them considerable quantitative data about their case filings * * *. (inaudible).
- 261 Chair Ellis I would predict that they will actually like being evaluated. They may not think that. The biggest complaint is that nobody tells me anything and I am kind of drifting. All of us came through an academic system with reasonable success if we always had a sense that somebody was reading our stuff and somebody cared. I will bet you from a morale and incentive standpoint this will be very positive.
- 273 B. Duncan When we met with the staff in * * * (inaudible). [Attorneys set goals for themselves, such as saying I] want to represent at a CLE or have a case where I can file petition for review. So we have seen people that have been receptive * * *. (inaudible).
- 282 P. Ozanne Excuse me, Becky. One of the other things that is facilitating this process is the fact all of our employees know that their managers will go through the process too. I will also be going around to talk to every employee in the organization to find out how they feel about their jobs and the agency.
- 288 Chair Ellis I think we are the only ones immune from evaluation. The Chief does it, but he has a secret system. On the contractor site visits is that --.

- 292 P. Ozanne Ingrid, who is taking the lead on that process, will give the report.
- 293 I. Swenson We did complete our second evaluation. This was the Clackamas Indigent Defense Consortium. The administrator of the consortium, Ron Gray, is here today. We asked a lot of them, as we asked of Crabtree and Rahmsdorff when we did that evaluation. They arranged the interview schedule for us and lots of other things prior to our visit and during the course of our visit. We had a three-day site visit in Oregon City and really found the whole process very rewarding. We hope it will ultimately be rewarding for Ron and his group too.
- 302 Chair Ellis Who was in your team?
- 303 I. Swenson Tom Sermak was our Chair. Dave Audet, a Hillsboro lawyer in private practice with public defense history, was on our team. Bob Thuemmel, who is in private practice and former president of OCDLA. Anita Crenshaw from the Marion County Consortium was very helpful because she is the administrator there and could look at a similar organization and assist us with the evaluation. Kathy Ruckle, who practices in Portland in a juvenile firm, also has general expertise in criminal law. She has been active in both criminal and juvenile law during her career. In any case, it was a large enough group so that we could send at least two people to most interviews. We like to have multiple input in each of the areas. We met with each of the judges and the district attorney and most of his chief deputies. We met with interpreters who provide services principally to the attorneys and to the court. They provided was very useful information. The sheriff had told us he didn't have much information for us, so we didn't really get law enforcement input to the extent we like. The information that was provided us this is a pretty good system across the board. While we aren't going to be publishing the report, and Ron has not yet received a final draft of his review, but he knows that we were very impressed with the quality of representation being provided there. We certainly have some recommendations for them to look at and some thoughts about things that they are doing very well which we would like to share with other contractors. So again, it was a very positive experience there. Our next evaluation is in Washington County with the Public Defender's Office. It is a larger organization and, although they don't have as many lawyers in Washington County, it is a very large office with all staff included. So we put together a site team of seven people. The site visit is scheduled for November 15. We have a lot to do. The questionnaires went out and some of them have already started to come back. Keith Rogers, who is the director there, has asked the administrator of his office to assist us once again in putting together the interviews and schedules. So I think we are pretty well set to go.
- 354 Chair Ellis Are you picking or initiating which offices you are visiting or do people ask you?
- 356 I. Swenson No one has jumped up and said, "Me next!" But they are willing to volunteer when asked. Wouldn't you describe it that way, Peter?
- 358 P. Ozanne Yes, but we are just about at the point where we will have enough experience with the process to no longer limit ourselves to volunteers and begin informing people that we are coming to your office next.
- 361 Chair Ellis Coming to a theater near you.
- 362 P. Ozanne I have hopes that this process will gain the support of all of our colleagues in the contractor community and –
- 367 Chair Ellis So they are not viewing it as the grim reaper so much as, "Maybe I can learn something from this?"

- 368 P. Ozanne Yes, I was inspired to hear three or four very experienced lawyers at our Management Conference talking very enthusiastically about the process, their experiences on site visits and how much they learned. Over the past year, we really encouraged people to participate voluntarily in site visits, particularly those who are serving on the Contractor Advisory Group. So Ron Gray stepped forward, Tom Crabtree stepped forward, Jim Hennings and Keith Rogers stepped forward. But I think at this point we feel confident enough about the process and whether we can accomplish its goals. As I have said many times, the first five site visits will probably be great. But will we be able to perform twenty or more, and install the process as a permanent component of our contracting system? I'm feeling like we can.
- 383 Chair Ellis I just see all kinds of potential benefits from the process, both from the individual office and the participants who benefit from the cross-pollination process. But also from the standpoint of our staff, who will gain a real sense of what is going on in the field, as opposed to what happens in Salem. We are dealing with entities and must have an understanding of what the issues are and what the problems are. I think that understanding will come from this process.
- 393 P. Ozanne I think the next chapter in this process involves our agency's and our system's performance measures. Robin LaMonte is here today and she has been very helpful in assisting us in developing and presenting our proposed performance measures. We have struggled with the development of meaningful and feasible performance measures. I believe we now have a solid set of measures. We have measures of performance for CBS in terms of providing services and handling complaints. We also have measures for the performance of the Legal Services Division in terms of reducing appellate backlogs. So we have our agency measures. As we discussed at previous meetings, that still leaves the question of how to measure the overall performance of the state's public defense system at the contractor and trial services level in ways that are both meaningful to the Legislature and within our capacity to measure given available staff and data. What we have come up with after meeting with the Legislative Audit Committee and, as a result of its recommendation, meeting with the Joint Committee on the Judiciary at the Oregon State Bar Convention are a set of performance measure for the public defense system that goes beyond the number of acquittals or numbers of motions to suppress granted and is based on our quality assurance efforts, particularly the contractor site visit process. At the meeting of the Joint Committee on the Judiciary, with Robin's help on budget matters, I reported on the Commission's efforts and accomplishments and talked with the Committee's members about performance measures. They had some suggestions, but appeared to very much support our approach and to be quite happy with our proposed performance measures. Essentially, these measures will be based upon on the site visit process we are doing. While we won't disclose the contents of reports to the contractors visited in order to encourage participation by contractors and gain their acceptance of the process as one involving peer reviews, OPDS will periodically report on the general problems and accomplishments of contractors and identify best practices for contractors of various types and sizes, which would include, for example, performance measures and periodic evaluations of contractors' individual employees. We will identify other types of best practices, like professional accounting practices and procedures and boards of directors with independent members, which emerge from our experience with the site visit process. We then propose to ask contractors to adopt such practices and regularly report their progress in implementing them over a significant period of time in the future –
- 344 K. Aylward Ten years.
- 345 P. Ozanne Yes, over a ten-year time period. It is a cultural shift, as the Chief has reminded me, that calls for such a long-term process. But we think this is the way to provide meaningful and feasible performance measures for the state's public defense system and, so far at least, legislators appear to agree. We will know for sure when we return in December to the Joint Legislative Audit Committee with this report. The site visit process is really the keystone for these performance measures. And, again, I think these measures are one more important piece in establishing our credibility with the Legislature. Our success is largely up to the folks here in

the audience, who will be taking the bull by the horns and visiting or being visited in the process. It will not be coming from an agency in Salem. Our contractors will be stepping forward to adopt and implement best practices that ensure quality legal services and cost-efficient service delivery, and that provide the bases for assuring the Legislature that we are spending available state funds wisely and effectively.

358 Chair Ellis Any of the providers or anyone else want to comment on the contractor site visits process? It must have been a huge success so far. The Juvenile Training Academy is next. Ingrid, you have a full plate today.

362 I. Swenson Well, this is a really exciting project. It has been difficult to get off the ground, however. A group of people interested in improving juvenile practice convened about a year ago to talk about things that could be done to help lawyers improve their practice skills in the juvenile area. The concept is to develop a comprehensive curriculum that a juvenile lawyer without any prior history in juvenile court could take. Then, after having completed that curriculum, the lawyer would presumably have the basic skills to be a good juvenile court lawyer. The idea wasn't just for beginning lawyers. Obviously, it is our hope that when we put together a curriculum it will have appeal and interest for lawyers who are practicing in the area. It is not an area of static practice. There are always lots of new legal and practice developments that experienced lawyers need to be aware of as well. We struggled along trying to do this work with a core group of four or five people. John Potter joined us at the outset and offered his experience from administering OCDLA training programs in terms of helping to visualize how we would use this curriculum once it was complete. We made good progress and outlined what that curriculum would look like. It is broad-based because it includes aspects of federal law and child and adolescent development, in addition to criminal law and law of evidence that lawyers who practice in this area need to be familiar with. We were fortunate that the Oregon Youth Authority lent to us one of their staff members who had been putting together trainings for OYA. She came to our meetings to help us go to the next step once we had outlined what our curriculum would look like; to assist us in filling out and promoting it and in deciding where to go next. It was her recommendation that we look for sponsorship beyond our volunteer core. So we approached OPDS and the Juvenile Court Improvement Project, which is a grant-funded project within the Judicial Department. Both were agreeable to sponsoring us, so we now have joint sponsors for our project. I think it definitely helped us move to the next phase. That phase involves identifying the pieces of the curriculum which should be provided and promoted first, in what order and how to make it available. The State Bar is currently offering two juvenile law CLE's per year. OCDLA is also doing two – a half day in December and a two-day seminar in the spring. So there are certainly organizations who are willing to sponsor the curriculum. The Juvenile Court Improvement Project also offers CLE's to judges, which are available to juvenile lawyers as well. John has agreed at OCDLA's December conference to put on the first module of this curriculum. This particular one is called "Talking to Teens" and it has to do with adolescent development issues, communication issues between adolescents and adults. So it is really designed for lawyers who either represent adolescents or need to interview adolescents in the course of investigation of criminal cases. The American Bar Association has put together a six-component training in juvenile delinquency. This is one of the components of the training that the ABA put together. John and I and others looked at this curriculum and were tremendously impressed with the good scholarship and work that had gone into it. We are interested to see how it is received and then we can decide where we go next and which one of our modules would be appropriate for presentation. At some point we want to encourage juvenile lawyers to take advantage of each and every component of the curriculum. Not all at once, not for a week or two at a time, but as they are made available over time.

439 P. Ozanne I would just add that, at some point after this curriculum is made available to everyone, completion of the curriculum could be made a requirement for practicing juvenile law under contract with the Commission. "If you sign a contract with us, the lawyers in your office who

practice juvenile law must complete this curriculum.” That is probably a long ways away. We will see how this project progresses, but that may be the end game.

456 Chair Ellis Any questions about the staff report? Ingrid, you are still on. Do you want to present the Complaint Policy, Attachments 2 & 3 to the Agenda?

Agenda Item. No. PDSC’s Proposed Complaint Policy

461 I. Swenson You have seen this proposed policy before. Today, you have a draft of the complaint policy, which has been updated since the draft you saw previously, but not in any significant way. The only real change that was made had to do with complaints relating to the expenditure of public funds for non-routine expenses. In those cases where a contractor has submitted a request for a non-routine expense and it has been approved by OPDS and used in accordance with that approval, we feel that what may appear to have been a poor decision on our part should not be the contractor’s responsibility – if we reviewed and approved it and it was used for the purposes that we approved it for. So the policy has been amended to say that. In those circumstances, OPDS needs to look at our procedures for reviewing and approving those non-routine expenses rather than to look to the contractor in that particular instance. Other than that, the policy remains pretty much the same, except for some changes that were made in response to input from the Commission members and contractors. The first one has to do with quality issues. Since we last spoke with you, Peter Ozanne, Kathryn Aylward and I met with representatives of the Oregon State Bar and the PLF to talk about this policy and how we can work with them on issues of quality. The process basically involves the receipt of a formal complaint pursuant to the policy, our review of that complaint, our communication of the contents of the complaint to the provider and then, depending on the circumstances, a decision whether an investigation is appropriate or an attempt at resolution. Ultimately, we need to decide whether there appears to be a failure of appropriate representation or misuse of public defense funds. OPDS would communicate that to the contractor and the complainant. The policy then provides for a series of measures which can be taken in response. It also has a provision which says that, despite the existence of this policy, OPDS remains free to investigate any information that comes to its attention in any way we deem appropriate. While this process is available to complainants and we want to make clear to them what they need to do if they want to make use of this process, we are not limited to responding to things that are submitted to us formally.

524 Chair Ellis I have a question on page 3, paragraph 1(l). That says “If a complaint is resolved informally, no written notice to the complainant is required.” I was curious why you opted for that because, from the standpoint of confidences that we might keep if it is resolved informally, why not give a response to the complainant?

531 I. Swenson Mr. Chair, the thinking was that it would not be resolved informally without the mutual agreement of the complainant and the contractor. So we would be in communication with the complainant and say, “This is our proposed resolution. Is that satisfactory to you?” And the same would be true with respect to the person against whom the complaint has been made. So it wouldn’t be necessary to communicate that.

539 Chair Ellis I really didn’t get that from reading this. But if that is what’s going on, that’s fine.

542 I. Swenson That is the intention.

543 Chair Ellis The other thing I thought that was really very good is the way this is structured. It really puts a lot of emphasis on the fact that the contracting agency, whether it is OPDS or a consortium or whatever, would respond first by trying to resolve the problem. I thought that was just right. Would I also be right in assuming that CBS will be aware of the history on these complaints? That is the ultimate hammer we have over underperforming contractors. It is

very appropriate in my mind that this history should be taken into consideration at contract renewal time.

- 557 I. Swenson Mr. Chair, very definitely, that is the intention. This function would be located within CBS and the staff of that division would be involved in the investigation and resolution of the complaints.
- 564 Chair Ellis Your next attachment relates to the confidentiality issue. Do you want to address that? You have a recommendation for us that I think we need to deal with.
- 566 I. Swenson Yes, Mr. Chair. I won't address the contents of the attachment, other than to say that the public records law in Oregon is a disclosure law, which basically says that government needs to be open and accessible and that papers in the possession of state agencies should be available for people to review. There are many, many exceptions which the Legislature has recognized for purposes of protecting information under certain circumstances. I think the one most applicable here is the confidential communication exemption. Obviously, lots of agencies under lots of circumstances need to be able to receive information submitted to them with the understanding that it is submitted in confidence because many people would choose not to submit information on lots of subjects if it were to become public knowledge. So the Act does protect those kinds of papers, documents and information. In the initial draft of this complaint policy, nothing was included about that. Certainly, without including it in the policy, you could still offer to receive information in confidence and protect that information. But I have recommended that the Commission consider adopting an amendment to this policy as presented which would basically acknowledge that information submitted in conjunction with a complaint or the investigation of a complaint may be made in confidence, or can include information submitted in confidence, and that we will not disclose that information except as required by law without the consent of the person providing the information. So I am recommending that you consider adding that amendment to the policy, if you decide to adopt the policy. We also talked a little bit about a proposed statutory amendment. Our management team has discussed this in a couple of contexts. I continue to have some concern about the waiver of the attorney/client privilege. When we talked to the Bar, they acknowledged that that is a potential issue. They haven't really found it to be a real issue very often, surprisingly. But if, for example, a client makes a complaint about a lawyer and talks about confidential information which was relayed between the client and the lawyer, I think that is a waiver of the attorney/client privilege when they are disclosing the information to us, a third party, without any privilege. Maybe not, but it seems to me it would be. For that reason, I suggested that we consider proposing legislation which would basically say, "If you disclose privileged information to OPDS for the purpose of making a complaint, you don't lose the privilege." It makes no difference with respect to whether it is confidential information in our possession, but it could be claimed at a later time that the client waived the attorney/client privilege –
- 635 Chair Ellis I can see the problem because I think the law is, at least in the civil context, when the client asserts a claim against the lawyer, the lawyer is able to defend by disclosing what otherwise would have been confidential information. This is pretty close to that. I would be interested how others feel. We have three questions that are coming up. One is the adoption of the complaint policy and procedures. Is there any issue there? Two is whether we add to that the confidentiality language that appears as Attachment 3 at the top of page 9. Three is this statutory issue, which we might seek legislation on. I would like to have a discussion of all three. I don't think we need to break them up but, when we get to a vote, that would be the sequence. Any comments by any of the Commissioners on any of these?
- 663 J. Brown I am once again going to show my lack of knowledge. Does this relate to the limits that the organization has in responding to media questions about the Weaver case, for example, in terms of how money is spent in defense of specific cases. More specifically than that, where are the limits? I certainly understand that there are all kinds of strategic issues that are terribly

important to the defense community, for defense purposes and for trial preparations. But is there anything more that can be accomplished that would allow the public and individual decision makers and others to make more meaningful comparisons between how the defense functions and how the prosecution functions? A DA's office doesn't pay investigators or experts. When they send somebody up to the State Hospital to be evaluated, that is not coming out of the DA's budget. I am wondering if there is anything more that we can do; or maybe we already have and I just missed it.

- 710 Chair Ellis You might have missed our response in The Oregonian to the newspaper's earlier article regarding the defense costs in the Weaver case. It got buried in a pretty obscure location in the paper three weeks after we submitted it; and it was cut by two-thirds.
- 714 J. Brown Going beyond that, is it possible to talk in terms of categories of effect? For example, if you say the defense costs \$200,000, that \$200,000 does not go to a lawyer. There is going to be money for investigators, money for client evaluations and money for transcripts and whatever.
- 735 Chair Ellis I see the issue. Peter or Ingrid, do you want to answer this?
- 738 I. Swenson We struggled with these issues in connection with that case.
- 740 J. Brown Is there anything we can do to help you?
- 740 I. Swenson Well, there are going to be some changes to our policy which would allow us to reveal some information and protect other information but it is an ongoing –
- 745 P. Ozanne Of course, we have historical data of cases in close enough proximity to today to establish the case you are making. Barnes and I tried to make that case in our Op Ed piece in The Oregonian. We compared the salaries of our two death penalty contractors in the Weaver cases to the DA's salaries, which were twenty to thirty thousand less. So I think, Jim, your concern is valid and one we share. [end of tape]

TAPE 1: SIDE B

- 013 P. Ozanne The average death penalty case costs PDSC about \$93,000 including non-routine expenses. We do have the historical data and can provide that. Individual cases present problems because the media wants information about a live case.
- 018 J. Stevens I was going to say you can have all the historical data you want but a reporter is going to print information about a pending case.
- 020 Chair Ellis How did they get together as much information as they did?
- 022 K. Aylward From me. The statute actually says the total amount of money may be disclosed at the conclusion of the trial. The Weaver case wasn't really a trial, but it had reached the point where it was effectively completed. So the total amount of money is this much for attorney fees and this much for non-routine expenses or all other expenses. And, of course, then they say, "Okay, well is the \$200,000 for other expenses? How does that break down?" And we compromise by just releasing the total amount of money. Because once you start breaking it down, and you are saying, "Okay, we have this much for investigation, mitigation, psychologists," and there is a category called "other." If there is a big amount of money in that category, they are going to want to know well what is that other and what expert did you use. That is where it gets hazy. There may be a category that gives something away that we are not comfortable giving away. So that is why we provide statistical information to say, "Okay, in the Weaver case, it was \$200,000 total and, of all the cases we do, 40 percent of the money goes to investigation and mitigation. So you can presume that probably 40 percent of the \$200,000 would go for investigation and mitigation. Our practice has been that we don't

release detailed information until the point at which post-conviction relief either could no longer be filed or was filed, and is now closed.

- 047 P. Ozanne I think we do need to come to you with a policy or guidelines. None of us want to do this kind of thing without your guidance.
- 051 I. Swenson When we approve non-routine expenses we ask for a tremendous amount of detail from those folks about their case, their strategy, where they are going.
- 055 Chair Ellis Do you use peer review for that?
- 055 I. Swenson Yes, we do that too. But we need to protect that information or, obviously, they are not going to be able to give us that and we will be in the dark when it comes to approving those expenses. So I just want to be able to assure folks that we have every intention of preserving the confidentiality.
- 060 Chair Ellis More questions?
- 061 J. Brown From time to time I have been involved with suing on behalf of public sector employees. So when the newspaper reports that somebody's salary is, for example, \$90,000 a year, that might not reflect the true cost. The true cost of a \$90,000 a year salary is more like \$120,000 or \$130,000. When this body spends X dollars for attorney fees there aren't any accompanying retirement or health insurance benefits. It is all in that sum, which makes the amount even more outrageous in my mind when someone compares it to other public employees.
- 071 P. Ozanne I would like to see less of the kinds of quotes in the newspaper from our colleagues in the prosecution community because I don't think it helps any criminal lawyer who is underpaid in comparison to private law practice. As Mike Schrunk suggested at our last meeting, how about a criminal justice lawyer 1, 2, 3, 4 and 5, and a salary scale that would apply equally to both DA's and defenders. That is the place I believe we should be, so I am trying to avoid arguing with prosecutors about salaries and expenses. But as long as we have prosecutors willing to go to the media with cheap shots, it is hard to avoid the arguments.
- 080 J. Stevens I have a question, speaking as someone on the other side of this discussion. In the story you are talking about it seems to me that the more information you give the media the better your argument is. Because if you are paying for investigators and you have the opportunity to say that, but if you never say that you are paying for investigators, nobody will know that. I think that more information and detailed helps your case.
- 083 P. Ozanne That's where we are on the horns of a dilemma because that disclosure could then hurt the case in court. But in the courtroom of public opinion, I certainly agree wholeheartedly.
- 092 J. Stevens Well I can see that ahead of the trial, but in the Weaver case there isn't going to be a trial. But you just leave yourself open for someone to come along and say, "Oh my god, we spent \$50,000 on this and these guys spent \$350,000!" And because you have not said, "Well, he is not paying for investigators and we are, and he is not paying for these and these and these," you lose the argument before it ever starts.
- 105 J. Hennings I fought this battle for a long time. Early on, the judges agreed that certain things have to be confidential and have to be held confidential. I think maybe it comes down (inaudible) and also maybe a better explanation (inaudible) but we don't have access to that. That is paid for by somebody else. Maybe it comes down to working with the district attorneys in order to raise all of our salaries (inaudible) we have a set response (inaudible) if you are looking at prosecution all of these things are not (inaudible)

- 115 G. Hazarabedian I am now at the Lane County Public Defender but, until recently, I had an aggravated murder contract with the Commission. While I understand the desire of the press and the public to learn more about these high profile cases, the discovery statutes make real clear as a lawyer we don't have to disclose to the district attorney who we have used as experts on a case or what evaluations we may or may not have had for our client or what polygraph or other tests we may have had performed on our clients. We only have to disclose reports that pertain to witnesses we are going to use at trial. I would hate to see the desire of the public and the press to have a better explanation for how the money is spent end up being the cause for giving gratuitous discovery to the state, which would prejudice future clients to be sure. Once the district attorney knows what a particular lawyers MO is in terms of experts and procedures on a client, that information could prejudice future clients in numerous ways I don't suspect we need to go into.
- 160 P. Ozanne May I suggest, Mr. Chair, since you and I and some others around the table here labored over the editorial on the Weaver case, which never got into the newspaper but only online, that we obtain the help from all of you who are interested to look at our piece and propose additions to it – things we didn't cover or we didn't put in; data we didn't include; information about the resources prosecutors have access to.
- 168 Chair Ellis Maybe we can draft a generic response.
- 169 P. Ozanne Yes, something that is short and concise, as Janet suggested. It has to be concise or it won't get printed.
- 171 J. Stevens Even then, it probably won't.
- 176 Chair Ellis Any other comments or questions about the complaint policy?
- 178 S. McCrea Yes. On page nine, I am going back and comparing that –
- 180 Chair Ellis This is Attachment 3. I'm looking over you shoulder and it relates to confidentiality.
- 183 S. McCrea Going back to the memorandum at page 4, talking about confidential submissions and the statute, ORS 192.502(4), and your analysis. Given the recommendation in the Attorney General's manual, I would understand that when a submission is made it is incumbent upon us as the agency or public body to inquire when submitting the information whether or not we want that to be confidential, would that be right?
- 189 I. Swenson Yes.
- 190 S. McCrea So, if the complainant wants the information to be submitted on a confidential basis, and you give the example on page 5 of the CASA, then the lawyer who is being complained about is not going to know where that complaint comes from.
- 192 I. Swenson That is right.
- 193 S. McCrea Then, if the complainant doesn't insist that the information be confidential, the complaint is not confidential. But if the attorney feels that it has be confidential there is going to be a complaint that the attorney has to make a disclosure to have the response available to the public.
- 197 I. Swenson The intention is that any party can submit the information in confidence. It may be the complainant or it may be the respondent. But in the course of the investigation we may need to talk to, for example, an investigator for the attorney: "So this was what was asked for; this was what was done?" And that person will want to talk with us about matters which are

confidential in the case. It is the intention of the policy to say that each of those people can assert confidentiality, and we have the obligation to protect that piece of the information.

- 204 S. McCrea Right. I guess what I am concerned about is, if I am the lawyer complained about, how can I defend myself if I don't know where the complaint is coming from and where the information is coming from?
- 208 I. Swenson That is an excellent question and I think the answer is this: when we get a complaint and the complainant gives us so many restrictions on what can be disclosed, it is probably going to be necessary to say, "This is as far as we can go with your complaint unless you allow me to disclose this piece of information, or even your identify." I think that is just the reality. Even today, when somebody calls and says, "I want to complain about so and so," you wouldn't expect that they were wanting that to be confidential. But if you ask them, "May I tell that lawyer?" and they say "no," then you say, "I'm sorry. There is nothing I can do to help you unless you let me talk to the lawyer." It is not addressed formally, but it is certainly the intention that we have to have the appropriate information to go forward. Otherwise, there is no way we can do that investigation.
- 220 J. Hennings Shaun raises an interesting argument and I hadn't thought about it before. What if there is a administrative fact-finder? This becomes public information if there is a contested hearing process. I sit on the Oregon Board of Investigators and we are involved in a number of contested cases. Quite frankly, we are struggling with how to handle those and how we deal with confidential information. Is there some expectation that this is going to be the investigation done by OPDS staff that is final, or is there any review?
- 233 Chair Ellis If you look through the policy, there are various instances where we end up making a final decision. It is mostly us working with the agency with whom the attorney is employed or working with people at the local level. None of these lawyers who are listed are our employees. It would be a different thing if we had a complainant make a complaint about an LSD employee.
- 240 J. Hennings I appreciate that and I think that is appropriate. What happens if you get to the end of the day and there is a contest? If there is a contest as to what events occurred, shouldn't you be thinking about what the process is going to be under those circumstances? Because this is public information and you are then saying in some fashion, "We the staff have found that this has happened."
- 252 Chair Ellis Since we are not really an action-taking body in this kind of thing, I have a little trouble with your point. You make it sound like an Administrative Procedures Act kind of process, and I don't think it is. But if the State Bar takes action, we have a process. If MPD has an employee who is underperforming, you probably have a way of dealing with that. The closest we would get is if we have an attorney underperforming on an appointment list. That is closer to something that we would take action on.
- 264 J. Hennings You mentioned our process. Our process is a confidential process that leads to arbitration.
- 268 Chair Ellis But you have the ability to be more private than we do.
- 268 J. Hennings If a complaint is published, then maybe we can't as an office respond because of those internal processes. I am concerned about where this could lead. I think the complaint process is a good one. But the fact that it becomes public raises some issues. You may be impacting a professional career and there may be a contest.
- 278 A. Christian We struggled with this at Benton County Consortium with regard to the consortium administrator and board. One of the issues that has come up is the importance of following up on a complaint. An individual wound up resigning from the consortium. The Oregon State

Bar then contacted the consortium administrator requesting whatever information the administrator had. It does create an uncomfortable situation when you think you are doing this internally through the organizational processes and then the Oregon State Bar steps in. So it is not just the complaint policy on the state level. I think each contractor should have a complaint process, and it is going to be different for different reasons.

- 303 I. Swenson Can I just respond to Ann's question. She had mentioned that to me before. And I think that, yes, we would be required to disclose to the Bar if it comes to my attention as a lawyer that unethical conduct has occurred. Then I have an obligation to notify the Bar of that. But I think notifying the Bar of such information and providing them with materials from our file are different things. I can call the Bar up and say, "I have to tell you lawyer X may have engaged in conduct which is in violation of this ethical rule," and they say, "Well, how do you know?" "Well, I have information which was provided in confidence," either by the lawyer or the complainant, or "I have some information which I can give you some of which is not confidential and some which is." I think we can work around those issues. When people submit things in confidence and you ask the lawyers, I would hope that they would always submit it in confidence for the purpose of protecting their clients. The Bar reported that lawyers very often overlook that, but that some lawyers are very careful when they respond to Bar complaints. They say, "Well, wait a minute. I don't want to give you that information. That is privileged or that is confidential." The Bar respects that when they raise the issue.
- 325 A. Christian I think how we resolve that because we do know that we all have the duty to report. But we don't have the duty to provide (inaudible) to our investigation. So we just put in our policy that information is submitted, rather than relying on the attorney to remember. Our policy simply says that information remains confidential.
- 332 I. Swenson I don't think we can do that because we are a public body and the Public Records Act requires information to be submitted in confidence before we can treat it as confidential. In our conversations with lawyers, we may want to make sure that they understand that.
- 340 A. Lopez Regardless of what our internal understanding of what court processes may be, I think it is incumbent to get the Bar's disciplinary position on how they would react to that type of situation, because if they demand that we turn it over we are sunk. We have to know that they will be consistent and be able to respect our policy so that we can assure the person who is being complained against that no matter what they tell us it won't end up on the Bar's desk.
- 350 G. Hazarabedian I have another potential issue. That is, the person who filed the complaint doesn't seek confidentiality, but the lawyer by virtue of what the answer is has to ask for that to be confidential. Then what you are going to have is you are creating a record where there are 20 public complaints with zero public answers. If you want to talk about us providing ammunition to prosecutors. I don't know the Public Records Law. Is it possible that the response needs to be confidential or do they need to be bifurcated decisions?
- 364 I. Swenson As I read the Public Records Law, they are separate decisions. But is it any different from the Bar where some lawyers have 120 complaints none of which are ever sustained? You can't really control the filing of complaints.
- 366 G. Hazarabedian I don't think some people are attacking the legal profession. I think they are attacking the expenditure of public funds for indigent defense providers. It seems to me that building our own record as to what the taxpayers are spending money on for indigent defense, where we are going to have a lot of public complaints, is certainly not the result that we want. I don't have an answer.
- 372 Chair Ellis I actually think most of the complaints we do get relate to excess money being spent as opposed to misconduct.

375 I. Swenson Mr. Chair, I would say that the ones that have been brought to your attention do, and those usually come from judges and prosecutors. It's clients who bring representation complaints to our attention and we do have a lot of those; probably more than those related to abuse of public funds.

380 J. Hennings Mr. Chair, to follow up on what Angel said, we were advised in a recent disciplinary case where the Bar wanted information and we provided a complete response based upon the complaint. The Bar said that (inaudible) which we did not find in our file.

402 Chair Ellis Let me make a suggestion because it sounds like there are more issues out there. I would like to move forward with adoption by the Commission of the complaint policy and take action on the confidentiality memorandum. But it does seem to me that there may be more work to be done. Since you are already in touch with the Bar you may want to involve them and try to work through the issues with them. Are there more questions from Commissioners on the policy itself? Do we have a motion to adopt the policy?
MOTION: J. Stevens moved to adopt policy;

419 S. McCrea Okay Barnes, here is my problem. Is the motion that we are going to adopt the policy of confidentiality –

423 Chair Ellis Policy first and then confidentiality.

423 S. McCrea Okay, then I will second that.

424 Chair Ellis Okay –
MOTION: J. Stevens moved to adopt policy, S. McCrea; 2nd.
VOTE: 5-0; hearing no objection the motion **CARRIES**

428 Chair Ellis Do you want to discuss the memorandum relating to confidentiality?

430 S. McCrea Well, we have been discussing it. I think the question is –

430 Chair Ellis Well, do we adopt it?

431 S. McCrea I don't know. I have concerns about the way that it stands. I think that we need confidentiality; and I think that is a good thing. But I would want to adopt it subject to continued analysis and research. I think that Ingrid, in conjunction with Angel or Jim or anyone who wants to be involved, should meet and confer and then come back to the Commission with a report.

438 Chair Ellis I have no problem with that. I would think, if I understand correctly your concern, we would at least want this policy and we might want more.

439 S. McCrea Yes, I think that is true.

440 Chair Ellis Am I right, Ingrid, that the word "submission" is a two-way street. It applies both to the complainant and the attorney.

443 I. Swenson Yes Mr. Chair, and anyone else that we might contact for information.

444 Chair Ellis And if I further understood it, it is your intent as a matter of practice to elicit from the submitter, "Do you wish this in confidence?" So it is not a trap for the unwary if they didn't know they had to speak up.

448 I. Swenson I would hope not. I think it automatically comes up during the conversations I have had with people on that issue. I think we should make it part of our practice to inquire.

- 451 Chair Ellis I think you should too. Is there a motion then to amend the policy with the language at the top of page 9 of Ingrid’s memorandum in bold print beginning with the word “Submissions” and ending with the word “submission.”
MOTION: S. McCrea so moved to amend policy; J. Stevens 2nd
- 455 J. Potter You asked the question about the word “submissions” and whether or not it includes the complainant and/or the attorney or both. Should that be in the language?
- 461 Chair Ellis It includes a large range of potential submitters.
- 463 S. McCrea Since we are adopting this language, aren’t we referring back to the sections on how to enter submissions on pages 4, 5 and the top of 6 of the memorandum? So that is going to be the guide.
VOTE: 5-0, hearing no objection the motion **CARRIES**.
- 469 Chair Ellis The third item is the proposed request for legislation to protect privileged communications that may be communicated to us in the context of this policy. Any discussions as to whether that is appropriate for staff to prepare legislation to be filed?
- 478 J. Potter I think it is appropriate and staff should do it.
- 480 Chair Ellis I actually think on legislative initiatives it is good to have a formal motion. So is there one?
MOTION: J. Potter so moves; J. Stevens; 2nd
VOTE: 3-1; CARRIES
- 485 J. Stevens I can’t vote for anything that narrows the Public Records Act.
- 494 Chair Ellis Let’s take a five minutes recess.
[Recess at 2:25]
- 500 Chair Ellis [Meeting called to order at 2:35.]
- Agenda Item No. 4 Discussion of Region 1 (Multnomah County)**
- 502 P. Ozanne We are about to devote part of a third meeting to the service delivery plan for Multnomah County. The relevant materials are attached to the agenda as Attachment 4, which continues to be a preliminary draft of OPDS’s report to the Commission. I anticipate that the report will probably become final within the next few months. We are awaiting further deliberation and direction from the Commission. As I recall, several of our colleagues in the contractor community still wanted to speak and didn’t have a chance at our last meeting in Portland. Our report remains largely the same. I added the comments of our guests at our September meeting as an Appendix to the report. I spoke with members of Multnomah County’s Community Corrections Department, the parole and probation department. I anticipate there will be responses to a matter raised by those folks, which I indicated in the report was only one side of the issue involved.
- 528 Chair Ellis That is the passage at the top of page 15?
- 528 P. Ozanne Yes it is. There are probably two, if not a half dozen, sides to that story. But I thought it was worth putting in the report, subject to revisions or additions as others comment on the issues regarding the post-adjudication drug court in the county. I indicated in a footnote in the draft report that there may be real problems in theory as well in practice as far as the defense

community is concerned. So I am anticipating that there is more to this story. Other than that, the issues identified in the report remain the same: as we discussed before, principally rate variations, late withdrawals and conflicts of interests. So today offers another occasion to hear more from anyone who wants to speak to the issues. On November 18, we will meet in Multnomah County again, with a public meeting followed by a Retreat on November 19. On the 18th, I anticipate the Commission will have an opportunity to discuss and deliberate over the actions to take and the recommendations to make in Multnomah County.

556 Chair Ellis

I see some familiar faces in the front row here. I would invite anyone who has views or information they want to share with us to come forward. John and Jim, are you prepared to do that?

561 J. Connors

I think the last time you asked if I wanted to respond to any of the comments that were made, and I would be glad to do so. I thought Ron Fishback at the last meeting also wanted to make some comments. I will wait my turn.

567 J. Hennings

I have told John that he is to respond as far as Multnomah County is concerned. I would like to raise one issue. I don't want the Commission to start getting sidetracked from the fact that all of the providers are substantially underpaid. Using my own analogy, our salaries when compared to the district attorneys, who I also think are not paid enough, our salaries are more than one-third less than the DA's. I know how much the independent providers get and the consortiums, and I don't think they get paid enough either. The question that you have to decide, though, is do you want these different kinds of organizations, and can you support them appropriately. You cannot have a full time public defender anywhere in this state and expect or demand that they can practice any other law on the side, or expect or demand that they be non-profits, or whatever it is you decide a full time public defender is going to be, unless you pay them the entire amount. Because they can't afford in the long run to continue to operate. For instance, there has been no money devoted to capital items in my office. Does that come out of thin air – it does not; it comes out of shorting the staff. We have to depend upon people leaving the office and not having the longevity we would like in order to pay for capital items. We have to have computers; we have to have copiers. If you are going to have full-time offices, then they have to pay enough money to provide for those offices. If you want full-time dedication from staff, you have to pay those people who do the work at least at the level of district attorneys. I think what Mike Schrunk said was very important. If you want, and I believe you should want, a sizeable percentage of the caseload being handled outside of public defender offices, then you have to pay enough money to make it worthwhile for those attorneys to do that work. I think one of the main reasons you want to do it is because it gives you the capability to add a small amount of cases or reduce a small amount of cases which I think is important because if you have an office that (inaudible). There are two analyses. One is how much does it take in order to have a full-time office, if that is a piece of what you want. Two is how much should you be paying for those attorneys who are doing it on a part-time basis and providing services. I think you need to approach it in terms of what does it take to guarantee these types of programs not only this year but next year, five years from now, ten years from now.

644 Chair Ellis

Let me ask you some questions that came to mind as we were listening to the presentations last month. Do you feel that the mix of providers we are dealing with is right, or are there some different things we should be considering? In other words, the way it is structured right now, MPD is clearly the largest provider. It is full-time, it is non-profit, it is well managed; plus we have MDI and other providers. Break it down if you want between criminal and juvenile. Do you feel that we have too many providers, not enough providers, the right kind of providers for the market?

660 J. Hennings

I think you have the right kind of providers, which is a mix of full-time offices and private attorneys who practice on the side. From your perspective, I think you have too many different providers because you have too many different contracts. In fact, by pushing a

consortium that merged five different firms to make it easier, I think there is some benefit to that. I think our office provides an entry level for many attorneys and I think we have done a relatively good job. A number of people in the consortium have come from our office and received initial training there. I would hope that you would look at, is there a way that consortiums can also bring in new attorneys, because we are all getting older. I am finding more and more the attorneys who leave my office do not hang around practicing criminal defense, and that worries me.

- 684 Chair Ellis Address in this context the role you see MPD and the role you see MDI playing in Multnomah County. I will just put some thoughts out. Do you view them as competitive? Do you view them as redundant? Do you view them as complimentary?
- 689 J. Hennings It is competitive, and it is an historical accident as much as anything else.
- 690 Chair Ellis It was no accident. You didn't want to do car cases.
- 694 J. Hennings Actually, the car cases were referred to us and we looked at them. We were told what we would be paid per case and we said we can't provide quality services at that level. Remember, MDI began originally as the Urban Legal Center.
- 702 Chair Ellis Address some of the harder topics. Historically, MDI was only handling misdemeanors and you guys were the big shots with the felonies and Measure 11's. Is that a distinction that should be perpetuated?
- 710 J. Hennings Originally, we were handling the misdemeanors. When the county extended our contract –
- 716 Chair Ellis I'm talking 15 years later, when MDI started.
- 715 J. Hennings Well, they were around about that time. The Urban Legal Center was around about the same time, and they were handling traffic violations.
- 720 Chair Ellis Forget the history. Talk to me about what is going on today. Do you think it is good policy to allocated the caseloads the way we are?
- 723 J. Hennings Traffic, we are not in competition. Misdemeanors, we are in competition. We have a very strong misdemeanor section. And in juvenile matters we are in competition. In juvenile matters, you have heard from Judge Welch. In juvenile matters, you need a large number of providers, simply because there are so many parties. It is unbelievable. Five or six attorneys could be involved in one case. You need that big a program. It makes sense in Multnomah County that there is a separate organization out in East County. That one will have to get larger because the county's intention is to have four operating courts out there – low level courts, primarily misdemeanor and traffic.
- 745 Chair Ellis So, you would be okay if their caseload shifted and they got felony cases and Measure 11 cases?
- 746 J. Hennings I don't think there are enough felony cases. I don't think you can still have a consortium with sufficient cases. We handle 68 percent of the felony cases that are appointed. The consortium handles almost all of the remaining cases. We can't handle more than 68 percent of the felony cases.
- 758 Chair Ellis So does that leave the young lawyers at MDI with no growth opportunity?
- 760 J. Hennings We have hired a fair number of them.
- 763 Chair Ellis So, do you view them in baseball terms as the farm club?

764 J. Hennings We seem to be a farm club for the federal defender and the bench.

769 Chair Ellis I'm just going to keep going.

770 J. Hennings I understand.

771 Chair Ellis At the meeting a month ago, and I will announce ahead of time I am not in favor of this proposal, the argument was advanced that we are paying twice for a large management staff: one at MPD and one at MDI. Why don't we only have one of them? I'll say quickly that I think the conflict issue makes that very unattractive. But you go ahead. What is your reaction to that?

780 J. Hennings As far as misdemeanor cases go, you need two organizations. In juvenile, I don't know whether you can reduce the number of providers out there because of the conflict situation. I would like to have the number of cases that I think is appropriate because I think our misdemeanor section is slightly smaller than it should be. But I don't think you can get away from the fact that there just needs to be a certain number of organizations. I don't think there is room for a consortium and two large organizations to handle felonies.

806 Chair Ellis Another question that came up last month at the individual lawyer level, not the cost per case level: what is your understanding of comparable compensation for a person of similar experience?

813 J. Hennings My understanding is that MDI's starting salary is lower than ours. The top range of their salary is higher than ours.

820 Chair Ellis Translate that for me. If I'm eight years into a career in public defense...

821 J. Hennings You are going to get paid more at MDI the longer you are there.

824 Chair Ellis If I'm 20 years into it?

824 J. Hennings You are still going to get paid more at MDI.

825 Chair Ellis But if I'm only two years into it?

825 J. Hennings You are going to get paid more at MPD.

826 Chair Ellis Another issue that came up last month was one rationale for what I think is an acknowledged fact, that MPD is paid at a higher rate than MDI and the consortium, is that some of the activities that MPD does benefits the system as a whole. I wanted to ask you to talk about the degree to which the training component, which has always been an outstanding feature of MPD, is shared with MDI and the other providers?

845 J. Hennings We actually just made available our program which trains people from outside the office at least twice a year, sometimes three times a year. There are two programs coming up relatively soon. Those are available –

866 Chair Ellis The word “available” could mean it's happening or it's not really happening.

869 J. Hennings We have had a variety of responses. Sometimes we have had a very good response. Other times we haven't. But we do publicize the programs and let other offices know.

875 Chair Ellis Another benefit is called the “institutional presence.” Do you get input from other offices on the work that you do in this area?

- 884 J. Hennings Probably not as well as I should.
- 885 Chair Ellis Are there other ways that you think MPD is making available to other defense providers in the region the benefits of your office. [end of tape]

TAPE 2: SIDE A

- 003 Chair Ellis One of the things that came up last month is this phenomena of what happens if conflicts don't get discovered until late in the case and you end up paying twice relating to the comment in Peter's report about the possibility of a "gray market" in conflicts. If it does in fact exist, I really want to know about and I want to shut it down. What can you share with us about that?
- 008 J. Hennings There are some conflicts that are late. The reason can be late discovery, that type of thing. Most of our conflicts are discovered very, very quickly, which is during the period of time that you are receiving discovery in the case.
- 013 Chair Ellis You mentioned that you had made great strides on technology and access to the information needed. Is that available to the other providers at the same level you have it?
- 015 J. Hennings They would have to buy the equipment that goes with it. But, yes, it is available and we have discussed it. We are available to help.
- 017 Chair Ellis Is there anyway to get common use of the equipment? You have to check conflicts early for other providers as well.
- 018 J. Hennings Not without raising confidentiality issues. I don't know any way. If all the other providers had access to everyone's database, then we have walked right into a conflict situation. We handle all the appointments of the felony matters. Maybe I should explain that a little bit. There is a wheel that has been created by staff that sets out the order in which appointments are made. There are lists that have been provided to us by Public Defense Services. Every morning we get the docket, which is basically all the people arrested on felony matters who are going to appear that afternoon. We run that against OJIN to see whether any of those people are presently being represented by somebody who can accept that type of case. If so, they get that case because we've found that that alone cuts down conflicts tremendously by keeping the client with the same attorney. We then check all of the cases to see whether or not we have any kind of conflicts. We are continuing to work with the District Attorney, who would like to provide us with more information, but can't because they have a new computer system that broke down for awhile. We look to see if we have any conflicts and then we simply go straight down the docket list. Whoever is the next person on that wheel and is authorized by PDSC for that type of case that is who it goes to. That is the screening process that we go through. If we are the next one on the list and we know that we have a conflict with that particular case, it goes to the next name--
- 044 Chair Ellis How do you figure out how many conflicts that wouldn't show up on the arrest date that would show up with witnesses?
- 045 J. Hennings You can't because the district attorney at this point can't provide us with that information as of the day of appointment. Until we have discovery, we can't get that information. None of us can.
- 049 Chair Ellis Do you want to respond to the passage the reference at the top of page 15 and the drug court.
- 050 J. Hennings I am going to waffle a little bit here. I may discuss the matter. I believe I will be coming back with some written material basically saying that this is the impression of a staff person.

The reality was that we spent over a year working on that program. There was a specific program that was set up, but within a few weeks was not working well in terms of what was expected of the attorneys. We pointed out several different times that people were not graduating from that program at an acceptable rate and I urged people to change the program back to its original design. Almost no one successfully graduated from that program. It was not a well operated program. If it is investigated further, I think you are going to find that, “yes,” we did raise issues within management to try and make the program better. But we didn’t kill the program. What killed the program was that Multnomah County ran out of money and Multnomah County said we are not going to fund this any longer after the federal grant ended. Interestingly, the program was supposed to stop and we were not supposed to put any one else in the program. But almost 41 people went into the program after they were not supposed to be put in the program. I think the question is how much investigation should be done before something is put in here as an allegation that someone is cooperative or uncooperative. It may be perfectly true, but this material is now public record.

- 081 Chair Ellis We all live in a gold fish bowl.
- 082 J. Hennings I understand that, but it seems to me that some caution needs to be made when someone is making an allegation that is part of a public record. The question I have is how much investigation went on.
- 086 Chair Ellis The title of the document is preliminary –
- 088 J. Hennings I will be coming back to the Commission with some additional material.
- 091 Chair Ellis Does anyone have anything else?
- 091 P. Ozanne Jim and I have talked about this. As everyone knows, I am the “investigator” for this report. I did talk to more than one person at the Community Justice Department in management and staff positions. They were certainly concerned about the working relationship with MPD and tried to place their complaints in the context of many positive points about both MPD and MDI. I included what I knew would be controversial statements and circulated a draft to the people I interviewed to be sure it stated what they intended. In terms of the process, I indicated in the report that these statements would no doubt require a response and that there would be different perspectives on the issue. I look forward to Jim’s response, which will then be incorporated in the next draft of the report. Realistically, that is probably the only kind of investigation that can be conducted with the staff and resources. I think it should be clear to the reader of the report that reasonable minds will differ about this issue and the merits of the complaint. The drug court program in question is no doubt controversial to the defense community and MPD will no doubt have a different perspective, as I indicated in the report. I welcome Jim’s written comments, which I will include in the next draft of the report. I think it was significant that somewhere down the road a working relationship broke down and our report of that development may induce positive responses by the Department of Community Justice and by MPD, as we have found in other counties where we have issued reports. If the program in question is inherently flawed I will report that as well. I really depend on Jim and his colleagues to make the record complete, and I am sure he will.
- 119 Chair Ellis Other thoughts you want to share with us?
- 120 J. Hennings As I started out, I think you really need to decide what types of programs you want and then you make it so they can continue to exist. If you can not pay private attorneys enough in order to attract those attorneys to take a substantial number of the cases, those too will disappear.
- 135 Chair Ellis It does put us in a little bit of a dilemma, but I don’t think we want to be line-itemizing your budget. The whole logic of the structure is we contract with an organization, and you

obviously have and should have a lot of ability to manage those resources effectively. I don't think you have detected this is a Commission that is determined to micro-manage, at the local level anyway. At the same time, you can certainly understand how your colleagues in the provider community see the numbers. The way they calculate them, and there are lots of suggestions in the staff report about why there are differences, I don't blame them for asking, "Why is that and what is the rationale?" So we aren't going to disaggregate these instrumental services in a line item budget approach. But I think we do need enough information to be confident that we are getting a bang for our buck. It is a different bang in some ways, but I am the first to say that I think MPD has been an absolutely wonderful presence in the criminal justice community in all the local communities you have been in.

- 159 J. Hennings The bottom line is there has to be enough money to run an office, with no funds coming in elsewhere, if you want such an office. The bottom line I think for the private bar is that you must pay enough to attract and keep the people. Those are the two models. Different cultures in terms of criminal defense in Multnomah County. I cannot push attorneys to handle more cases than they can handle. So, if the cost per case is dropped, then I can't bring in enough money to keep the office open.
- 188 Chair Ellis To the best of my knowledge, and somebody can correct me if I'm wrong, isn't Multnomah County the only place where we have two FTE non-profit providers.
- 191 K. Aylward Yes.
- 192 Chair Ellis Does that raise an issue?
- 194 J. Hennings I know how it happened, but I don't know if it should be undone. As I said, especially in the misdemeanor area, you are going to have to have someone other than MPD doing misdemeanors; and I think in juvenile cases you need someone other than MPD. We need the number of providers we have right now.
- 199 Chair Ellis Any other questions?
- 200 J. Potter I don't have any questions right now, even though there are plenty of questions. But I would like to see how many people are here to speak to this issue because we don't have a signup list. I would just like to get a sense of how many folks we will be hearing from.
- 203 Chair Ellis Thanks Jim. John do you want to add anything at this point?
- 204 J. Connors I'll wait.
- 205 Chair Ellis I've sensed your game plan. Paul?
- 206 P. Petterson I'll be terse, as usual. First, I would like to kind of wrap-up what I said last month. I think we need a paradigm shift after Gideon for felonies and for misdemeanors in Oregon. Oregon is better than almost any place else in the country, but Oregon has accommodated those constitutional requirements with an ad hoc patchwork system. Instead of FTE, which I think is the model, we got contracts for this, hourly for this, contracts for that – a patchwork over the last 30 or 40 years. I think if you are going to have contracts, you should switch from that ad hoc patchwork system to a professional state contracting approach: again, the 1955 Oregon State Contracting Law where you use the prevailing local wage. You look at the private bar and you model your expenses after that. You look, as the Bar does with its surveys, at how much the average salary is for private criminal defense lawyers in the community.
- 224 Chair Ellis Do you disagree with Jim's description of the comparative incomes of the lawyers at MDI and the lawyers at MPD?

- 226 P. Petterson The salary scales?
- 227 Chair Ellis Yes. Do you disagree with his description?
- 228 P. Petterson He got it right this time. Our salary scale goes higher and his salary scale starts higher.
- 230 J. Hennings That is what I said.
- 231 P. Petterson Both of them are way, way, way below, not just the prosecutors, but the private market, which I think should be the Commission's policy that is consistent with the professional state contracting system started way back 45 years ago. I just wanted to repeat that. You will be hearing that as long as I am speaking to you. That should be your goal. Gideon has never been implemented, and I just wanted to repeat that. Whether MDI and MPD should co-exist in the Metropolitan area? Of course. King County has three or maybe four full-time public defender offices. It is a function of the size of the urban community. You can't compare it to Grant County. Why aren't there two public defenders there? Because we have a large urban county and, obviously, because of conflicts. Now we historically and accidentally developed where MDI is mostly misdemeanors and not felonies. I propose, and I have repeated over and over to you, that we add some felony cases – a dozen or so cases a year. A dozen or so would not take anybody else's contract away. Some of the cases involve the clients we already represent. So, as Jim described the docket every morning, a case comes up; they look at OJIN and who does the person already have for a lawyer, if anybody. If it is MDI, then that case should go to MDI. It makes perfect sense for the client because he doesn't need two or three or even four different lawyers. It makes sense for the court. You don't have to have all kinds of conferences and try to get these global –
- 256 Chair Ellis How many of these – you said half a dozen or a dozen – is that really the magnitude you are talking about?
- 258 P. Petterson Yes, a dozen or two a year is my proposal. And it has been on the table for a year and a half. The contract accommodates that, but it doesn't happen because that accommodation involves a process that requires a call or an e-mail to Salem to say, "We already represent this person, the person has been charged with a felony, we can take that case, is that okay with you, Salem?" If they say "yes," then we get that case. But that is a very cumbersome and unorganized process. It has worked so far this year exactly once. But there has been a dozen or so cases where it should have worked. It is in the client's interest to have one lawyer to accommodate the long-term interest of the system because if that case and the client ever comes back we minimize future conflicts by keeping that client with that firm, instead of spreading them around on a rotation basis like we do now as Jim described. You do this rotation business and after a decade or so, everybody has a potential conflict. You just maximize future conflicts by doing this rotation. It also works well in the juvenile system, and we are an essential part of that, as Judge Welch described, in their felony probation consolidation program. So, if I represent a father in a dependency case and he picks up a felony case or a felony probation case, another contractor gets appointed. That doesn't make any sense and it doesn't work at all well in Judge Welch's program to consolidate all those cases because then you get not just a half dozen lawyers you get one. My proposal over the years is just add a dozen or two felony cases of clients that we already represent. It is not going to dislocate anyone and it is best for the client and the system. It is also good for my staff. In the last year, I have lost three of my brightest young lawyers because we don't have felony cases – one to Jim and two to the consortium. So I am the farm team.
- 292 Chair Ellis That is not all bad.
- 293 P. Petterson And we will continue to be the farm team. I like being the farm team. We do excellent training, which is why they cherry pick them after a year or so.

- 294 Chair Ellis Anyone have questions for Paul?
- 297 P. Ozanne Paul, as you suggested with regard to contracting law, I wonder whether you think the Commission should consider from its study of Multnomah County more consistency in terms of how contractors' organizations are structured. There are entities that we loosely refer to as non-profit full-time public defenders that seem to share common characteristics. Let's assume that it is true around the state that the internal allocation of resources within these offices varies from office to office. Some of this may have to do with the seniority of staff, so they are paid more. But it looks to me, though I haven't carefully investigated this, that these offices that are striking different balances between salary and infrastructure, including investigators and other things. I am not criticizing that approach. There just seems to be significant variations between offices. Since you all are independent contractors, one could argue that this is the prerogative of the independent contractor. But since you seem to share my aspiration for some consistency, do you think the Commission should make some effort to influence the allocation of resources within offices to attain some consistency. How do we pursue parity or make any sense of it without such consistency? If separate offices are making choices that affect their salary scales versus their infrastructure, is that something the Commission should look at?
- 322 P. Petterson You should certainly be aware of it and observe it and understand it and have a dialog about it. I spent 24 hours over the last six months in heavily mediated labor negotiations. I don't know if you want to join that process. The allocation of resources for my firm and for Jim's firm with labor ingrained in the process is quite complex. I would be glad to describe it to you detail.
- 333 P. Ozanne What about around the state. Should we be striving for some consistency in entities – in this case, nonprofit public defenders? Or do we leave that to the judgment of the board of directors within each office? Some offices will pay more and some offices will pay less. Some will have internal investigators and some won't.
- 339 P. Petterson Well, you either have investigators included in the contracts or you don't. So you have some control over that. If you want to add professional investigators to your staff, you have some influence over that with the resources you are contracting for – whether you want to say that a public defender have a streamlined, minimal management system, as I do, or a overblown heavy management system, like a hypothetical one.
- 344 Chair Ellis Beginning with M?
- 344 P. Petterson I think you just leave that to the board.
- 345 J. Stevens Peter, isn't that basically what Judge Jones was talking about last time, and it would require us to quantify the various elements?
- 345 P. Ozanne With due respect to Judge Jones, I think his approach was a little heavier handed than what I had in mind, but it raises the same question.
- 346 J. Stevens Wouldn't it require Jim, for example, to quantify the value of his training programs, so that we could choose to contract with him or not contract with him for those kinds of things.
- 347 P. Ozanne It might require that.
- 347 Chair Ellis I am going to speak for Jim. I just see lots of problems with those kinds of things. So he has two or three of his senior managers that are handling the training. Are you suddenly going to quantify the costs of the training by some arbitrary percentage of their costs? It is a growing concern and you don't just pull out training as a line item.

- 353 P. Ozanne Maybe then I misunderstood Janet’s question. My question is, should the Commission ask an office that has a low salary structure along with training programs, and it is allocating some of our resources to the training program and complaining about low salaries, and another office doesn’t have a training program and is paying higher salaries – do we have anything to say about that, or is that within the prerogative of the contractor? I can see the argument that we should have laboratories of experimentation with variations in internal practices and allocations of our funds. Our market system arguably promotes innovation by encouraging approaches. I don’t necessarily have a problem with that. But I am just asking the question whether we strive for consistency or allow for diversity. But if we permit the current level of diversity, how do we make sense of the notion of parity and how would we achieve it?
- 365 J. Stevens To do that, don’t you have to set a value on the various components to make a judgment that they are paying low salaries because they are also doing this? And they are paying high salaries because they are not? Don’t you have to quantify the value of the individual services?
- 371 P. Ozanne If you ask a contractor to come forward and explain it, that process would probably require some quantification. Whether you would do it on an ongoing basis, or ask them to do it on a line item by line item, I don’t think any of us would want to do that.
- 374 J. Hennings Peter raises an interesting issue and that is, what is the appropriate caseload? This has been debated for 40 years at the national level. How many cases can an attorney handle per year? Florida tried to address it perfectly. They have full-time public defenders in every county and they are actually elected, which is bizarre. The public defenders have a state standard that states the number of cases that can be handled by an attorney and provide that they are supported by X number of support staff. And they cost it out – the state rate for an attorney and it is a comparable rate with the district attorney. And they talk about parity for investigators and support staff. For every case it was projected they would handle, that was how they determined the salary cost. They then told each of the offices, “This is your baseline budget and if you want to have more attorneys and fewer support staff or whatever, as long as you can prove to us that you are providing quality services in all the cases, that is what it is.” One of things I think you are going to have to decide is, are there limits that you want to impose on how many cases an attorney can handle with what type of support staff and what kind of cases? That is what you need to take a look at, if you want this kind of comparability, especially if you want to do it across the state.
- 406 Chair Ellis Angel, do you want to report?
- 406 A. Lopez I am part of the consortium in Multnomah County, which is five law firms there. I think the big assumption that was relied upon when we were asked to be a consortium was that it would decrease the amount of internal conflicts within our consortium. And I want to tell you that that assumption was right on the money. We have saved you a lot of money because we have been able to funnel our conflicts internally at no extra cost to you. Another assumption was that in having the Calhoun, Fishback and Engle firm and my firm as part of the consortium was that we would be able to absorb the vast majority, maybe 95 percent or more, of all Spanish speaking cases in Multnomah County, whether they be misdemeanor cases or felony cases. It enables us to do the work by speaking to our clients in Spanish. We all have staff who speak Spanish who can talk to our clients in Spanish. And guess how many dollars an hour that saves you? That is an assumption that was not reflected in what we are being paid. For Spanish speaking work, we are being paid the same as any other type of case. And as a consortium, we are being paid less than the non-profits. Quality control is an issue that has always been near and dear to my heart. There is no reason for anybody here to think that I do not care about the quality of representation being afforded by the lawyers in my firm. And you know why? Because my name goes out on every piece of paper and I take great pride in that. I take great pride when I have a new lawyer go into court and the judge says, “Where do you work?” and they say, “Squires & Lopez;” and they say, “You are working with an

excellent outfit, you are very lucky to be working there,” and they are very lucky to be working there. I want to extend my thanks to this group because I know what you are doing is very difficult. I know this could have just easily sunk to a situation where we are all pointing fingers at each other and saying, “They are no good, or they are less than competent and why don’t you give us more and give them less.” It didn’t descend into that and we kept on the high road. I think if anything has come of this experience, it is the understanding by this Commission and I think by each other of the “value added” that each of our firms gives to Multnomah County. We all serve a purpose, we all serve a function and, in terms of the report, I would ask that you change nothing about it. I was very, very happy with the responses and I think they are reflective of the work we do. I think it is reflective of who we are as a group and how much we care about what we do. When I first started doing public defense work some 14 or 15 years ago, I went into it with the idea that I decided my business could help support the public side. So we could afford to be a little more reasonable in value, cheaper if you will, in the public defenses, and that was true 15 years ago. Because 15 years ago life was not as expensive as it is today. Fifteen years ago our young attorneys and our potential young attorneys were not saddled with debts from \$60,000 to \$120,000. So what we found as the years went by was the proportion of our private profit and our public defense are going like this. The public defense is now eating into our profits at a significant rate. We learned that very, very painfully when BRAC came into play. We learned that when I had to tell my partner, “Guess what, this month we aren’t getting paid and next month we aren’t getting paid. You and I, our staff is and our lawyers are. Once more, we have to take out a loan in order to keep the place operating.” And she told me, “Well, what the hell are we doing this for?” Why the hell we are doing this is because I have a commitment, because we have a commitment, to helping those who cannot help themselves by virtue of the bad breaks they got in life. I do this because I believe in giving an equal voice to the voiceless, whether they are in trouble and charged with murder or whether they are in trouble and charged with criminal trespass. They deserve to be equal and equally represented in comparison to those on the other side who are represented by our gifted and well-paid prosecutors. You have two hurdles to jump here. It is not about giving Metro less. It is not about giving MDI less. It is about raising us all to an equal standard of living and then raising us all to a realistic standard of living. Last Saturday at the House of Delegates meeting, a resolution was passed to reaffirm the commitment of the Bar to adequate funding for our cause, public defense. And the bright spot of that for me was when a young deputy district attorney in Washington County stood up and said this: “When we had the BRAC, I had the unfortunate experience of having to tell many of my complainants that their cases just were not important enough to prosecute; that they would just have to stand in line and wait. I never, ever want to have to do that again. But I also learned because of the BRAC experience how important the defense function is. Without the defense function the justice system cannot function.” We all need to recognize that and we all need to recognize that in enabling the best of the best to continue what we are doing, to pay them what they are worth and to move forward. Last session we weren’t even there. Now we have the prosecution understanding how important we are to the integrity of the system. I believe that we are in a place of having the Legislature understand how important we are to the system. So I say let’s focus on what is really important here. This is not a time to finger point or to say why I’m better than they are. It is a time to get us to where we should have been long ago.

529 Chair Ellis

Thank you.

529 R. Fishback

Angel and I are both board members of PDC. I can add very little to what he had to say, but I would point out a few things. The consequence of BRAC was that when it played out we accepted lesser rates in case counting and that sort of thing. We found ourselves in a position that structurally we were carrying more cases. John talked about value added and Jim talked about the services his lawyers provide. Angel talked about the Spanish situation. My office also has an office manager who is Guatemalan and speaks Spanish and two lawyers who speak Spanish. When you consider all these things, make it fair, make it equal and bring us up to where we should be, and then bring us all up to where we should be. I’m here to tell

you PDC is five firms, 21 lawyers; and the vast bulk of our work is public defense work. It limits the number of private cases we can take. So keep that firmly in mind. At least 95 percent or 97 percent is from public defense work.

- 597 Chair Ellis Thanks. Any other presenters on the Multnomah County issues?
- 599 P. Petterson I now have five law students in my office, the next generation.
- 600 Chair Ellis Good. All this talk about graying, we need some.
- 601 P. Petterson They are all going to a special deal from Mr. Potter to this new lawyer training. And they will be ready to hit the ground next year, so I will give you their names.
- 616 Chair Ellis Thank you all for your input. Let's move now to Item 5.

Agenda Item No. 5 Status Report on Lane County's Court Appointment Process

- 619 Chair Ellis Shaun what can you tell us.
- 619 S. McCrea Last month, Mr. Chair, at the last meeting, the Lane County Public Defender announced that Tom Sermak would be their representative. Things got bogged down a little bit between my request of Judge Bearden, as to who she wanted for the Lane County judge position, and me being out of the country. So now we have been in contact and she recommended Jack Mattison. I ran that past Tom and Peter Ozanne. Now we have three members of the panel, what we have to do is to pick the other two members. I talked to you a little bit informally before the meeting because Tom and I had a difference of opinion about the fourth member. It was my recollection that the fourth member should be an attorney in Lane County who practices in Lane County and has some background in criminal cases with the prosecution or the defense. Then the fifth member would be somebody basically at large. Was that your understanding?
- 638 Chair Ellis It was.
- 639 S. McCrea Then my intention is to try and get this put together and have the two other people on board by next week.
- 644 Chair Ellis Then assume that we are going to key in on the administrator as the first order of business.
- 648 P. Ozanne We have four responses. So we are prepared to confer with the panel. My recollection is we are supposed to do that is that right, Shaun?
- 651 S. McCrea That is correct.
- 654 G. Hazarabedian I have a question. I was at the last Commission meeting and I thought I heard something about the Lane County Bar Association picking one member of this panel.
- 657 S. McCrea I think what I had said, and this is what I intend to propose to the other two core members, is I have talked with John Kim, who is the Lane County Bar Association president, about assisting us. And he is certainly willing to do that. So I intend to consult with him.
- 661 Chair Ellis This sounds like it is moving right along.
- 664 S. McCrea It is going to move right along or else John is going to take it over.
- 666 J. Potter It is going to move right along.

668 Chair Ellis Any other questions on Lane County?

Agenda Item No. 6 Discussion of Plans for PDSC's November 19th Retreat in Portland

669 Chair Ellis Item No. 6 is to talk about the Retreat. We are talking about November 19. We will hold our Commission meeting the afternoon of the 18th and then, hopefully, everyone can stay over in Portland.

674 P. Ozanne We think we are close to reserving the Kennedy School. So we will have it there and I don't think we have set the time, but probably 9:00 to 4:00. I'm open to suggestions, but I would like the majority of the day to talk about some of the items that I have suggested on Attachment 5.

688 Chair Ellis Legally, this is an open meeting, but we run it somewhat informally -- kind of a think tank meeting as opposed to an actual decision-making meeting. As with our prior two Retreats, we do welcome providers or others to come. I think the question you are asking is, are there particular subjects that people want to include on the agenda and Attachment 5 is a list of suggestions. Does anyone have any of those or others that they are particularly anxious that we include; or do we leave it up to Peter and I to come up with items? I certainly think that the potential legislation piece is right on the money. I think we want to do that. Peter, it might be good to circulate the Strategic Plan for those who don't keep good files.

711 P. Ozanne Yes, I think we need to revise that plan for the following year. That ties into #1, which were the directions you gave me to accomplish as the core of the Strategic Plan.

718 Chair Ellis I personally like Item 10. I think the delivery planning process is an important part of what we are doing. I want to make sure that we keep focused and keep on task.

723 S. McCrea I think that #5, the intangible Performance Measures, builds into that Barnes.

731 Chair Ellis Any other thoughts.

733 J. Potter On #7, we haven't heard from Ingrid. I'm surprised because it just spells out death penalty qualifications. Do you not wish to have some standards for juvenile representation in there too?

735 Chair Ellis This says "especially." It is not limited to that type of case.

736 J. Potter That is what surprises me, I guess. It didn't say "especially juvenile."

737 I. Swenson We may not be ready for that discussion yet. I think it needs to happen and I hope it does. But it may not be ready at this point.

743 Chair Ellis Peter, do you subsume under #3, the budget packages, I don't know that we have formally –

747 P. Ozanne Yes, I would be happy to do that. Between #3 and #6, we would want to cover that.

749 Chair Ellis For those of you who don't know, I spoke some this morning to the larger audience about PCRs and the Policy Package we are considering. Anything else on the Retreat? Does it look like we are going to get a decent attendance on that?

758 P. Ozanne I think everybody that is here now is coming.

759 Chair Ellis Has Chip spoken?

760 P. Ozanne No.

- 761 Chair Ellis Has Jon resigned? Does the Chief have any news for us on a replacement?
- 764 Chief Justice Carson No news. I have a list of about 15 people that several of you have put together. I would be glad to take more names. I haven't called anybody. None of these people have been approached, or have said they are just dying to do it. One name is Mike Greenfield. I want to road test with folks in the Legislature and Robin specifically to see how that would read. What I am looking forward is another Jon Yunker.
- 787 Chair Ellis There isn't one.
- 787 Chief Justice Carson I know there isn't, but he brings government experience and is well known in budget circles. Kent Aldrich is another person that has some background. The one I thought of, and I have no idea whether he is interested in doing it, is Rick Burke, who is the former Legislative Fiscal Officer. I have a list of people and I looked at the list that OCDLA gave us. But I would like to talk with you, Mr. Chair, and Peter.
- 811 Chair Ellis Sounds like this may not happen by November 19th, but it might.
- 812 Chief Justice Carson It could. Anyone else who has other names out there or on the Commission that they think ought to be considered.
- 823 J. Potter Mr. Chair, Chief, is there somebody that is due to rotate off in this group?
- 827 Chief Justice Carson No as a matter of fact I have an order here from Kathryn, who is really getting good at making me do my work. Kathryn went over to the State Court Administrator's office and got information for an order that recognizes who you all are and what your terms are. Lazenby should have been reappointed on 12/12/03.
- 841 Chair Ellis Maybe this explains his attendance.
- 842 Chief Justice Carson I certainly can't hold him in contempt. Yunker said he would serve for one more year, and in December his year is up. Jim will be extended, and should have been extended as of August of last year; and Shaun too. The carry over members are Barnes, whose term ends in August 05 and John, whose term expires in August of 05 and Janet, whose term expires in September 06. So that is where we are right now and I do hope to get all put together, but no guarantee.

Agenda Item No. 7: New Business

- 867 Chair Ellis Any new business?
- 868 Chair Ellis **MOTION** J. Potter moved to adjourn meeting; J. Stevens 2nd
VOTE 5-0

Meeting adjourned at 4:00

Presenter: Kathryn Aylward

Public Defense Services Commission

Meeting Action Item

November 18, 2004

Issue

PDSC approval of Preliminary Agreement (PA) for a death penalty contract to begin January 1, 2005.

Discussion

Attorney Timothy Lyons submitted a proposal in response to the Request for Proposals for death penalty contracts issued in the Fall of 2003. At the time, the decision was made that additional death penalty contractors were not needed. Bidders were informed that their proposals would be kept on file and that if circumstances changed, we would consider awarding a contract in the future. In recent months, there has been an increase in the number of death penalty cases particularly in the metropolitan area, and there is now sufficient need to add an additional contractor.

Recommendation

Approve the preliminary agreement listed below.

Required Commission Action

Vote to approve the preliminary agreement listed below.

Contractor	Primary Counties	Contract Amount	Comments
Wm. Timothy Lyons	Clackamas, Multnomah, Washington	\$155,052	Fully executed one-year PA

Blakely Workgroup

Options before the Group as of 11/04

I. Potential Legislative Fixes to Sentencing Guidelines after *Blakely*.

a. Do nothing. Do nothing and see whether the system can function under *Blakely*.

b. Keep things as-is, but amend guidelines and other statutes to permit the state to allege and prove aggravating factors to jury. Because of the doubt that *Blakely* casts on the state's need and ability to allege "sentencing" factors in a trial, the statutes and guidelines could be amended to expressly establish a procedure by which the state can and must do so.

Should Oregon enact statutory authority for notice of intent to prove/present aggravating factors to a jury, based on the Kansas Statute 21-4178?

c. Convert all "presumptive" sentences into "advisory" sentences, with departures being permissive based on no particular findings. This might be the quickest fix, as we see how *Blakely* plays out in Oregon, and might be accompanied by a sunset clause to provide us that opportunity.

d. Increase all presumptive ranges by some amount, but otherwise maintain the court's ability to impose upward/downward departure sentences in conformity with *Blakely*. This would allow a judge to impose a sentence that is greater than the current presumptive term, but would still constrain discretion and would require jury findings of factors that will support departures from the heightened presumptive range.

e. Increase the "presumptive range" to the current maximum departure sentence, with the ability to depart downward based on findings by the court of *no* aggravating factors. This would be very similar to our current system, but would be based on the idea that a court may (or shall?) impose downward departures if no aggravating factors exist.

f. Create "aggravated" forms of crimes based on aggravating factors. This would eliminate any concern about the state's ability to allege and prove "sentencing" issues at trial, because it would require the state to prove the aggravating factors as part of the offense itself.

g. Return to an indeterminate sentencing scheme. This would avoid the *Blakely* issue, because the only limit on the court's discretion to impose sentence would be the maximum indeterminate term (e.g., 20 years for a Class A felony; 10 years for a Class B felony; 5 years for a Class C felony), and the parole board would have the authority to execute those sentences and to make parole decisions.

II. Contemplated Legislative Fixes to Individual Statutes.

1. Should the legislature consider amending ORS 137.750 (judicial denial of sentence reduction options) because of possible Blakely impact?
2. Should the legislature consider amending ORS 137.121 and .123 (re: consecutive sentences) because of possible Blakely impact?
3. What changes to guidelines rules (including adding to or modifying aggravating factors) should we consider?
4. Are there statutory changes or other state-level work to be done on waiver of rights related to Blakely?
5. Should the Criminal Justice Commission's rulemaking authority be modified to enhance its ability to adopt rules to respond to future judicial decisions similar to Blakely?
6. Should the "jail space availability" consideration be addressed and modified?
7. Should the sexually violent dangerous offender statute be modified?

Memorandum

Draft

To: Blakely Workgroup
From: Legal Services Division of the Office of Public Defense Services
Re: Potential Legislative Response to the Procedural Requirements Imposed by State and Federal Constitutional Law Prior to the Imposition of Minimum Sentences and Departure Sentences
Date: 11/11/04

Introduction

The workgroup was formed to address the ramifications of the United States Supreme Court decision in *Blakely v. Washington*, 542 US ___, 134 S Ct 2531, 159 L Ed 2d 403 (2004), which was decided under the Sixth Amendment's guarantee of the right to jury trial in a criminal case. One possible legislative response is a variation of the "Kansas method," as proposed by the Attorney General's office.

While considering the impact of the *Blakely* decision, the legislature should likewise consider the requirements imposed by Article I, section 11 of the Oregon Constitution, which also guarantees a criminal defendant the right to a jury trial.

In *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981) and *State v. Wedge*, 293 Or 598, 652 P2d 773 (1982), the Oregon Supreme Court announced the following "simple principle":

"In *Quinn*, we stated as a simple principle that facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing judge." *Wedge*, 293 at 607.¹

In *Wedge*, the Supreme Court held that Article I, section 11 guarantees a criminal defendant the right to have a jury, not a judge, make the fact finding necessary to authorize the sentencing court to impose the gun minimum sentence (ORS 161.610). The legislature responded to *Wedge* by amending ORS 161.610 to provide that "the use or threatened use of a firearm * * * by a defendant during the commission of a felony may be pleaded in the accusatory instrument and proved at trial as an element in aggravation of the crime as provided in this section."

¹ Elsewhere, the *Wedge* court presciently observed: "The legislature cannot eliminate constitutional protections by separating and relabeling elements of a crime." *Wedge*, 293 Or at 608.

Given that the Oregon Constitution guarantees a criminal defendant the right to a jury determination on the “facts which constitute a crime” and the federal constitution guarantees a criminal defendant a jury trial on *any* fact that exposes a criminal defendant to a longer sentence than otherwise statutorily prescribed, a legislative response should arguably attempt to accommodate the guarantees of both constitutions.

Overview of Possible Legislative Response

1. Reduce the number of departure factors to the most common factors.
2. Amend ORS 132.557 to include a subsection that would require the prosecution to plead in the charging instrument the departure factors that are related to the particular offense.
3. Amend ORS 132.557 to include a procedure for the imposition of a minimum sentence or a departure sentence based on facts related to the offender.

Possible Statutory Wording

Amend ORS 132.557 to read as follows (**new text in bold**):

(1) When a person is charged with a crime committed on or after November 1, 1989, that includes subcategories under the rules of the Oregon Criminal Justice Commission, the state is required to plead specially in the indictment, in addition to the elements of the crime, any subcategory fact on which the state intends to rely to enhance the crime for sentencing purposes. The state shall plead the elements and subcategory facts in a single count. Nothing in this subsection precludes the pleading of alternative theories.

(2) The state must prove each subcategory fact beyond a reasonable doubt and the jury shall return a special verdict of “yes” or “no” on each subcategory fact submitted.

(3) Any fact or facts that are related to the commission of the offense and whose existence authorizes the sentencing court to impose a minimum sentence or a departure sentence are to be pleaded in the charging instrument and found by the jury beyond a reasonable doubt before the sentencing court has the authority to impose the minimum or increased sentence.

(4) Apart from recidivist statutes,^[2] any fact or facts that characterize the offender and whose existence authorizes the sentencing court to impose a minimum sentence or a departure sentence are not to be pleaded in the charging instrument but are subject to the following procedures.

(a) No less than 30 days prior to trial or 14 days prior to plea, the prosecutor shall file with the court and serve on defendant a “notice of intent to seek a departure sentence” that identifies the departure fact or facts the prosecutor intends to prove.

(b) Following the proceeding that establishes defendant’s criminal liability for the underlying offense, the court shall conduct a separate fact-finding proceeding before a jury at which the rules of evidence apply and the prosecutor bears the burden of proving the existence of the alleged fact beyond a reasonable doubt.

(c) If the jury finds the alleged fact or facts beyond a reasonable doubt, the sentencing court has the discretion to impose an upward departure sentence prescribed by the Oregon Sentencing Guidelines.

(d) A criminal defendant may waive jury and agree to be tried by the court on the departure fact or may stipulate to the existence of the departure fact.

Perceived Benefits

1. There should be **no negative fiscal impact** on the **Department of Corrections** because the sentencing courts will be in the exact same posture under these procedures as they were pre-*Blakely*. In other words, once the factfinder determines the existence of the departure factor, the sentencing court still has discretion (as it always had) to impose or decline to impose an upward departure sentence. Consequently, as to those cases where departure facts are found, there should be no increase to the percentage of cases that result in an upward departure sentence.
2. The offense-related procedures would satisfy state (*Wedge*) and federal (*Blakely*) constitutional review without evoking objections that the introduction of evidence relevant to the offender-related departure factors would improperly prejudice the jury during the trial and deliberations.

² This term refers to statutory offenses that include a prior conviction as an element of the offense, such as felony DUII.

3. Because the prosecutor knows the facts of the offense at the time of charging, the fiscal impact on prosecutorial resources to implement the charging aspects of the statute would be minimal.
4. The jury could indicate its offense-related departure findings by a simple “yes/no” special verdict.
5. It appears that most departure factors are offense-related; consequently, the offender-related departure proceedings will be relatively infrequent and of limited scope, thereby limiting fiscal impact on the prosecution and the judicial department.
6. The predominant objectives of the sentencing guidelines (conservation of Department of Corrections resources, truth in sentencing, and fair and appropriate punishment for each offender) are preserved.

DRAFT
(11/12/04)

**OPDS's Report to the Public Defense Services Commission
on Service Delivery in Multnomah County (Region 1)**

Introduction

Since the completion of its Strategic Plan for 2003-05 in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its 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 the risk of legal errors and the resulting delays required to remedy them, the Commission has concentrated on strategies designed to improve the quality of the state's public defense delivery systems and the legal services delivered by those systems.

Foremost among those strategies is what the Commission refers to as a "service delivery planning process"—a process designed to investigate and improve local public defense delivery systems across the state. During the first half of this year, the Commission undertook investigations of the public defense delivery systems in Benton, Lane, Lincoln and Linn Counties. Following those investigations, PDSC developed Service Delivery Plans to improve the operation of those counties' delivery systems and the quality of legal services the Commission provides in those counties.

This report, which examines the condition of Multnomah County's public defense delivery system, represents one of the first steps of that planning process in Oregon's largest county.

PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by OPDS and a report such as this, the Commission will review the condition and operation of local public defense delivery systems and services in each region by holding public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's Service Delivery Plans will (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system

and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts. Fourth, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region.

Because critical steps in PDSC's service delivery planning process will not yet have been completed, any findings and preliminary recommendations in the final version of this report may be reconsidered or revised, depending upon new information presented to the Commission and its deliberations at subsequent meetings, as well as additional research and investigations by OPDS that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops in a particular region will not be the "last word" on the service delivery system in that region, or on the quality and cost-efficiency of the region's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the extent of the first planning process in any region. Indeed, PDSC's planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to address pressing problems in those regions.

Background and Context to the Service Delivery Planning Process

The 2001 legislation creating PDSC was based upon an approach to public defense management, supported by the state's judges and public defense attorneys, that Oregon's public defense function should be separated from its 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 indigent clients, the Commission not the courts is primarily responsible for the provision of competent public defense attorneys.

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

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

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of experienced public defense contractors from across the state. That group

advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review processes 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.

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

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the performance of public defense contractors and individual attorneys. 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. 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.

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).

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in

conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations 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 the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

While some of Oregon's public defender offices operate in 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

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

result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

- Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP for a consortium 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 30 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

³ *Id.*

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

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

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

- Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public 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 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, the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

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

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

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

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

OPDS's Observations Regarding the Service Delivery Planning Process in Multnomah County

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

weaknesses of a local system in order to assist the Commission in determining the need for changing the service delivery structure of that system and the kinds of changes that might be needed and (2) identify issues the Commission is likely to confront in the event changes are needed.

These investigations serve two other important functions. First, they inform local public officials and other stakeholders in a county's criminal and juvenile justice systems of the condition and effectiveness of important aspects of those systems. The Commission has discovered that the function of "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, create its own momentum for self-reflection and improvement. Second, the history, past practices and rumors in a local justice system can distort perceptions about current realities. OPDS's investigations and reports on service delivery may serve to correct some of those misperceptions.

Over the coming months, as PDSC deliberates on the service delivery issues in Multnomah County, OPDS conducts further investigations and the Commission receives public comment, this Draft will develop into a final report to the Commission on the condition of Multnomah County's public defense delivery system. The blank sections in this Draft will eventually contain all of OPDS's substantive findings and recommendations to the Commission regarding the effectiveness of Multnomah County's delivery system and the need for any change in that system.

At this stage of the Commission's service delivery planning process, the Draft of OPDS's report to the Commission is simply intended to provide a framework within which the Commission can undertake discussions regarding the condition of public defense service delivery in Multnomah County and the range of policy options available to the Commission—from concluding that no changes in the county are needed, to significantly restructuring the county's delivery system. This draft is also intended to offer some guidance to PDSC's contractors, public officials and justice professionals and other stakeholders in Multnomah County's criminal and juvenile justice systems about the kind information and advice that is likely to assist the Commission in maintaining or improving the county's public defense delivery system. In the final analysis, the level of engagement and the quality of the input from all of these stakeholders may be the single most important factor in determining the quality of OPDS's final report to the Commission, and the effectiveness of the Commission's final decisions regarding service delivery in Multnomah County.

Therefore, on behalf of the Commission, OPDS urges all interested parties in Multnomah County to forward written comments regarding this Preliminary Draft, or any matter relating to the delivery of public defense services in the county, to Peter Ozanne, the Executive Director of OPDS at peter.a.ozanne@opds.state.or.us, or at OPDS, 1320 Capitol Street NE, Suite 200 Salem, Oregon 97303. The written comments received thus far are included in Appendix "A".

The Commission has also held three public meetings to receive testimony and public comment from contractors, judges, prosecutors, other criminal justice stakeholders and interested citizens in Multnomah County. Excerpts from the Commission's September 9, 2004 meeting minutes, which include the comments from the Commission's guests and others in attendance, are attached as Appendix "B."

At the request of the Commission, a comparison of the rates public defense contractors are paid in Multnomah County is included in Appendix "C." A comparison of the average salaries paid to attorneys in the county's not-for-profit public defender offices and the Multnomah County District Attorney's Office is attached as Appendix "D." An analysis of issues relating to the management of conflicts of interests is contained in Appendix "E."

A Demographic Snapshot of Multnomah County

With a 2001 population of 666,350, Multnomah County is the largest county in Oregon.⁴ As the home of at least five major institutions of higher education, the county's residents are relatively well-educated, with 20 percent of its adults over 25 years old possessing a Bachelor's Degree and 11 percent with post-graduate degrees. Forty-five percent of the county's high school graduates enroll in college.

As the leading center for commerce and industry in the state, Multnomah County has had a relatively low unemployment rate in recent years, below the state average in 2000 and the unemployment rates of 31 other Oregon counties. The county also has a relatively high proportion of professional, scientific and management workers in its workforce (11.4 percent, compared to Washington County with 11.9 percent) and the third highest per capita personal income in Oregon (at \$31,419 compared to Washington County at \$31,891 and Clackamas County at \$33,362).

Multnomah County's population is one of Oregon's most diverse counties, with non-white and Hispanic residents making up 23.5 percent of its population, compared to 16.5 percent for Oregon. The percentage of the county's individual residents living in poverty is 12.7, compared to 11.6 percent in Oregon and 12.4 percent in the United States.

With 22.3 percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Multnomah County's "at risk" population, which tends to commit more criminal and juvenile offenses, is smaller than average. However, the county had the third highest index crime rate in the state in 2000 (74.8 index crimes per 1,000 residents, compared to Lane County at 57.9, Marion County at 58.5 and the state average of 49.2).⁵

⁴ 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).

⁵ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

The public defense caseload in Multnomah County is approximately 24 percent of the statewide total.

OPDS's Findings in Multnomah County

The following findings by OPDS are based upon (a) PDSC's discussions and public comments to the Commission since assuming the responsibility of administering the state's Public Defense Services Account and the public defense contracting system in 2003, (b) discussions between public defense contractors in Multnomah County and OPDS staff over the past two years, (c) interviews of the county's public defense contractors by OPDS's Executive Director over the past 18 months, (d) interviews by the Executive Director over the past four months of the county's contractors, public officials on the Local Public Safety Coordinating Council and the Circuit Court's Criminal Justice Advisory Council, Circuit Court Judges, senior staff of the District Attorney's Office and the Department of Community Justice and representatives of the Citizens Review Board,⁶ and (e) comments by special guests and attendees at PDSC's September and October 2004 meetings.

1. The general quality and cost-efficiency of services. In general, Multnomah County's public defense system appears to be delivering quality, cost-efficient legal services at a level equal to or greater than any other county in the state. In fact, a number of stakeholders observed that the quality of public defense practice is among the best in the state, particularly in the areas of juvenile law and the defense of Ballot Measure 11 cases. Judges on the Circuit Court are generally satisfied with, and frequently complementary of, the performance of most public defense contractors in Multnomah County. The senior staff in the District Attorney's Office are critical of a few individual attorneys and law offices, and are concerned about such chronic issues as the expenditure of non-routine expenses, the untimely and apparently unjustified withdrawal of counsel in criminal cases and some appointments of counsel for apparently ineligible defendants. Nevertheless, they are favorably impressed with the general level of commitment and the quality of advocacy and legal services provided by the county's public defense contractors. Finally, contractors generally regard each other as skilled and experienced lawyers who are committed to the common goal of providing high quality public defense services.

Although there appear to be many accomplished lawyers providing public defense services in Multnomah County, some of the larger contractors have gained statewide and national reputations. Metropolitan Public Defender Services, Inc (MPD) and the Juvenile Rights Project (JRP) have been cited over many years as national models for the delivery of public defense services. The Portland Defense Consortium (PDC) is regarded throughout the metropolitan area as a group of lawyers with some of the most experienced and ablest advocates in the state's criminal defense bar. Multnomah Defenders, Inc. (MDI) has generated a large corps of distinguished graduates and a reputation for providing quality defense services in juvenile and misdemeanor cases. Perhaps the greatest long-term

⁶ Interviews with other criminal and juvenile justice stakeholders in Multnomah County will continue through December 2004.

challenge for the Commission will be to find ways to maintain the quality and cost-efficiency of public defense services in Multnomah County and to ensure that, over time, the level of quality remains consistent among all the county's contractors.

Management and line staff of the Department of Community Justice (DCJ), which is responsible for administering corrections supervision and programs in Multnomah County, provided their perspective on the delivery of public defense services and the performance of contractors and defense attorneys in the county. Although parole and probation officers are sometimes in an adversarial relationship with defense attorneys, DCJ staff recognized the special legal and ethical obligations of defense attorneys and were generally complementary of the quality of PDSC's contractors and defense attorneys in Multnomah County. They emphasized that the most effective defense attorneys establish cooperative working relationships with parole and probation officers and collaborate with those attorneys as much as possible in exchanging information relevant to the appropriate sentence and corrections programs for public defense clients. They also noted that the least effective lawyers were unnecessarily adversarial in their personal dealings with DCJ staff, as well as in the courtroom, engaged in personal attacks on parole and probation officers and used information from private conversations and negotiations against them in judicial hearings, and failed to offer creative dispositional alternatives and ideas to further the interests of their clients. DCJ's management and line staff were enthusiastic about the idea of holding local training programs with defense attorneys and corrections staff to share perspectives on their respective roles and the latest information on local corrections procedures and programs.

2. Variations in contract rates. Variation in rates of payment under PDSC's contracts for the same kinds of cases, or to contractors who appear to be similarly situated, seems to be the most common concern of justice system stakeholders in Multnomah County. PDSC is well aware of this issue as a result of the many complaints voiced by the county's contractors to OPDS and at the Commission's meetings over the years. However, the concern is not limited to PDSC's contractors in the county. Judges and prosecutors have expressed the view that some of the ablest and most experienced defense attorneys in the county are being unfairly treated and may leave public defense practice due to the relatively low rates they are paid under PDSC's contracts.

As the table entitled "Multnomah County Rate Comparison" and attached as Appendix "C" indicates, variations in the rates paid for public defense cases in Multnomah County do in fact exist, and in some cases they are significant.

The causes for these variations in rates are many. One cause could be that, over decades of arms-length contract negotiations with the state, some contractors may have benefited from persistent attention to those negotiations and to planning for changes in their operations; while others may have suffered from inattention to those matters due to the size of their staffs and the demands of their law practices. Another cause might be that some contractors have developed significant infrastructure, including staffs of in-house paralegals, investigators, interpreters and social workers, which accounts for some of the differentials and, from the state's perspective, may represent cost-efficient methods of

providing services that the state would otherwise have to pay for in the form of non-routine expenses. In any event, PDSC has inherited these differentials, and many stakeholders in Multnomah County perceive this problem as the largest threat to continued effectiveness of the county's public defense system.

Unfortunately, solutions for eliminating these differentials in rates may not be easy to come by, particularly in an environment in which Oregon's voters disagreed with the Legislature's proposed method of balancing the state's budget by rejecting Ballot Measure 30 last November. In addition to the shortfall in the state's public defense budget caused by the failure of Ballot Measure 30, the 2003 Legislature specifically directed PDSC not to raise its contract rates during this biennium. This harsh reality apparently leaves the Commission with the unappealing option of taking money from some contractors, thereby risking the dismantlement of established public defense offices and the disruption in the careers of dedicated lawyers, in order to give more money to other contractors.

Assuming that PDSC finds no justification for continuing variations in the contract rates in Multnomah County and determines that such variations pose a threat to the stability of the public defense delivery system in the county, the Commission may wish to consider several interrelated approaches to addressing this issue:

- Recognize that variations in contract rates is a problem that can only be resolved over several contract cycles or biennia;
- At the risk of using painfully familiar metaphors, recognize that the best solutions probably involve a "glide path" approach, as opposed to "running over a cliff," in the sense that comparative contract rates should be adjusted upward or downward on an incremental basis and on a multi-year timetable set by the Commission;
- In accordance with PDSC's normal practices and procedures, changes in contract rates should be part of the normal contract negotiation process, which is administered by OPDS and subject to the review and approval of the Commission;
- Acknowledge that strict uniformity in contracts rates is unrealistic and that differences in rates of payment for similar cases or to contractors that appear to be similarly situated may be justifiable, as long as the basis for such differences is rational and capable of articulation; and
- In order to properly structure the administration discretion of OPDS, PDSC should establish criteria or guidelines to justify differences in contract rates and require OPDS to articulate the bases for any differences in accordance with those guidelines. The following list contains some examples of rationale with differing degrees of merit that have been offered to justify higher contract rates:
 - the existence of internal infrastructure, such as paralegals, investigators and interpreters;
 - the capacity to handle high volume caseloads (although this factor could also lead to efficiencies that call for lower rates);

- the capacity to handle unique caseloads or participate in special court programs;
- an effective management structure, including financial controls governing internal business operations, administrative processes to facilitate dealings with OPDS, personnel management and staff evaluation systems that ensure the quality and cost-efficiency of legal services and actively engaged boards of directors;
- training programs with the capacity to train significant numbers of lawyers in the local community and the accessibility to other public defense attorneys;
- the capacity to raise legal challenges and handle test cases that have widespread implications for the development of criminal law and procedure;
- an institutional presence on behalf of the public defense community on policy-making bodies, such as the Local Public Safety Coordinating Council and the Criminal Justice Advisory Council;
- participation with other agencies in programs and policy initiatives that advance the interests of public defense or promote the effectiveness of the criminal justice system in ways that are consistent with the interests of public defense clients;
- benefits to the county's or region's public defense contractors as a whole.

Based upon public comment and PDSC's discussions at the Commission's its recent meetings, the Commission may wish to consider attaching monetary values to some of these rationale at least once. This could assist in determining whether the higher rates associated with the rationale are justified.

DCJ management and line staff reported long and productive working relationships with Multnomah County's larger contractors, such as MPD and MDI, in designing and administering special corrections and court programs like a Drug Court, a Mental Health Court and Drug Treatment and Early Disposition Programs. However, they also expressed frustration with the lack of cooperation of public defense attorneys and contractors in the county from time to time.

For example, DCJ worked closely with MPD over a number of years to design and develop a post-adjudication Drug Court,⁷ including travel out-of-state to visit model programs. Nevertheless, DCJ staff claim that MPD's management failed to cooperate in the operation

⁷ In a post-adjudication Drug Court, offenders must plead guilty to a criminal offense before gaining access to a drug treatment program, as opposed to a Drug Court diversion program in which offenders' pleas of not guilty remain in effect and their charges are dismissed upon successful completion of treatment. The considerations of defense attorneys and the interests of their clients may be quite different in these two programs.

of the program and, as a result, its effectiveness has been compromised. MPD will no doubt have a different perspective on the matter.

The Commission should keep in mind that, whatever the truth is regarding this episode, MPD has been involved in many other interagency projects and policy-making groups for decades; and its managers and employees have made significant contributions to the public defense and criminal justice systems in Multnomah County. Jim Hennings has been an active member of the county's Local Public Safety Coordinating Council (LPSCC) and the Presiding Judge's Criminal Justice Advisory Council since their inception, as well as numerous interagency projects and programs. He has also been a leader in promoting technological and management innovations in the county, including the establishment of a data warehouse for the collection, sharing and analysis of information among all of the county's justice and law enforcement agencies. John Connors has served as an active and effective participant on numerous policy-making groups and interagency initiatives, including LPSCC's five-year project to reduce racial overrepresentation and bias in Multnomah County's criminal justice system. Given the many expressions of interest and willingness by other contractors to perform these services, however, the Commission should consider directing MPD to form a steering committee of local contractors to facilitate their input on matters of policy and to share the burdens and benefits of participating in policy-making activities and interagency programs and projects.

In the final analysis, if these and other types of activities serve to justify a contractor's higher contract rates, the Commission should ensure that the performance of those activities is verified, evaluated and effective.

3. Contractor preferences and caseload priorities. In light of the fiscal calamities experienced by PDSC's contractors in 2003 as a result of budget cuts and the steps the Chief Justice and his Budget Reduction Advisory Committee (BRAC) were forced to take in response, PDSC is also well aware of the desire of some contractors to have "preference clauses" in their contracts. These clauses would presumably establish preferences and priorities in the allocation of caseloads among contractors in the event of a precipitous drop in public defense cases and to ensure that these contractors retained most of their original caseloads.

Because another budget crisis and a precipitous drop in caseloads is only a possibility rather than a probability, OPDS recommends that the Commission avoid the time and effort associated with negotiations between OPDS and contractors over preference clauses before the need is apparent. In the event PDSC faces another budget crisis comparable to 2003, the Commission can then establish a fair and open process to address contractors' caseload shortages. Such a process would involve (a) Commission deliberations on the record at its regular public meetings regarding contractor preferences and caseload priorities, (b) an opportunity for full and fair comment by contractors and other stakeholders, and (c) the establishment of explicit rules or guidelines that would also be subject to public comment before their adoption.

The most OPDS would suggest that the Commission consider at this time is a set of general principles governing the determination of contractor preferences and caseload priorities. For example, on numerous occasions over the past two years, PDSC has discussed the possibility of giving non-profit public defender offices preferences in the allocation of caseloads because of the dependence of their attorney-employees on a full caseload due to restrictions on their ability to engage in other types of law practice and because of the special services the offices provide. The Commission has also discussed giving particular consortia a higher priority in the allocation of caseloads, but with greater flexibility to adjust their caseloads downward due to the ability of consortium lawyers to engage in other types of law practice. Finally, the Commission has discussed the possibility of giving individual lawyers on court-appointment lists a lower priority for caseload allocations due to their ability to rely on a private law practices. While the process of establishing these principles will still involve substantial time and effort in anticipation of an improbable event, the process could be justified on the grounds that all of PDSC's contractors are entitled to a clearer idea of the business risks they are assuming for the purposes of developing their business plans and recruiting new employees.

4. The process for handling attorneys' conflicts of interest. The state's process for handling (i.e., paying for) cases in which a public defense attorney discovers a conflict of interest and is required by professional ethics to withdraw has, over the years, been a source of ongoing controversy and frustration in Multnomah County. The challenge for the state has been to strike a balance between (a) fairly compensating attorneys who, with due diligence, have discovered a conflict of interest (e.g., a prosecution witness turns out to be a former client of an attorney's law office) and have expended substantial amounts of time and energy to prepare a defense in the case and (b) avoiding an incentive for attorneys to hold on to cases until the last minute and lighten their caseloads by raising conflicts of interest, knowing that they will probably receive full payment for the case. That balance has been elusive. The result has frequently been double payments for the same case: one for the attorney who discovers a conflict of interest late in the case; and one for the attorney who is substituted into the case.

This problem is by no means unique to Multnomah County. But, perhaps because of the large number of cases and defense attorneys makes the problem more visible, the process for handling conflicts of interest in Multnomah County has been a perennial source of criticisms and complaints. Prosecutors and judges are obviously concerned about last minute withdrawals and substitutions, and the delays they cause in court proceedings. Defense attorneys frequently complain about the problem too. Several PDSC contractors have claimed that a virtual "gray market" in conflicts cases has existed for years in the county, with a few contractors augmenting their caseloads and income with conflict of interest cases that demand little work and, if held long enough, generate full payment.

Whether or not this claim has any validity, the issue of how conflict cases in Multnomah County are handled may be a good example of past history and practices distorting current perceptions of reality. In 2003, the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office took steps that may have solved or significantly mitigated this

problem. IDSD encouraged a group of individual lawyers and law firms who had previously contracted with state to gather together and form the Portland Defense Consortium (PDC). PDC now handles most of the serious criminal cases involving conflicts of interest in the county, without the kinds of disruptions and double payments that Multnomah County experienced in the past. Because the consortium is not considered a “firm unit” by the Oregon State Bar for the purposes of determining conflicts of interest, attorneys in PDC can transfer cases among themselves without disqualifying the entire consortium or all the attorneys in it from handling such cases. Furthermore, OPDS does not provide double credits or double payments for cases assigned to the consortium.

Yet the problem of how to handle conflict of interest cases cost-efficiently has probably not disappeared and may still deserve the Commission’s attention. To the extent that the handling of conflict of interest cases remains a significant problem, OPDS recommends that the Commission take steps in this service delivery planning process to resolve or further reduce the problem. Fortunately, the Commission has access to the talents and experience of Ann Christian in addressing this issue. As part of her contract with PDSC to expand the Application/Contribution Program across the state, Ann agreed to study the issues arising from conflicts of interest and to develop more cost-efficient management strategies for the Commission’s consideration. Her analyses and recommendations regarding the issues that arise in managing conflicts of interest are attached as Appendix “E.”

5. Withdrawals and substitutions of attorneys. A significant number of prosecutors and defense attorneys have reported instances in Multnomah County in which defense attorneys are allowed to withdraw from cases relatively late in the case without declaring a conflict of interest or providing any other apparent reason to justify the withdrawal. These observers consider such instances commonplace, occurring particularly in less serious “run-of-the-mill” cases. OPDS cannot conclude from these anecdotal reports by observers without direct knowledge of crucial facts that a serious problem exists.

The Commission adopted a Substitution Policy in June 2004, which was mandated by the 2003 Legislature and called for the courts to confer with OPDS in certain instances when a motion to withdraw has been granted and the court is about to substitute one lawyer for another. The purpose of this policy is to reduce costs to the Public Defense Services Account caused by the repetitive withdrawals of court appointed attorneys in criminal cases. Under the policy, OPDS and the courts may agree to exempt particular categories of cases from the policy’s “meet and confer” requirement.

To the extent that “run-of-the-mill” cases in Multnomah County may have been exempted from this requirement under PDSC Substitution Policy, a significant number of withdrawals without apparently sufficient reasons may not be coming to OPDS’s attention. PDSC’s Substitution Policy and its enabling legislation does not authorize OPDS to participate in or influence a judge’s decision to grant an attorney’s motion to withdraw. Nevertheless, further investigation and conversations with the Circuit Court are likely to uncover the

nature and extent of this problem, and may offer OPDS an opportunity to inform individual judges of the budget implications for withdrawals and substitutions.

6. Summary of Written Comments Submitted to PDSC. OPDS has received three written comments on behalf of the Commission. They are included in Appendix "A."

John Connors' written comments for the Multnomah County Office of MPD outlined the office's accomplishments and unique contributions to the county's public defense system. Judge Ed Jones's comments questioned the wisdom and fairness of the differentials in contract rates between MPD and other contractors in Multnomah County, and challenged the soundness of the rationale offered to justify these differentials. Paul Petterson, the director of MDI, presented comments containing a proposal for a new felony caseload for his office.

7. Summary of Public Comments at PDSC's September 2004 Meeting. Three Circuit Court Judges, the District Attorney and the Director of MPD's Multnomah County Office delivered extensive comments regarding the delivery of public defense services at the Commission's September 9, 2004 meeting in Portland. (Excerpts of PDSC's September meeting minutes containing those comments are set forth in Appendix "B.") Other persons attending the September meeting offered shorter comments; and were assured of an opportunity to present further comments at the Commission's October meeting. The five individuals who presented comments to PDSC agreed, in general, that the issues identified in this report represent the most important challenges to the quality and cost-effectiveness of Multnomah County's service delivery system.

The Chief Criminal Judge for the Multnomah County Circuit Court, Julie Frantz, emphasized the importance and difficulty of managing late withdrawals and substitutions of defense attorneys on the basis of conflicts of interest and breakdowns in attorney-client relationships. Judge Frantz urged the Commission and the defense bar to pay special attention to the need for early and regular communications between defense attorneys and their clients in order to reduce the number of late withdrawals and substitutions. Judge Frantz also emphasized the importance of fair and adequate compensation for PDSC's contractors and the need to identify additional qualified expert psychologists for preparation of timely reports and evaluations.

Judge Elizabeth Welch, the Chief Family Court Judge in Multnomah County, described the many steps in the Court's juvenile dependency proceedings and the extraordinary demands the Court places on the Commission's juvenile law contractors. Judge Welch expressed the view that the experience and effectiveness of those contractors are outstanding, and that the quality of advocacy and law practice before the Family Court is exceptional. However, Judge Welch emphasized the immediate need for additional experienced and competent juvenile practitioners for the Family Court's appointment list, and the threat to the fairness of guardianship proceedings in Probate Court due to the unavailability of volunteer legal counsel and the absence of a legal right to court-appointed counsel in those proceedings.

Judge Ed Jones elaborated on his written comments in Appendix "A" with regard to the unfairness to defense contractors and their clients due to differences in the compensation and contract rates that the Commission pays contractors in Multnomah County. Although he praised the dedication of MPD's attorneys, staff and management, he criticized the logic of the rationale offered for that office's higher rates and urged the Commission to (a) attach monetary values to all legal services that are discretionary or that do not involve direct services to individual clients in pending cases and (b) entertain contract bids from other contractors to deliver those services.

District Attorney Mike Schrunk expressed his personal views regarding the importance of the defense function, the need for prosecutors, defense attorneys and the Circuit Court to work closely and cooperatively together in order to ensure the quality of justice in Multnomah County, and the special demands on defense attorneys and acute need to compensation them at levels comparable to the salaries of deputy district attorneys. Mike emphasized the importance of special efforts by defense attorneys to identify conflicts of interest early on in criminal proceedings. While generally satisfied with most defense attorneys' requests for non-routine expenses, he also highlighted the problem of delays in obtaining expert psychologist reports and evaluations once requests for these non-routine expenses are approved by OPDS. However, he recognized that a major part of the problem of untimely expert reports and evaluations for both defense attorneys and prosecutors is the unavailability of qualified experts; and he urged the Commission to work with his office and other prosecutors in the state to address this problem.

John Connors elaborated on his written comments in Appendix "A" regarding the achievements and special contributions of MPD to the county's service delivery system. John urged the Commission to avoid imposing new requirements to establish the monetary value of the special services for which MPD receives no direct compensation and to support the unique mission and contributions of public defenders offices like MPD. John also reserved time at a subsequent PDSC meeting to present more support for these position and to address the Commission's requests for additional information regarding contract rates, costs of services and economies of scale.

OPDS's Recommendations

[NOTE: OPDS will to submit its recommendations to PDSC following the Commission's deliberations and recommendations at its November 18, 2004 meeting.]

PREPARED TESTIMONY
by Judge Edward Jones
before the
Public Defense Services Commission
September 9th, 2004

Before I got my current job, I was the director of MDI for 14 years. I negotiated many contracts with the State; those negotiations were often intense. We never got all we wanted, or even, in my opinion, all we needed to provide the level of service our clients were entitled to. Nonetheless, we did the best we could with the money we got. Part of our willingness to accept less than we needed was our awareness of the financial constraints under which the SCA operated. What I did not understand then, nor understand now, was why, given those constraints, some contractors were paid much more for exactly the same kind of case.

I don't mean I didn't understand the historical reasons for the disparity, I did. What has puzzled me is the persistence of that disparity, even into the present. I'm pleased that the Commission is willing to undertake an examination of the question.

I agree with John Connors that the lawyers and other staff at MPD have often been in the forefront of establishing and assuring excellent representation in virtually every area of law in which indigent defense contractors are found. I have no issue with their achievements; there is no court, or contractor, or criminal defense lawyer, or defendant who does not owe a debt to Metro. Much of what is good about our state's delivery of indigent defense services has its roots in the decades of work done at Metro. My concern is not with their history or their achievements, it is with their current budget, and the sacrifices that other contractors and their clients have made to allow Metro to have more money per case than anyone else.

To make my point clear, I would ask to the Commission to examine each item of "added value" described by Mr. Connors and ask, "How much additional

Appendix "A"

money in the current budget does that achievement justify?"

For example, since I submitted my comments to the Commission I been told of a spread sheet showing a \$300,000 difference between what Metro and MDI would be paid for the same group of cases under their current contracts. Accepting that number, I would ask what, during this budget cycle, the Commission has received for that additional \$300,000? I had expected that once this issue was raised the Commission would see something from Metro which identified how that additional money is being spent. Instead Metro has submitted a document which confuses their historic achievements with their current budget and offers nothing about the relationship between the added value they profess to provide and the additional money they receive. All contractors provide "added value": given what they are paid, they could hardly do otherwise. If "added value" explains the disparity, why isn't all "added value" treated the same? In my experience "added value" is neither bid on nor contracted for. There is no reason to believe that the added value described by Mr. Connors could not be obtained cheaper from other contractors, if they were given a chance to compete for the opportunity to provide it.

I don't mean to over simplify the contracting process or the difficulties that arise when apportioning costs among cases, but it must be possible to understand how the additional money is being spent. I believe that the Commission has an obligation to assure itself, the legislature, and the community that the money it is responsible for is being wisely spent. As I have said, I applaud the Commission's willingness to examine the current disparity in contract payments and await with great interest the results of that examination.

Additional Input to the PDSC
On Service Delivery in Multnomah County

By John Connors
Multnomah County Director
Metropolitan Public Defender

The task of describing the delivery of service to indigent clients in Multnomah County completely and fairly is a daunting one. This is especially true given the history of the Metropolitan Public Defender in Multnomah County and the long list of contributions that this office and all its members have made that are not easily measured. This is important because of questions that have been raised about differences in costs per case throughout the county. This memo is an effort to capture at least some of the attributes and accomplishments of MPD. Most of the specific activities described have occurred in the past two years.

I. Value Added – Clients and Caseload

For the past 33 years, MPD has handled the majority of court appointed cases in Multnomah County—including felony, misdemeanor and juvenile matters, civil commitments and most of the specialty courts. During some years MPD's share of the total county caseload has been more than 60%. This is not surprising when one considers that for many years MPD handled more than 1/6 of the entire court-appointed caseload throughout the State. Over the past decade the Portland office of MPD has handled approximately 13,000 cases a year, with a staff of about 40 attorneys. More important is the fact that lawyers and other staff at MPD have often been in the forefront of establishing and assuring excellent representation in areas such as death penalty cases, Measure 11 cases, drug and property cases involving enhanced sentences, and on a wide range of issues in both juvenile law and civil commitments. A significant statistical study covering a recent 18 month period shows that more than 60% of all these charges end up in acquittal or dismissal. The critical role the office plays in the integrity of the system and protecting individual rights is beyond dispute and immeasurable in terms of its contribution to a democratic society.

Throughout this long history, few claims of incompetent practice have been filed and only a handful of post conviction claims have been sustained against any of the lawyers on any case. Throughout this long history there has been only one instance of bar discipline—a stipulated reprimand on a complex conflicts issue.

It's easy to overlook in a system that is so busy, but there is much added value to a job well done. When trial cases don't get retried because of post conviction relief, when federal habeas relief is unnecessary to correct unjust or wrongful convictions, when contractor's malpractice coverage rates remain constant due to proper work on cases—the whole system and State saves money. When clients feel that they were properly represented—that time was spent with them and on their case, that their rights were

protected, that they were shown respect and dignity—they think twice and often don't re-enter the system, saving the system and the State money.

When clients are provided alternatives and alternative sentences are prepared and advocated, clients often change their lives and become productive citizens. When this happens, not only do they provide for themselves and their families, but they don't come back with new cases. When MPD handles thousands of duty-informational calls a year and hundreds of expungements per year for any prior clients, without specific contract credit, the system and the State saves money and becomes more just. The same is true with respect to the dozens of calls we take from staff at the Federal Defender's office looking to coordinate efforts to handle pending or potential State cases affecting their clients, and the dozens of cases our office handles on behalf of out of state prisoners or probationers seeking to clear their warrants or reinstate their social security benefits.

II. Value Added – Staff Development

MPD has also greatly benefited the criminal justice system on both a statewide and county level by developing and training large numbers of lawyers who then go on to become leaders in the Bar. MPD alumni include approximately 10% of the statewide circuit court bench and Ancer Haggerty, Oregon's first black federal judge. Office alumni include two of the law professors at Lewis and Clark, Steve Kanter and Susan Mandiberg, and a list of other college professors. The office has also helped train some of the most highly regarded private practitioners across the State in both criminal law—Janet Hoffman, Steve Houze, Larry Matasar, Lisa Maxfield, and Ken Lerner, and civil law—Larry Barron, Ray Thomas, Stuart Teicher, Steve Crew, Linda Eyerman, Diana Stuart, and David Slader.

The Portland office has also graduated a significant portion of the Federal Defender's office, including Steve Jacobson, Ellen Pitcher, TJ Hester, Tony Bornstein and Susan Russell, as well as most of their investigators. Many of the leading death penalty practitioners in the State, including Mark Cross, Rich Wolfe, David Falls, Laurie Bender, Michael Curtis, Kathleen Correll and Jim Lang, have also practiced at MPD, as have the heads of several other public defender offices—Jack Morris, Tom Crabtree, and Carole Hamilton. Finally, it's worth mentioning two Oregon State Bar presidents, Judge Julie Frantz and Angel Lopez, and three OCDLA presidents, Jack Morris, Dave Audet and Paul Levy, started at MPD.

This of course doesn't count the large number of support staff and interns who have gone on to become attorneys, social workers, or other persons dedicated to the ideals of quality and service.

III. Value Added – Legal Leadership

MPD also has a long and significant history of leadership in making legal challenges and providing legal training and support. Much of this leadership has benefited the system on a statewide basis. Initial lobbying efforts in the state legislature on behalf of indigent

defense were handled by Jim Hennings and Marcy Hertzmark. For many years much of the testimony regarding criminal law matters came from MPD staff. This type of system leadership continued through last year when the office, joined by the Lane County Public Defender's office, sued the Oregon Judicial and Legislative branches for adequate funding and, along with the Multnomah County Sheriff, sued the Oregon State Hospital for due process violations.

More importantly, the office has a long history of raising major issues from their daily caseload. A very small sampling includes Tony Bornstein's work challenging the Multnomah County jury pool, Gail Meyer's work challenging the "scheme or network" sentencing structure in drug cases. Susan Russell and Michael McShane's challenges to Measure 11, and Paul Levy's challenges to Measure 40. More recent efforts include attacking the trespass zones and minimum sentences for certain drug and property offenses. It is not an overstatement to say that in every year of its 33 year history MPD attorneys have been in the vanguard of excellent lawyering on the most minor violations of city ordinances up through the most serious murder cases. This commitment and expertise have also been demonstrated in the large number of significant appellate cases that have come from the office. These include, *State v. Hockings* on discovery, *State v. Carahar*, emphasizing looking to the Oregon Constitution first on search and seizure issues, *State v. Campbell*, defining what is a search in Oregon, *State v. Freeland*, outlining District Attorney obligations with respect to similarly situated defendants, and *State v. Wacker*, further defining permissible searches in Oregon—to name just a few of many, many cases.

IV. Value Added – Innovation

MPD has a long history of system involvement and innovation. Starting with Jim Hennings' pursuit of federal grant money to start the office in 1971, to his early use of Jesuit Volunteers as alternatives workers and pre-sentence report writers, to his current work as Chair of the Local Public Safety Committee's computer data committee, the office has provided dozens of examples of leadership in the areas of technology and innovation.

Much of this work has been in cooperation with the court, starting with now senior federal Judge Robert E. Jones' early disposition docket, up through Judge Abraham's special separate docket for drug cases, and more recent programs such as STOP and Clean Court, three different community courts, and the early assignment project. In all of these MPD has helped improve efficiency and promoted cost savings.

These efforts have also included projects with other system players such as Stand Down, a project to allow veterans to clear warrants and access services in cooperation with the District Attorney's office, the criminal law internship program in cooperation with the Lewis and Clark Law School, the trial practice program in cooperation with the Davis, Wright, Tremaine law firm and the voter's registration program in cooperation with the Western Prison Project.

V. Value Added – System Involvement

Much of MPD's ability to add value to the system is its commitment to participation in a wide variety of criminal justice activities and agencies. This involvement is on both the macro and micro level and is systematic and ad hoc. Recent activities include staff participation in the Local Public Safety Coordinating Council, Criminal Justice Advisory Committee, and various court work groups including those on the Oregon State Hospital, the mental health court, Sentencing Support, CARES, Electronic Monitoring, OJIN, SWIS, community corrections sex-offender grant, CRBs, standardized release decisions, and the domestic violence program. There are also ongoing meetings for the drug courts, community court, juvenile court, the misdemeanor docket, the contractor's and sheriff's computer system that demand time and attention.

The staff at MPD also always makes itself available for individual requests. These may include more systematic projects like participation in the special grand jury on corrections, or the Federal Defender Screening Committee for its panel attorneys or a special sentencing seminar at one of the law schools. More isolated examples include Justice DeMuniz's work on the Russian criminal justice system or meeting with concerned family members of minority Measure 11 defendants claiming discrimination, or placement of a clerk by the OSB affirmative action program, or interns from the PSU criminal justice program, or participation in the OSB diversity section job symposium for minority students, or meeting with pre-law students from OES or guest lecturing on ethics at the Lewis and Clark Law School Clinic. The office has also maintained an important position on the County Bar Association's Judicial Screening Committee. MPD's commitment to help in the almost daily requests to aid someone or some part of the community has been relentless.

VI. Value Added – Community Involvement

In addition to all the case work, client work and criminal justice system work, members of MPD have done significant amounts of community work in an effort to make others more aware of our mission or to simply help our clients in a form other than their case. This kind of activity has been a long tradition and is very diverse. A very small sampling includes, fundraising for the Campaign for Equal Justice through co-sponsored sports events with the District Attorney's office, staff contributing to the Burnside Chapel, Volunteers of America and Sisters of the Road Café through our Entertainment and Humanities Committee, presentations on civil rights at Jesuit, Lakeridge, and Tigard High Schools, speaking appearances on Ballot Measures on KBOO, KGW or KXL, meetings with editorial boards of the Oregonian or other publications and fundraising efforts for Oregon Lawyers Against Hunger and the establishment and support of Courtcare.

VII. Conclusion

In addition to the discomfort a person always feels when bragging, I'm now certain that attempting to capture all the added value provided by MPD was not only a daunting task but an impossible one. Everywhere I turn I've done injustice to each category by only scratching the surface or leaving out worthy name. There is also important ground left completely uncovered, for example, the clothing room and Library that MPD maintains for use by the whole defense bar, our regularly, open training sessions, or the work of Keith Rogers and myself on a national level with the VERA Institute, or the current work of myself and Martha Spinhirne on the Governor's Task Force on Sentencing, but then you get the idea. Thanks for the opportunity to provide input.

We propose a cautious and incremental addition of felony cases, mostly minor in nature, using the case types and values set out in Appendix H of the November, 2002 contract amendment (the types and values of the 187 felony cases we were assigned between November, 2002 and April, 2003). We propose starting with felony charges against current MDI clients, then former MDI clients, and finally defendants with no history of representation by any current contractor willing or able to take the case. This adjustment will: minimize future conflicts; promote MDI attorney staff career development and retention; enable continuity of counsel; and facilitate efficient court administration.

APPENDIX "B"

**COMMENTS OF DISTRICT ATTORNEY MIKE SCHRUNK
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 7-12 of the Minutes)**

- 479 M. Schrunk I'm Mike Schrunk and I know most of you. I am the District Attorney here and have been for 20 plus years. Prior to that time I actually took appointed criminal cases in the state, particularly conflict cases, and was on the Federal Public Defender's panel. So I have had some experience in the past defending criminal cases.
- 486 P. Ozanne Excuse me, I was actually going to introduce those people who you may not know. Jim Brown was a colleague of yours from Benton County. You know Chip Lazenby, Shaun McCrea from Eugene, Janet Stevens from Bend and the Bend Bulletin and John Potter with the Oregon Criminal Defense Lawyers Association. Barnes Ellis, who is our Chair and is expected soon. Thanks for coming Mike and thanks for inviting me to your offices last month.
- 498 M. Schrunk Peter, let me first of all commend you personally and the Commission for what you are doing. I really think you are on the right track and you are going the right direction. I reviewed and I sent around to my senior deputies the draft report, though not the same draft that you handed out today – the draft that was before the appendices were attached. I think we reviewed a 9/02 draft and this one is 9/09. I arranged for Peter to come in with representatives from my senior staff and mid-level staff – someone from each of the trial divisions handling everything from juvenile, misdemeanors, community court, person crimes; the full range – to speak in an open session where they could without recriminations make their comments. I think that was helpful. In fact, I set the ground rules and then I left the room so there would be no blow back on them.
- 423 P. Ozanne You did tell them to beat up on me though.
- 424 M. Schrunk Well I told them I needed Peter alive when they walked out of there. I have practiced law in this community before there was Public Defender's Office and I have seen the growth of the Public Defender's Office. I have seen by leaps and bounds the improvements of representation because of our local Public Defender's Office. I have sat on any number of court committees both as a private practitioner and as a deputy district attorney and then as the district attorney. I am convinced that we are going in the right direction, but there are still some things we can do. It is not perfect. As you know, you have taken on a heavy job just sitting on the Commission. No one likes to pay for the person who rapes someone's neighbor's daughter to be defended. No one particularly likes that requirement and wonders why tax money is being expended that way. That said, all of you wouldn't be here unless you believe in a true adversarial system of justice with a level playing field. I commend you for trying to make that happen and to keep pushing.
- Some of the areas that we'd like to define and we try to step back, not to say that I don't put my hands around Jim Hennings neck and shake him every once in awhile, nor does he stop from kicking me in the rear end if I am going the wrong way, and that is as it should be. That makes for a better system. But I think if you take the personalities out, and there are always going to be conflicts in a hotly contested trial, and there are going to be noses out of joint, but things will heal. But we have got to have a system that works, that is adequately funded. We suffered through a disaster when indigent defense could no longer represent

clients during what is referred to as the BRAC. And I think you have all heard the horror stories. One of the hallmarks I think of what happened here is we banded together and decided what would be prosecuted and what wouldn't be prosecuted. And believe it or not, we had an awful lot of good input from the defense bar. We tried to come out fighting the issues we needed to fight, but also holding hands and supporting the need for an adequate system. That said, there are some problems areas that I think need attention, that need monitoring. The conflict area, and there are two kinds of substitution conflicts. One is a conflict when there is a legitimate conflict. I think we need to pay attention to this and we need to work hard. Now we don't as prosecutors across the state probably come with completely clean hands, when I talk about conflicts. It is incumbent on us to make sure that we get early and complete police reports or investigative reports with a list of witnesses out. So we have to do that. But it is also incumbent upon appointed counsel to screen those things, to read them as expeditiously as possible, and to notify the court if they have a conflict. In any metropolitan area, maybe even more so in smaller communities, you are going to have conflicts because you have represented someone, you have represented someone's sister or a co-defendant or the state's chief witness. And those have got to be brought out early. Too often we see this brought out at the last minute and it is disruptive to the trial process, it is disruptive to the court process, to witnesses, to victims and doesn't serve the ends of justice. It gives everyone a black eye. And attached to the conflict issue is the substitution of counsel. When I say substitution of counsel, there is no apparent witness or representation or firm rule conflict. It is just when they get at each others throat, the client and counsel.

TAPE 1: SIDE B

001 M. Schrunk

I recognize that this usually happens as you get closer to trial. The client doesn't like the advice that he or she is getting. Quite frankly, that advice is frequently: "You are dead in the water and you are not going to get up and tell some lie in court." Then we get a substitution of counsel this way. There is a feeling in our office that this is pushed too far. Again, this is way too disruptive to the system. So again I would ask that the things that you can monitor, that you can take a hard look at, are the conflicts and substitution counsel.

And non-routine expenses, there are going to be expenses. Sometimes we feel that it is the defense counsel's job to ask and ask and ask and ask until they are denied by the court or denied somewhere along the way, and then assign that as an issue on appeal as error. That may be true or that may not be true, I don't know. I suspect it probably isn't. I would like to believe that all requests for non-routine expenses are legitimate. When those expenses are approved and the money is to be expended, when will that forensic work be done, when will that pathology report be done, when will that mental health report be done? Not that you get the money approved and I hire Dr. McCrea, but she is booked up for the next 90 days so we again set things over. We stop the wheels of justice until we get this one expert. I think paying more attention to when non-routine expenses are approved or authorized is a timeliness issue. If you are going to have ballistics, so be it. But let's make sure we have the time between the approval and the actual performance of the test, or whatever we are doing. Contract rates, I see that there are different rates paid to the various contractors in this community and certainly across the state. I know that this is a touchy subject and I know that you and Peter have inherited not a one size fits all system. Nor do I think one size fits all is correct, but I think the contract rate has got to include and recognize that the defense bar doesn't just represent an individual client. Their presence in the community is integral to the quality of

life, the quality of justice in the whole community. That means that the attorney has got to attend 7:00 a.m. meetings, local public safety council meetings. They have got to participate in numerable committees and they aren't billable. But someone has to have an office, and they need to have a support network to do these sorts of thing. We try in any high volume operation a lot of pilot projects. Pilot projects are important, whether they are drug courts, community courts or mental health courts, like they are doing down in Lane County. You need defense counsel to be involved in the planning process. Is that covered in the rate for a Class C felony or a Class A felony? I don't know. Maybe there is a legitimate reason for paying people just a flat fee and saying, "You don't have to participate." But I think what I am trying to say is we need the defense infrastructure in each community, certainly here and we need it supported. We are always going to pick at it and say they have too many investigators or legal assistants. But the fact of life is they need to participate with the courts, with the prosecution, with the victim's community and with the police community. They need to serve on committees. Their voice needs to be heard early on. So you have to factor that into when you set the rate for how you are going to pay and how you are going to contract. I just think that is crucial. The one thing in my troubled decades of prosecution that I learned is that we have got to work together and we have got to chose what we can disagree on. When we disagree, that is fine. That's what courts are for and you all know you are trial attorneys in here, for the most part. You know that you try less than 10 percent of the cases and the rest of it is done in negotiation, the rest of it is done in setting policy. What are the thresholds for a DA issue? What are the thresholds for entrance into a drug court? What are the thresholds for entrance into a mental health court? How do you staff a community court? How do you staff a fast plea an expedited plea court? These are things that need to be factored in when you figure out how you are going to contract with various defense contractors. Those are my comments. Again, I have read the draft report and I will start now that the Chairman has arrived.

[Barnes Ellis arrives at 10:55.]

057 M. Schrunk

I think those are the things you ought to take into account. Like I say, I am an unabashed fan of the indigent defense. I think it is a very high level in fact. I think they win cases they shouldn't. I chew people's rear ends in my office when that happens, but is the way it ought to be. It makes your District Attorney's Office better, it makes your police departments better and it makes your judges better when you have a proactive defense component in the community. That said, I could stand more guilty pleas. I will answer any questions or any areas you want to cover. And I think the report is a good first step. Those things that I highlighted, I would hope you will monitor them and will work on trying to figure out some sort of solutions.

068 J. Potter

Mike, you may recall last legislative session Max Williams had, early in the session, a long proceedings on extraordinary expenses, or what we are now calling non-routine expenses, about things that the defense may have purchased or done, and whether or not there were some inappropriate expenditure of funds. What I am gathering from your comments, though, is slightly different. If I understand what your office is saying, it may not be that the funds that were awarded were inappropriate, but that the time frames in which the funds are used, and the way that is being done, is slowing down the process or causing delays, is that what you are saying?

077 M. Schrunk

I think that is it, more than what is being accrued. Of course, we are always going to pick at it when you hire someone to read crystals about the witnesses or

for jury selection. You are always going to get someone who is going to fire at you. That is the nature of our business. My complaint is more if Dr. Potter is approved for up to \$5,000 for the examination of Mike Schrunk defendant, and you are booked out for 120 days, we don't do anything about it. We don't ensure that, when you are hired, you are available and you meet some sort of parameters. We all know, defenders, prosecutors and judges have more to do than we really want to do, so we kind of let things slide. When you let things slide, we are spending time that is not ours. Court dockets, witnesses fall off, we lose them. Local jails spend money housing people. We have a list here that we started monitoring between the defenders office and the courts and my office of cases where defendants have been in local custody over 150 days. Now a lot of them are just awaiting services and we are not clean either. The state mental hospital on aid and assists, we have to solve that problem and that is not your problem. But, hopefully, you can get your oar in the water on that. We have to be able to get fit to proceed hearings or evaluations done. So I guess my plea is, when those things are extended or approved, that someone says, "Hey, when is this going to be done?" and there is a time slot that is going to be done, this week or next week, but not 90 days from now.

- 101 J. Potter So is the person who might do that the judge? Or are you suggesting that we have a standard?
- 103 M. Schrunk I think that would be a question, when you are asked for extraordinary expenses: when will this be done? This should be part of the consideration. Will it be done, or since we got the money, we will never get it done?
- 106 Ron Fishback There is a shortage of qualified people, particularly in the mental health system. When I seek approval for funds, I typically ask two or three different professionals, when are they available, are they available to do it? It is kind of shocking how far out it is. We don't control their professional schedules.
- 107 M. Schrunk I agree with you.
- 108 Ron Fishback I have an evaluation now that was done, but I can't get it completed because the fellow is off on, as he put it, "murder row" up and down the valley, having to do other more pressing things before he can conclude matters in my case. It does drag things on.
- 111 M. Schrunk Ron, I do agree with you. I don't think that it is entirely your fault, nor is it entirely the deputy district attorney's fault nor the court's fault. I think all of us together have got to develop new experts. We can't hold out for Dr. Potter because we know he is the best and we know he is going to help our case. That is a consideration that we have to make. I would almost urge that we make the appointment before we get the funds or we determine the availability of the doctor. As you know, there is a cache of doctors that we use and we have the same problem. It is hard to say, "Well, let's explore Dr. Stevens because we know how Dr. Potter is going to come down, so let's take a chance on a new doctor." I think we have to. I guess the other thing that I have learned is when you look at a system or an agency, if you watch it, it will change. So I guess what I am saying is, if you pay attention to it, we will do a better job. It's like our 150 days in custody without anything happening. Now, all of sudden, we are getting this report monthly. And I know the defenders look it and I know judges look at it, and I know I look at it and ask questions of the people who are responsible for this case. You don't need to have any drastic policy. You just have to monitor it and it will change. And if it doesn't you can find out why. I'm not so much concerned about approving money for people to read crystals

or whatever because I think enough people have enough sense not to approve those kinds of extraordinary expenses. I think there may be probably one or two instances and, lord knows, prosecutors have those same kinds of problems.

- 132 J. Potter Well, possibly during this brainstorming session that we are having here, you mentioned when you are requesting the expense that you are asking the judge or asking the state and you are saying, "We have got Dr. Barnes as our No. 1 choice and he is available in 60 days." You are giving the court or the agency more information about when the expert would be available and that may then put everyone on notice as to what is going to happen on the front end.
- 138 M. Schrunk I would agree. And Ron Fishback, if he went and asked for his money and he said, "I've got Dr. Barnes or Dr. Potter, and they are available in 120 days." Whoever the approving authority is going to say, "Go back and renegotiate that time frame or find someone else." In some court systems, when you ask for things, you have to certify that this not going to cause undue delay. What's undue?
- 153 J. Potter Thanks Mike.
- 154 M. Schrunk You know, maybe it's just a grumpy old prosecutor, but we have the same problems. I am the last one to come in here and say that I have clean hands because we do things that delay the system too. Peter has asked me to point out some of the areas that were of concern.
- 156 J. Potter I think you have raised a new wrinkle because I didn't hear that concern being raised at the last legislative session.
- 161 C. Lazenby First of all, I am shocked and appalled that there is expert shopping going on in this field. So if you have any ideas, and I think it is beyond the scope of this Commission to figure out ways to open barriers of entry in this expert field. Do you have any ideas on how we could grow that field of experts, other than increasing resources in the system, which is the perennial answer.
- 166 M. Schrunk Chip, I don't know if you as a Commission can do it, but if you want to grow that the same way the district attorneys do it, they try collectively to try to push out for different experts. I think you can say, "Let's cultivate these different experts, or let's broaden our field to draw from." I think that is what we all need to do. There is no question about that. If you talk to the judges, they are in the same predicament that we have in a way. We become captive to someone else's schedule, which mucks up our schedule
- 177 C. Lazenby I wrote down notes of what you talked about, how important it is to be adequately funded, and you touched a little bit on the contract rates. In my other life before this, one the issues of parity kept coming up in the legislature, especially the disparity between what prosecutors are paid and how their offices are funded and the kinds of funds that we have. Traditionally, when the public defense side has tried to seek more funds, as you pointed out politically they are very unpopular, and what has consistently stymied efforts of getting parity has been the opposition of the District Attorney's Association. Are you signaling a change in direction that you are willing to work with us and try to get system parity?.
- 188 M. Schrunk For a long time some of you in this room have heard me in other forums advocate for a Criminal Justice Worker 1, 2, 3 and 4. I think it should be the standard for entry level attorneys, whether it be a Deputy District Attorney, a

Deputy Attorney General or a Deputy Defender. I think there needs to be – I don't mean to insult any of the fine young defense attorneys here, but I have interviewed literally hundreds of people for deputy district attorney and I find that 99.9% of them are the same men and women that end up defending. They believe in the system, they want the same goals, they believe in the same premise of advocacy. Yes, we have true believers on each side, you know, whatever that terms means. But they are by and large the same people. I don't see why there shouldn't be some sort of parity. We can make the argument that prosecutors review more cases. Well, there just has to be more prosecutors to review the cases that get rejected. But I think there needs to be some sort of parity. I'm not speaking for all district attorneys, as you well know. I try to work hard with the office that I am in to continually improve the salary structure and I have shared that with the defender agencies. The only thing that appalls me sometimes is that Hennings will get a hold of it and then I will get back that someone is claiming that Hennings is saying that my staff is overpaid. I say, "Jim, that's the wrong message. It is your staff that is underpaid."

217 Chair Ellis

Anything else? I will apologize later for my tardiness, but thank you.

218 P. Ozanne

Mike, if we have other questions, I will bring them to you and perhaps meet with your senior staff again. We would like to follow up as we go through this planning process. And knowing how cooperative you are, I know you would be willing to do that.

222 M. Schrunk

Good luck. I think the fact that you are coming around to various regions in the state and you are holding open hearings and you are taking input. That is important. Getting the public input, getting input from the stakeholders in the system, and then Peter coming around. Peter has a lot of credibility up here because he worked with our Public Safety Coordinating Counsel for a long time, and he has talked formally and informally with defense counsel and prosecutors. You are on the right track. Thanks for letting me spend this time with you. Good luck.

**COMMENTS OF JUDGE JULIE E. FRANTZ
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 12-19 of the Minutes)**

235 Judge Frantz

I'm Julie Frantz. I have been the Chief Criminal Judge for the last seven or eight years. First of all, I would like to compliment the Commission on the thoroughness of the draft report. The detail and the analysis, I really think it was a very thoughtful and thought-provoking report. I would like to start by echoing the last comment that was raised by Mike and Commissioners, and that is the parity issue. I strongly believe that it is absolutely critical and essential that defense counsel be paid on an equal basis with deputy district attorneys. There is no justification for otherwise, and that has historically has not been the case. That is something that has to be addressed. I might just digress for a moment. I did defense work for five years between 1975 and 80, and then I did civil work for about 14 years before being appointed to the bench 10 years ago. I have been impressed with the increased level of complex cases, the growth of those who are mentally ill and who are charged with crimes, and the complications in the system that that has caused and the necessity for defense counsel to be in various courtrooms at the same time. The difficulty of being able to easily access clients for the reasons we all know, budget problems. All of those things

have added a tremendous load to defense counsel's job. We never have been in a position to do more than simply count the number of cases that each individual attorney carries, rather than to be in a position to look at the magnitude of each case and look at the complications that are created by the types of cases and the issues that a particular client brings to the table. I see it as being significantly different than it was when I was practicing in this area 30 years ago. The elements are the same, but the growth of complexity and additional issues I think have dramatically increased. The level of competency of defense counsel is very high in this county. The dedication and commitment to clients and to working within the system I think is something everyone can be proud of. The interaction between the District Attorney's office, defense counsel and law enforcement, and how it works in this county, is something I think we can be very proud of. I do believe that it is absolutely critical, as it was pointed out in the report, that there be clear criteria for those who are appointed, whether it be through a contracting firm, independent contractor attorneys, a consortium or a public defender's office – that there be well-established criteria for those who should be appointed on certain types of cases. And that goes beyond just experience. I think there needs to be evaluation of not only the competency, but the attentiveness that they pay to their clients.

That is going to segway into an area that I think is a big concern to the Commission, and that is the level of substitutions that create considerable expense. Let me move to that for a moment. I have made a concerted effort to only allow substitutions when there is virtually no alternative – when there is an active conflict when substitution is mandated or there is such a deterioration of the attorney/client relationship that the representation can simply not go forward, like threats or multiple bar complaints. I do not grant substitutions simply because there is a bar complaint. I will often conduct a little mini-session in my court to make a determination as to whether that is something that should be granted or denied and to see how that develops. There are times when the deterioration is too extensive, there is no communication between the parties, and both sides are saying, both the defense and the client, that they cannot proceed. That in itself is still not a reason. I am making a point of this because this seems to be one of the major criticisms – that is routine substitutions. I spend a great deal of time in my court trying to talk through the issue with defendants of the role of defense counsel -- that their job is to prepare the case for trial, to do everything that is possible to assess the case, and to provide the best feedback so the client can make the best decision for him or herself. There needs to be a desire to work together and listen to the advice of counsel. The attorney may be doing and is doing many things for the client that the client is not aware of. That being said, one of the major complaints that I hear is the lack of communication between attorneys and clients. If there is one thing that I could identify that defense counsel could improve and would save a great deal of anguish for defense counsel and reduce the level of frustration for clients and reduce the number of substitutions that come before me would be that defense counsel, on a regular basis, would have immediate contact with their client. Now that is not always possible because attorneys are in trial and they have heavy caseloads. But early face-to-face contacts or phone calls followed by face-to-face contacts would create confidence by the client in the attorney. If that doesn't happen very early on, there is frustration and distrust that develops, and it leads to motions for substitution in my court. If nothing else comes out of this process, that is the one thing that I would emphasize again and again: early contact and answering phone calls. Now, that being said, I think there are an increasing number of clients who are very difficult to manage and there is an increasing amount of legal information that gets floated around through the jail system. There are increasing numbers of what we refer to as jail

house lawyers that are providing bad advice to other inmates. Those issues make the job of defense counsel even more difficult. A lot of time has to be spent undoing that bad advice both by defense counsel and the court. There is also a greater number of clients who are preparing their own motions and who get into a struggle with their attorneys because their attorneys won't handle their motions or won't file the motions, and that creates a great deal of conflict. The standard in my court is that, if at all possible, we will work around that kind of conflict, and it works with the new ethics rules. If the conflict is clear and it is a natural conflict in accordance with the rules, there has to be a substitution, whether that happens in the first week, or it happens on the 120th day and trial is about to occur. Where I think money should be spent is on a system that uncovers conflicts prior to appointment of counsel. And I know we have a system in place and it sometimes works and it sometimes doesn't. That system should remain in a place. But a review should also be done again after the first couple of weeks, after the police reports have been received. There are witnesses who pop up at that time. There are unindicted co-defendants that create all kinds of problems. The earlier the substitution can be made, the less expensive it will be for the system and for indigent defense, and the more effective the representation will be for the client because, if any substitution needs to be made, it will happen very early on. That is a place to spend money.

With regard to the issue of psychologists, we used to have in Multnomah County a list of those we were approved. That was dismantled about six years ago because there was really no clear criteria for who should be on the list. There was not a good system for indigent defense to control the list. So now it is really by word-of-mouth who an attorney should pick to perform a psychological evaluation on a client. There are those who are more favored than others. You see their names coming in all the time. But there is an incredible shortage of psychologists to do examinations for the purposes of aid and assist, sexual examinations and other evaluations like GBI evaluations and diminished capacity. There is an extreme shortage and when we hit the summer months or we hit the holidays and psychologists go on vacation, we then spend September and October trying to catch up. By the time we almost turn the corner, the holiday season hits and the same thing happens over again. People just are not available. Any plan that would create a list of qualified psychologists would be extremely helpful. I think it would move cases along. I think the identification of the psychologist and the time when that psychologist will have the report back would be a very good approach. Often in my chambers when we have a settlement conference and I find that the psychologist's evaluation is not back, I require the defense counsel right then and there to get on the telephone and call the office and tell the psychologist that the report must be due back by X days because this case is going to trial. Or if we are not that close to the line, we get a date when that report will be back, or a date by which that evaluation will be done. Everybody has to be pushed in the system. There is no question about it. At the same time, there are things that have to be done in order for a case to be properly prepared to be tried.

There are constitutional rights that must be protected, and post conviction relief to be avoided at all costs because that is additional burden on the system. I started case management conferences about four months after Ballot Measure 11 was enacted. We did a study in the court regarding the number of Ballot Measure 11 cases that came through the system in one month and we found there were approximately 45 to 50. I determined that I could do 15 minute case management conferences in each case, with about 16 between 8 a.m. and 12 noon on Tuesday mornings. So I set up a system where, every 15 minutes, lawyers on either side come to my chambers without their clients. I have a

checklist that is prepared and we go down the checklist to make sure that such things as police reports have been confirmed, photographs of the evidence that is needed to be tested. Are there records that need to be subpoenaed from different counties? Are there psychologists' evaluations? I don't require defense attorneys to talk about that but, if it affects the timeline of the case, they do need to talk about it. There are probably about 30 or 40 boxes that we go through. Those 15 minutes conferences take place between 70 and 77 days after the initial appearance, the idea being that after 60 days there is a waiver and the defendant is going to be in custody. And the defense attorney has had adequate time to develop a relationship with the client and to get into the case enough so that we can talk about the particulars. By doing these case management conferences, we start the discussion of settlement going forward because any time two lawyers have to pick up a file and go into the judges chambers to talk about the case they have to know something about the case, to have thought about it. And the two lawyers start talking about what needs to be done and what the options might be for settlement. Often the settlement conference is set. By utilizing this system, I have been told by the sheriff that they have seen a dramatic change already in the length of time that an individual remains in custody because the cases are getting resolved earlier. Set-overs in felony matters are handled by Judge Koch and me. Misdemeanors and drug and property cases go through the CPC court. The CPC court, the Criminal Procedure Court, also does substitutions of attorney on the property and drug cases and in misdemeanor cases. The set-overs do not occur without a conference, unless the set-over would place the case within the 120 to 150 days for sex offense cases. So the attorneys have to come in, and we sit down and go over the reasons why the set-over is being requested. I hold the reins as tight as possible for the nearest date when the case can get tried. The other forum is in Judge Koch's court, the presiding court, where requests for set-overs are heard. I believe we are doing everything we can to keep those trial dates as close as possible to the 120 days, and only setting beyond that when there would be a serious issue that could come up on post conviction relief. For example, if the case was tried without the psychological report being back before a trial with a GBI defense.

With respect to the disparity of pay that is provided to different contractors, addressed at pages 12 and 13 of the draft report, I think you have done an excellent job of outlining a very complex issue that has multiple facets. I think the outline set forth in the report should be pursued. It is a very difficult situation for those who are underpaid for doing very complex cases and who have clients that are facing significant sentences if convicted. They look across the table and see others who are doing the same kind of work who are getting paid more. That is demoralizing and troublesome. On the other hand, there are some contracting firms, non-profits, who have an infrastructure that needs to be supported in order to provide the quality of services. That has to be taken into account in setting those costs. I think the goal should be to ensure quality services at a fair price, to use your terminology. It is a complex issue and it has to be inspected and evaluated. So I am open for questions. I know there are things I haven't addressed, but those are my initial thoughts.

546 J. Potter

In your experience, what percentage of the substitution of counsel requests that are raised in your courtroom, after hearing the arguments and chatting with these folks, what percentage do you approve?

551 Judge Frantz

Now just so it is clear, I only do the Ballot Measure 11 and A and B felony cases – those that are not on the property and drug docket that go to CPC. I assume you are talking about those that are not natural conflicts.

- 558 J. Potter Right.
- 558 Judge Frantz The percentage that are approved, I would say, and this is just a random guess, a gut reaction, probably about 15 to 20 percent. It is my goal, if at all possible, to keep the relationship together, so it is probably more like 10 to 15 percent. Sometimes the attorney and client can go to the jury room, if there is a communication problem, to sit down and talk about the case. Sometimes what I do is, when there is a substitution request, at the right time I ask the clients if they would agree to defer the motion for substitution and allow me to conduct a settlement conference. I get an agreement on the record to do that. We go to my chambers and talk about the case, and sometimes we are able to resolve the case right then and there. We go back on the record and again I ask the defendants if they are voluntarily withdrawing their motion for substitution of counsel. Of course, that is a case with no additional expense.
- 592 Chair Ellis I thought I understood you to say that a big factor that you think leads to these motions for substitution is lack of communication. The question I have, is there any observation you have as to any common characteristics that lead to that? I am just going to suggest some and you tell me what you observe. Is there is correlation between hourly compensation and per case unit compensation that you think may contribute to that? Is there a correlation between the experience level of the lawyer, either so young they don't do it or so old they don't do it? Is there any correlation between a MPD lawyer, various consortium lawyers and the other lawyers that appear? In other words, I am trying to see if there is something we can be thinking of from the contracting level to try and address the issue.
- 624 Judge Frantz I think it varies from individual-to-individual. I have seen across the board a level of dedication in each type of contracting situation, whether it is a public defender, an independent off the court-appointed list, somebody from a consortium, somebody from a small contracting firm. I have seen the same level of dedication, commitment, ability, responsiveness and attentiveness.
- TAPE 2: SIDE A**
- 001 Judge Frantz I have also seen the same level of lack of attentiveness and responsive to clients across the board.
- 002 Chair Ellis Does it tend to be repeated? So you see the same people involved?
- 003 Judge Frantz Yes.
- 003 Chair Ellis Is there is anyway that could get communicated either to contracting agency or the agency's staff?
- 005 Judge Frantz There are instances with individuals where I see the same issues coming up over and over. That could be shared.
- 008 Chair Ellis There is nothing we could be doing to make sure that it is communicated, so that it could be corrected?
- 009 Judge Frantz Well, I think you as a Commission have spoken to a number of judges and sought feedback from a number of judges in our courthouse, as well as I think you have spoken with the District Attorney's Office and others. So my understanding is that there has been quite a bit of feedback about the issues that

lead to concern about inattentiveness and lack of communication, lack of preparedness, competency.

- 016 Chair Ellis One other issue that I thought of, still on the substitution issue. On the conflict cases, you said that, if there is money, a place we should be spending it would to improve the conflict situation. Can you help us? First of all, what is there now and what do you see could be done?
- 021 Judge Frantz Well, Jim might be able to help out a little me with this. My understanding is that MPD still has a contract to review the police reports –
- 025 J. Hennings We don't review police reports because we don't have them. We don't have that information. Our review is when we get the case and if we see that that client is already represented by somebody and, if so, it goes to that person. We make sure that there is a strict rotation. The main area that we have problems with is that we don't get the information. We have talked with the District Attorney and Mike Schrunk would like to give us the information, but he does not have to do that. He would like to be able to submit it to us electronically. He would like his reports coming from the police department to come electronically. There is a great deal more that would we could do if there was further attention given within the first week or two when you start getting the police reports. The problem is we shouldn't get involved, we are mandated to get involved in the case once we are appointed, because that breaks the attorney/client relationship. But if we don't, then Julie sees it as a conflict request from the client. But at the same time, how deeply do we want to get involved in the case because we don't have the information? So there is an area I think the Commission, working with the other people in the justice system, should start pushing, and not only in this county but throughout the state. Early discovery of this type of information is necessary. The chief issuing deputy district attorney would love to have the time to let us know who the key witnesses are and the co-defendants. He doesn't have time because he has to issue cases every morning. So something as simple as that is preventing the district attorney from letting us know so we can determine those kinds of conflicts.
- 048 Chair Ellis Any other input on that?
- 049 Judge Frantz It is a very expensive process to put into place – to be able to track every witness in the police report before the case is assigned. It has to be done quickly. Judge Koch, Doug Bray and I have talked about it and we have talked about it at Criminal Justice Advisory Committee meetings. It is a very expensive process.
- 053 P. Ozanne Judge, just to follow up on the substitution issue. I certainly hope that our report indicated how much progress has been made in your courtroom. You were one of the first to alert people to the substitution issue. Of course, it is always a challenge for those of you in judicial management positions to manage the decisions of so many independently-elected officials in this courthouse. We suggested in our draft report, I think we referred to “run-of-the-mill” cases, which is not a very good term, that there may be substitution cases that occur below your radar screen. You were saying that you do Ballot Measure 11 and A and B felony cases. Mike Schrunk, when he just spoke to us, mentioned the effects of shining the spotlight on decisions or behaviors and how that could heighten the awareness of a problem and change decisions or behaviors simply because of the attention. Working with the Commission, is there any similar ground to be gained here with respect to other judges' substitution decisions?

- 066 Judge Frantz The key to it is having the same judge hear the motions and not having a motion for substitution be heard before one judge pertaining to one defendant and then another judge hearing the second motion for substitution and then a third judge hearing the third motion because there is an inclination by a judge to give the benefit of doubt to the defendant to work with another attorney. If it is the same judge who is always hearing the motions, that judge is going to be much more concerned about the fact that there has already been an attorney appointed for you, and you are only entitled to one attorney at taxpayer expense. There has to be a very sound reason to remove that attorney and appoint another attorney. So in the cases that I don't hear, they go to CPC court, the Criminal Procedure Court, where we change judges on a regular basis with three- month rotations. Sometimes judges are only there for a month at a time. There is constantly a push to have judges who are in those rotations understand the importance of holding the line on substitutions of attorneys, just like there is a push to let the judges hold the line on set-overs according to stated procedures. So that is the issue. If there is any criticism to be lodged against the judiciary, I think it is because there are constantly changing judges hearing these motions. There isn't that same sort of understanding of the importance of trying to keep the relationship together between the parties and the expense of not doing so.
- 097 Chair Ellis You referred to some bad advice that jail lawyers give. Is that something that is increasing in incidence because word gets out that that may be short-term perceived advantage?
- 099 Judge Frantz What I see is trends that defendants rely upon in order to get new attorneys. For example, someone will get a hold of the model ABA code and it will say that each attorney should not have more than X number of cases. Then they bring that in a basis for their attorney to be removed because the attorneys have more than X number of cases according to the code.
- 104 Chair Ellis They all do.
- 104 Judge Frantz They all do. So we try to avoid that conversation as much as possible. Then there will be the filing of bar complaints. There will be a rash of filings of bar complaints early on. That's why I hold a mini-hearing to make a determination of the legitimacy of the bar complaint. If you grant those motions, then you give the green light and then anyone who is dissatisfied and doesn't like the news that they are hearing from their attorney will file a similar motion.
- 113 Chair Ellis Do you think it is going down, up, or staying the same?
- 113 Judge Frantz It is definitely on the increase. Ballot Measure 11 consequences and property consequences, whatever, if there are significant sanctions that will be incurred if a person is found guilty and they are not happy with the assessment that the attorney is providing as to the probability of a more favorable outcome, the frustration that develops for the defendant becomes significant and the only person to blame is the attorney who is providing that advice. So I think in this era when we have very significant sanctions for criminal behavior, the frustration and taking it out on the defense attorney has created much more difficult relationships between defendants and their counsel.
- 126 Chair Ellis Do you see a higher correlation in the more serious crimes?
- 127 Judge Frantz Yes, I can only speak from recent experience.

- 128 Chair Ellis Which brings us back to the other point you made to improve the assignment criteria to get the more competent, experienced lawyers handling the more difficult cases.
- 132 Judge Frantz Right. And if a defendant threatens a lawyer on the 120th day and it is ready to go to trial, the consequence is not far away and there is a threat to the attorney, I take a look at how serious the threat is. It is not out of the realm of possibility for a client to throw a punch or to create some type of situation, either consciously and unconsciously, which creates a conflict that has to be addressed, even though it is very late in the case. The later the motion is brought, unless there is a clear conflict, the less likely it is that the motion will be granted. If there is a conflict that is brought early on, there usually is a possibility of working it out. When the conflict comes very late, often when it is about to go to trial, those are normally not allowed.
- 147 Chair Ellis Any other questions for Judge Frantz?
- 147 J. Connors Judge, you mentioned the 120 day rule a couple of times. It is my understanding that about 90 percent of the felonies in Multnomah County get done in that time frame. Does that sound right to you?
- 152 Judge Frantz Well, the Supreme Court requires that they be concluded within the 120 days. We are falling below that. We haven't attained that goal. It is 150 days for sex offender cases because it simply takes longer for the relationship to develop between the attorney and the client, and there is often more to do in those cases such as sexual evaluations and so forth. That is taken into account when we are talking about resolving the case in 120 days. But the truth of the matter is we are resolving less than that 90 percent within 120 days.
- 160 J. Connors Do you know how close we are?
- 162 Judge Frantz I think it is around 80 percent, give or take a couple of percentage points.
- 165 J. Connors Then the second thing I wanted to ask is you mentioned the complexity of the cases have increased. Having worked with you on the court and the mental health groups that you and Commissioner Naito have chaired, we have heard a lot that there are more mentally ill people in the jail. My sense is that this has played a big part in the complexity of the cases. Is that a growing problem.\?
- 170 Judge Frantz Absolutely. That is a great contributor, and it takes more time to deal with those cases and the psychologists to evolve relationships. Clients have to stay in custody longer. I think there is a lot serious lawyering going on. There are a lot more motions created by inmates and I think caseloads are heavy, so there is less time and it is more difficult for lawyers to access their clients. You know it is not possible to fax documents back and forth between lawyers and clients, so it means going out to Inverness Jail to get a 60 day waiver signed and that takes sometimes three hours of time. Sometimes Inverness is closed because they have run shutdowns. There are all kinds of factors that are making it so much more difficult for defense counsel to be able to have substitutive conversations with their clients and to get procedural matters taken care of. Of course, that takes away from the time that they have to prepare the cases and it adds to the frustration of the clients and the dissatisfaction with their attorneys because they are not seeing them as much.
- 191 Ron Fishback One of the things I have thought about over the years, and that the Commission might want to think about, is for some of these really difficult clients, say you

inherit someone who has had two or three lawyers before and it is a very serious case, often I will press for a second opinion. Sometimes what folks need is an outright substitution. But I think most of the time, but not always, Lawyer No. 2 gives the same advice as Lawyer No. 1. But if you could approve funds for a second opinion, I think it would be less expensive than an actual substitution. That lawyer could consult with trial counsel and review the work that has been done by the first lawyer at a very reasonable rate. This is just something to consider.

206 Judge Frantz

What I tell someone when there is just a total breakdown in the attorney-client relationship and they just can't proceed is that "you have the opportunity to work with one more attorney. You will not have a third attorney and, if you cannot work with this attorney, you may well find yourself in a position of representing yourself. These are extremely serious charges and you do not want that to happen." I tell them that up front so that they don't go through three or four lawyers. But there are extreme cases where substitution has to be granted, in my opinion, even though there is not an actual conflict as defined.

215 S. Gorham

Judge, how often do you follow through with that threat?

217 Judge Frantz

I have followed through on it and the case has gone out to trial. I have asked attorneys in the court if they can continue zealously representing the client and they say "yes." But if the situation has deteriorated where, as Ron was saying, we get another attorney in and client hears the same advice and we move the case to resolution. We determine if he or she will stay on and it goes out to trial and the defendant decides, "I better have an attorney." It does mean that trial gets set over and the attorney gets back on, and then the case often gets resolved. It has to be followed through on, or it has no affect. It is a hard thing to do from a judge's perspective because sending someone out to trial who is facing hundreds of months if found guilty causes a conflict in your conscience to do that. But the flip side of that is having four or five or six attorneys appointed to get to the same point. The other thing I do is ask to see if there is a legal advisor that can be appointed to make it absolutely clear to clients that they will be representing themselves because they are not going to get another attorney. That attorney might agree to stay on as a legal advisor to provide procedural information. It is a very awkward situation for an attorney to be a legal advisor. You are giving some legal advice but you are not controlling the presentation of the case. It is just setting the lawyer up for post conviction relief proceedings. So that is a very difficult situation for a lawyer to be in. I do know of one case that went to trial where someone insisted on representing himself. I think those cases where an attorney has been removed and a client has refused to go ahead with that attorney, those individuals have changed their minds ultimately and continued with the attorney or accepted a legal advisor.

260 Chair Ellis

Thank you.

**COMMENTS OF JUDGE EDWARD J. JONE
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 26-31 of the Minutes)**

- 045 Judge Jones I'm pleased to have the opportunity to do it. I am Ed Jones and I am a circuit court judge here in Multnomah County. But before I got this job, I was the Director of MDI for 14 years and I negotiated a lot of contracts with the state over those 14 years and those negotiations were often intense. We never got what we wanted or even, in my opinion, what we needed to provide the level of service we thought our clients were entitled to. But we did the best we could with the money we got. Part of our willingness to make due with less money than we thought our clients deserved was that we were aware of the financial constraints of the Indigent Defense Services Division and now those that you operate under. But what I didn't understand then, and I don't understand now, is, given those constraints, some contractors were paid much more for exactly the same kinds of cases. I don't mean to say that I don't understand the historical reasons for the disparity. I do. What puzzled me is the persistence of that disparity, even to the present. I am very pleased that the Commission has decided to undertake an examination of the question.
- I agree with John Connors that the lawyers and the staff at Metro have been in the forefront of establishing and assuring excellent public defense in this state. There is no doubt about it. I don't have any issue with their achievements. There is no court, no defense lawyer, no defendant that hasn't benefited from the work that Metro has done over the decades. It is absolutely the case. My concern isn't with their history or achievements. It is with their current budget and about the sacrifices that other contractors and other defendants have to make to allow Metro to have more money for every case. To make myself clear, I want to ask the Commission to look at the items with added value and that John set out in his document and ask yourself, "What is the current cost in this budget of each of those achievements? How much are you paying this year for each of those achievements?" Now in the draft report for today's meeting, on page 13, there are criteria that might justify relatively higher contract rates. They might rationalize higher contract rates. But if you actually sit down and say, "What is the current dollar cost in this contract for each of these achievements and are we getting our money's worth?" I think the answer you have to come to is: "We have no idea." For example, talk about the existence of an internal infrastructure. Well, that begs the question. That is why they get more because they have more people and that is where the money is directed. There office is like MDI and any other office, like your office. Frankly, that is where the money goes to the employees.
- 086 Chair Ellis Can I interrupt prematurely? Is there any data or information comparing what a comparably experienced lawyer at MDI gets relative to a counterpart at MPD?
- 089 Judge Jones Well, of course.
- 090 Chair Ellis At the individual level, as opposed to the contractor level?
- 091 Judge Jones Well, I would hope you have that data, frankly. It certainly wouldn't be that hard to get, if you didn't have it.
- 092 Chair Ellis Do you know if there is a disparity there?

- 092 Judge Jones Well at Metro pay scale, and John would know, but I think they run a little higher in the beginning and ultimately they go further up. I think there are some rationalizations that explain that. In other words, MDI lawyers top out sooner than Metro lawyers. The difference is small maybe \$1,000 or \$2,000, I am not even sure what it is.
- 098 J. Connors Closer to \$3,000, I think.
- 099 Judge Jones That is obviously one place the money goes. But when you look at the spread sheet, I have no idea and I can't vouch for these numbers, but it suggests that the same group of cases being done by each of the two offices generated over \$300,000 difference to you in costs. Now what did you get for your \$300,000, that is my question to you. Now, if you go down and look at the proposed suggestions, for example, a strong and effective management structure, you can have a strong and effective management structure in any defender's office if you are prepared to pay for it. But the reality is that the offices that have come along since Metro have not been given the opportunity. So to use that now as a reason to continue to give more money to Metro, it just doesn't make any sense. We go down and look at the capacity and willingness to raise legal challenges and handle test cases. Now how much does that cost? What is the dollar value of that? I mean, is it a \$100 extra a case or \$10 extra a case? Frankly, I don't think that any other law office would be any less capable, or has been historically any less capable, of raising those kinds of challenges. It simply isn't the case that any of the items laid out in the draft report can be connected to some justification for actually having more money. And that, in the final analysis, is the problem here – that you are examining why you are paying the extra money.
- 125 Chair Ellis John Connors, for example, the training that they do?
- 127 Judge Jones Yes, how many outside lawyers do you have attending one of Metro's training sessions? A second question: let's suppose that the cost of one trainer, full time, is a justifiable expense in an office the size of Metro. What does that average out to per case: one dollar, ten dollars? You certainly could figure it out. If you want to have that the trainer there, and frankly I think it is a good idea, fine, write it into the contract. But to justify a \$300,000 difference in a relatively small group of cases on the basis of having one lawyer doing some training, most of which is done internally, just strikes me as being – the reality is that most of the indigent defense training in this state is done through OCDLA.
- 137 Chair Ellis They do a lot of what I call CLE, but do you really think they do the training?
- 139 Judge Jones I don't know how many defender offices other than Metro have anybody working as a designated, paid trainer? Who is training those people? Let's suppose that training is a good idea. Should all the money we are spending on training be spent in one office?
- 144 C. Lazenby Let me ask you a question. Let's assume we take out all of the deltas out of the Metro budget and then we distribute the money evenly throughout all of the providers in the Metro area. What is the plus for indigent defense in this city if you do that? Or is there one?
- 149 Judge Jones There are a number of different issues there. If there are things that can be done that need to be done by somebody, then everybody should have a fair shot at providing that service. That hasn't happened. If it is something that can be spread around, it should be. So it depends on what the particular service is. One of the items listed on in the report was an institutional presence on behalf of

public defense. That is probably system-wide one of the greatest contributions that Metro makes to indigent defense – is the time that people in the administration and other lawyers spend involved in these public processes. Fine, what is the dollar value of that? How many extra dollars does it take to have that presence? The answer is, frankly, that it doesn't take any extra dollars. Lots of people do those things on their current salary. What justifies – and again I am just using that number because it is handy; I suspect the real number is larger looked out over the entire contract – how much of that \$300,000 in additional funds goes to providing that institutional presence on behalf of public defense? It is a necessary task, but how does it fit into the budget? What is the cost? Are you getting cost effectiveness with that money for that service? I don't know, but you should know.

171 C. Lazenby

I don't really have a point of view on this, as you probably know from knowing me, but let me just go down this line and talk about this a little more. I was around when the county was setting the first contracts here, and one of the reasons why we gravitated toward these larger and larger contracts was because of a perception that I think was valid – that there was a real inconsistency in quality and services, it just wasn't cost-effective.

176 Judge Jones

I am absolutely in favor of larger defender offices doing the bulk of the work in counties that can support an organization of that size. There is no question in mind that those offices provide a higher level of service largely, in my view, because of the group training, the sort of self-support that comes out of that kind of office. That was on one of the findings of a task force of the State Bar, when we made a statewide survey, when we looked at complaints about the quality of work and the better quality of work that was getting done in larger defender offices. That is a fact.

186 C. Lazenby

But your arguments, to a certain extent, result in decentralizing those services, if you are going to break down all the components and let them out for bid to see who is going to do them. You are dispersing those services amongst a lot of different –

191 Judge Jones

If you are not getting services now, then they need to be dispersed. That is a real question. That is the question that comes up with the training issue. Another one of these factors in the report – a capacity to handle high volume caseloads – well, if it costs more money to have high volume caseloads, why are we doing it? It doesn't make any sense to spend more money to have bigger caseloads. That's nuts. If you are not saving money by having bigger caseloads, you shouldn't be doing it. The benefits need to be pin downed, quantified and priced out. Maybe you will come to the conclusion that you are getting your money's worth for the extra money. But frankly, you ought to pay the same for the cases and sign a separate deal for the additional services, instead of hiding those additional services in increased case values. Because if everyone gets X amount of dollars to do a case and we say well we also need this service for drug court, to do a training session, to lobby, I guess we could call it that. Whatever it might be, fine, let's put a cost on it. Maybe Metro is the right place to get them done. They certainly have a good history to do them. Then give them a contract to do them. But then you know what you are spending and you are not hiding those services in your case cost. That is what has got us to where we are today. Anybody who looks at these numbers says, "How can this be fair?" Rather than sitting around trying to rationalize it, let's lay it out clearly. We pay X for that kind of case and, because the system needs these additional services, we buy it for a price.

- 222 C. Lazenby Judge, there is also an irony that you and I are getting into this conversation –
- 223 Judge Jones It's history.
- 224 C. Lazenby Yeah, but it seems to me as well that a lot of things I heard John mention are in the nature of the beast, and the reason why people get into this business and stay in this business. So to a certain extent, you look at Ron Fishback or Ken Walker and say, "I know that those guys do things that they don't get compensated for either." So don't we run the risk that, if we put a price tag on everything and there are no extras, we are ignoring what it means to be a true professional criminal defender.
- 226 Judge Jones In other words, we are only paying one office for the free work, and we aren't paying the others. I'm saying that I think a lot of contractors add a lot of "added value" because, frankly, with what you pay they couldn't do otherwise. But you can't do these contracts and not provide added value. Because if you were just doing what you were paid to do, you couldn't represent your clients. We all understand that. So everybody who has one of these contracts is giving you more, is subsidizing the payments you make. That is a fact. Frankly, if none of them get paid for it, then we would all lump it and everyone would understand. They wouldn't be happy, but they would understand. But why should one office get its "added value" recognized with a fat check, while other offices' added value results in nothing? That is my question. It seems to me that you have to know the answer.
- 247 J. Potter Let's switch gears just a little bit. You are on a brainstorming roll, but I want throw this idea out. Why do we have two large offices in Multnomah County? Why don't we have MDI and Metro PD merge together?
- 250 Judge Jones Frankly, I don't think there is any good reason except –
- 251 Chair Ellis Conflicts?
- 252 Judge Jones Well, the consortium model is probably the best response to conflict problems. Now I have been surprised to discover in many large jurisdictions that public defender offices solve conflict problems by never looking anything up. That is the way it is done in many big cities. They just don't look it up. I'm not recommending that, but we are one of the few jurisdictions that I am aware of where the defender offices take seriously their obligation not to take conflicts, and that clearly has some expense association with it. The consortium model does respond to that. Now, I think there are other big problems with consortia because, of course, to say they are management-thin hardly comes close to describing it. They have zero management, or as close to zero as any group of people trying to get a common task done can get by with. I don't think, frankly, that is a good idea, but it clearly has some advantages with regard to conflicts.
- Multnomah County is not a rationale system, not a rationale provider system. It is entirely a question of historically accident. MDI would not exist if Jim Hennings would have been willing to do traffic cases. There it is. That is why MDI was created, to do traffic offenses which Jim's office didn't want to do. Then, over time, as cases and numbers went up, it grew into more and more misdemeanors, into juvenile cases, and by the time we wanted to get into felonies it was a mature industry. There weren't many extra cases lying around and, frankly, the state over a period of years chose to sign many contracts, which have a big advantage for the state. That is not something the state was very successful with, with Metro and to a lesser extent with MDI, simply because,

once you get to a certain size, you have some leverage in the negotiation process that the little guy doesn't have. You have two caseloads you could be gone tomorrow. Everybody understands that. And when the comment in the first draft report about not being as good as a negotiator; well, when you have no where to go and nothing to stand on, it is hard to negotiate tough. On the other hand, if you have the bulk of the cases in the jurisdiction, it is possible to negotiate with a little more leverage, and that has been the history in this jurisdiction. Things have flowed towards those who have the ability to negotiate from a tough position and away from those who have not.

- 298 Chair Ellis Just to give the other side of that. If an organization has only one purpose and one buyer for that purpose, how much leverage do you think you really have?
- 300 Judge Jones Well, it is like the union shop that has one business union. They have to get along. I mean they can strangle each other but, bottom line, they have to come to an accommodation. The large contractors are in exactly that position with you or the State Court Administrator. It wouldn't be possible to say, "Metro, we are tired of you and you are not being reasonable, so you're out of business and we are going to hire somebody else."
- 307 Chair Ellis The other side of it is, it is not very realistic for Metro to say, "We are tired of you."
- 308 Judge Jones Right. That means you have a classic contractors-state negotiation that comes down to the last minute, and finally everybody is forced to get reasonable and get on with the life. They have to live with each other, and that is how it has been over all of the years it has been going on. But right now this notion of added value as an explanation for rate disparity, how come it can't it be costed out? Why shouldn't we have a clear set of standards?
- 319 J. Potter I want to come at this one more time. Let's say that we decide that there is some value, and we talked it out and concluded there is some added value – we decide that, as Connors said, having an institutional presence makes sense or, as Schrunk said, having a defense infrastructure in a large office makes sense – then why aren't we combining these two offices? Why doesn't MDI and Metro combine? And if that were the case, would be saving money? We have two administrative processes with the two offices. Couldn't we reduce the average cost per case by doing that?
- 326 Judge Jones You would think so. But when you look at the numbers and the bigger the office, the more cost. So I guess the answer is "no," although I can't understand why that is. I mean, you would think there would be economies of scale – that if you got a 50-lawyer office, you could do a drunk-driving offense for 10 or 15 percent less than a five lawyer office. But you guys haven't achieved that. In fact, the bigger the office, the more money you pay.
- 334 C. Lazenby You have already explained why that occurs. You explained that the smaller groups don't have the leverage and the negotiations to get the true cost. So really the argument may not be that MPD is getting paid too much. The argument may be that the other contractors need to be paid more.
- 338 Judge Jones I don't disagree with that. Don't get me wrong, nobody is getting enough money to do the work you expect them to do. Really, the issue you have is how to share the pain, not how to divide up the extra cash. I wish our discussion was, "Let's divide up the money in a way we can all be happy with," but that isn't it.

What you guys are dividing up is the suffering and you are not dividing it fairly, in my opinion. That is pretty much what I have to say.

- 346 P. Ozanne Judge, I would like to follow up with on Chip asked. And maybe I just didn't hear your answer. I certainly understand all of your arguments we have to track and manage costs. And merger of the larger offices might make some sense, as I understand you. Disaggregating cost, and you might have been out of the room when we talked about this with John Connors, the reason you would do that, it seems to me, is to encourage other people to bid on the disaggregated services. There also would apparently be some competitive dynamic that would perhaps increase our cost savings. So, on the one hand, as Chip was saying, you are apparently advocating structurally for larger organizations and, on the other, you seem to be suggesting that we should move toward a competitive market model that would tend to atomize the organizational structure for our contracting system. How would you handle this if you were the administrator in our position? What is your advice in that regard?
- 364 Judge Jones Well, we can talk about the ideal system for Multnomah County. Even assuming we could agree on what it would be, and I can give you a view on that, I don't think you can get there from here, at least not in the next decade or two. In some ways, the biggest problem over time is that contracts proliferate and, up until very recently, they never went away. In each new situation, it would present a problem for the Commission or the State Court Administrator and they would respond with some new contract to solve that problem, or some side deal with an existing contractor to solve that problem. And the things just have gone unimproved might be one way to describe it
- 377 P. Ozanne Unless I am misunderstanding you, by costing out these various services and putting them out for bid we would be encouraging the formation of boutique contractors that would be saying, "We will do drug court, we will do the lobbying, we'll do such and such for less money --
- 380 Judge Jones If you can get the service. Now the institutional presence issue is an interesting one. You can't bid that out. That doesn't make any sense. The people who are there from indigent defense should be the people who are deeply involved because they are doing it everyday. But, for the life of me, I can't understand how that service fits into a budget number or why it would justify an extra \$20 a case.
- 391 J. Stevens If you can't justify it, and I think you are probably right that you can't, then doesn't the Commission have the obligation to say, "We'll take away that \$20 and hire more lawyers somewhere else where we need them more."
- 396 Judge Jones If you start with the assumption that you are spending apparently more money than you could get those same cases done elsewhere and then say, "What am I getting for that money?" Until you know for sure what that money is going to, you can't make a decision about whether it is wisely spent. And, frankly, a lot of these items don't have any demonstrable cash value. You know, "we do the big cases, we win in the Supreme Court" – every lawyer's dream, but isn't because we pay them more and, therefore, they get better people. Or is it because we have smaller caseloads, which cost more money, so the lawyers have time to do those impact cases? I can think of six different explanations for why one office would have more presence in the Supreme Court than another, and each one of them might come down to some sort of a budget issue. But you have to decide what it is. Why is it that they are in the Supreme Court more often, smaller caseloads, smarter lawyers, what is it? If paying them an extra

\$3,000 wins more cases, then I am all for it. But, frankly, there are a lot people, and I am probably going to regret saying this, in the system which no extra amount of money is going to make into a good lawyer.

422 Chair Ellis

That was pretty well phrased.

423 Judge Jones

When they get hired in a public defenders office, they have already decided that getting rich is not their life goal. They ought to get paid a decent wage and many of them don't. But I don't think that money produces better lawyers. It just produces people who can pay off their loans and feed their kids.

434 Chair Ellis

Thank you.

**COMMENTS OF JUDGE ELIZABETH WELCH
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 31-35 of the Minutes)**

441 Judge Welch

I am Elizabeth Welch and I am the Chief Family Court Judge for Multnomah County. I just have a couple of issues. They are not very dramatic and they are not very messy. The first thing I want to say is that, in the year that this change-over has occurred, as far as I know as the person who signed most of the paperwork to appoint and compensate and approve fees, and I don't have to do that anymore, it was absolutely a seamless transition. We have had no problems whatsoever with this new function, absolutely none.

I am going to talk now mainly about juvenile court, which is a very small part and on the edges of what you have been talking about while I have been sitting here. One of the advantages we have enjoyed over the years, and I have been involved in one capacity or another for 35 years back when I started in the DA's office for juvenile court and the system is so much better that it is absolutely breathtaking, one of the reasons for that is the quality of work that is being done by defense attorneys in juvenile court. We benefit mainly by the fact that juvenile court is not a place you go when you are being punished or when they shouldn't have hired you in the first place either, in the DA's office or in a defender organization. We have wonderful lawyers who stay in the system to become extremely expert and it is a very, very challenging job and very different from criminal defense. We are very grateful to the Public Defender's Office and MDI and some of the other firms that have contracts. They don't simply move people in and out, and that allows people to become very capable and very, very, effective. You can always be better, but I am very happy 99 percent of the time with the quality of representation that we see in the juvenile court. One of the things that I am hoping, as this system that you are administering gets on its way and looks at new issues and how to better do the job, the issue of conflicts is, of course, a pain in the neck for people who are trying to run an efficient system. You have to get off the case and now we have to postpone the trial and all that sort of stuff.

I don't know if all of you have an understanding of what a juvenile court case looks like. I am not talking about delinquency. That is just like the criminal model, except there is no jury and it is simpler. The dependency case model is something I should tell you a little bit about, just to make sure you understand. A dependency case is a case where the children are removed from the parents because the parents aren't very good at that job. In the typical dependency case there is one mother and typically two or three fathers for the children who we

are dealing with. And then there are the kids. These people all probably need to be represented. If you add that into the calculus of conflicts in the criminal context, you will go absolutely bonkers. MPD is appointed to represent the mother in a dependency case. They check their records and they discover that, eight years ago, they represented one of the fathers in a criminal matter. They can't take the case. It is a mess. When you talk about making law firms all into one, what that means is there are people who simply would not get represented. It would be a disaster from our standpoint to do that. Most of our conflicts are with the Metropolitan Public Defender because they have such a broad range of representation of the adults, and because they have been around for a long time.

The solution for the conflicts, of course, is an appointment list, and our appointment list is so pathetic that it is embarrassing. We rely on that because there are only X number of contractors, and we need a lawyer for the momma in a determination case and no one can represent her because of all these conflicts. So we fall back on the appointment list. Our appointment list is horrible. We can't get anyone to be on it anymore for all of the obvious reasons. We have a list that is kind of a public list and then we have people that we actually appoint off it. I am just being honest and I'm not going to name any names. But most of the lawyers on that list we have decided we are not appointing because they are not competent lawyers. They don't do enough work at the juvenile court or they are just not competent lawyers, and we are in terrible distress. We have no lawyers to help us out on these conflict situations, which are numerous.

The other thing that I want to make sure you are aware of in Multnomah County, we have a very elaborate system in juvenile court. We have many kinds of hearings that we invented. We place a lot of demands on the lawyers who represent kids and parents. Again, if the model in your head is the criminal model, I have to ask you to try and suspend that and think about a hearing that occurs the first day the case is in the system. A lawyer from one of the firms picks up a case in what we call shelter hearings. There is a second hearing, which in about 50 percent of the cases happens in about two weeks. We have a pretrial conference, a JSC or Judicial Settlement Conference, in everyone of these cases. The lawyers are expected to be prepared, to have worked with their clients and to be ready to settle the majority of these cases at that point. Then just a trickle of them go on to trial. After there is adjudication and the children are made wards of the court, there are family decision meetings. Actually, they happen before and are called by the Department of Human Services, which most lawyers feel obliged to attend, especially if their client has a shot at getting their kids rather than a hopeless case scenario. There is also a Citizen's Review Board. The demands that we place on the lawyers who are in these contract agencies is horrendous. And then we top that off by operating in two physically different locations. We have judges here and we have judges at 68th and Halsey and they have hearings back and forth during the day. We try to minimize that, but it is a pain in the neck for them and it is a pain in the neck for us because it slows us down, because we have to wait for people, because they run overtime, and all of that. The fact that we operate out of two buildings, I'm surprised Jim Hennings can hold on to some of these folks. So, what I am saying as sort of the caretaker and spokesman for the system is I want you to be aware of how hard these lawyers work. We think they are wonderful with a few minor exceptions. They are wonderful, hardworking, dedicated and of course underpaid. But mainly we want to help you find ways to compensate them better and to get us more people on that appointment list to relieve some of the strain.

There is one other subject that I just want to open up to you, but there is no obligation on your organization's part to deal with this. I am, among other

things, the Chief Probate Judge in Multnomah County. There is a problem in the probate area that one of these days is going to actually hit the world and people are finally going to recognize it. The human impact between a civil commitment, in which people have a full bore right to counsel, and the establishment of a guardianship is that a guardianship lasts forever, unless it is actually terminated by the court. There are people whose liberty is at stake, their right to chose where they live, their right to have all of the decisions about their life made for them against their will, have no right to representation in this state. What we do in Multnomah County, much to the distress of the few other probate judges that are in the state, is that we do the old style when Mr. Ellis and I were young lawyers and that is, if you were in the wrong courtroom at the wrong time, you got told that you were going to represent this person and you were not going to get paid. Because the elder law bar in this state and, in particular, in this community are such good folks, they do it. They just take the appointments and they represent the people. Most of them don't have much of a case in fighting off the guardianship, but they absolutely have no right to representation, unless of course they can hire a lawyer and pay for. But if they can't, there is no money and there is no attention being paid to this issue. I know it is not on your plate, but I'm just mentioning it. I would glad to talk about anything else you would like.

- 645 Chair Ellis Questions?
- 646 S. McCrea Do you have any suggestions about what we could do to help you in terms of your appointment list?
- 648 Judge Welch Well, again, I make the assumption that the reason people are not on the list is because the compensation isn't that good. I haven't taken a survey, but I did send a letter out about three or four years ago to domestic relationship types. They would be most obvious, although there might be other people. I said in my letter that this is good stuff; that you are representing children, you are on the side of angels. I think maybe one person responded and I think I sent out 50 letters. It is tough stuff.
- 008 Chair Ellis You indicated you had an informal or unofficial quality screen on the appointment. Do you think it would be useful to consider something more formal with criteria for inclusion on the list, or some kind of advisory committee that would screen people on the list? It is troublesome to hear people may think they are on the list, but the reality is they are not qualified and are not being used.
- 015 Judge Welch I don't know how people get on the list. I mean I know there is a process, but I just don't know exactly how it works. But there are people that have been on it forever. I shouldn't be this ignorant as to how they get on there. We have asked, and I don't know if it has gotten to you yet, it was a long time ago, to be given permission to take some people off the list and we haven't gotten an answer yet.
- 020 Chair Ellis Who did you ask?
- 021 Judge Welch Well, I asked the trial court administrator. Have you received a request, Mr. Ozanne?
- 022 P. Ozanne We are thinking about that statewide, in terms of qualifying people for appointment lists, in general. As we do that, which we are doing in Lane County as we develop a new court-appointment system there, it is a learning

experience for us. We expect that in any court, including your court, we will to apply this experience to screening qualified applicants for appointments. But I hear you saying it is not so much screening; it is finding somebody who is competent. The two would go hand-in-hand, I expect.

029 Judge Welch

Obviously, we have to appoint the people who we have. If somebody needs a lawyer, at least somebody said this person was a lawyer. Mr. Ozanne mentioned something about the idea of people in this field should just represent parents and some lawyers should just represent kids, and maybe there is some desire on the part of the lawyers to do that. I haven't had much time to think about that. But there is one law firm that just represents children, the Juvenile Rights Project, although that is not even 100 percent; it is 97 1/2 percent. Meaning no disrespect to the Juvenile Rights Project, I think it is a dangerous idea that the system can become specialized that way. I can understand having done it myself, having appeared a little bit in juvenile court when I was in private practice, and then representing kids. First of all, anybody would rather represent the kids than the parents for obvious reasons. It would kind of be like being a prosecutor and a defender, one in the morning and one in the afternoon, because when you are representing parents – the system is a good system in my opinion the screening that DHS does is a good screening – you don't get to fall off a log and secure dismissal of cases. Most of the cases have a lot of substance to them. Some of them are a little bit marginal, so if you are representing parents you are very much in the criminal law context. Your client has committed a crime, now how do we mitigate the damages and give them the best shot at recovering their parental responsibilities and rights. And then in the afternoon, you represent a child, where you want to see absolute purity and perfection in the parental function before you want to participate in the return of the child to these always somewhat marginal situations. Obviously, it would make you crazy to have to do both of those things, and I sympathize with that. The crazy making that goes on in private practice is there for lots of us though, where we present people on eight different positions. I think it is important that, as people mature in their professions, they understand that there are two sides to issues and that the world is not made up of Donna Reeds and Robert Youngs. That is not what the world looks like and sometimes we have to make due with parents who are not perfect by a long shot. But the kids are better off with a parent, rather than disconnecting them from everyone.

065 Chair Ellis

Metro provides both juvenile service and criminal service. I'm not sure if there is anyone else who is doing both. My question for you, from your vantage point, is that a plus with Metro, a minus, or is it neutral?

069 Judge Welch

Well, I think it is a minus simply because of the conflicts that we all have to live with as a result. I think way over half of the conflicts are out of that firm, and I don't know how many firms serve our juvenile court.

075 I. Swenson

Eight.

075 Judge Welch

As an example of the virtue of having Metro, we have a program that we started here about four years ago called the Family Probation Program. It is a wonderful program. What we do is, on the first day that a dependency case hits the door, we have a person whose sole job is to do a criminal records check. This woman has contact with all the databases in the state to find out if any of the parents are involved in the system or have a history in the system. It is a wonderful program that lets us know on day one a lot more about the parents than we normally do. If the case is adjudicated in the juvenile court as a dependency case, and we know that dad is on probation in Multnomah County,

that adjudication on dad is transferred to the judge who is handling the juvenile case so we have one judge and one family, so there is continuity. Having been the pigeon who started this, the virtue of having probation violation determinations made in the context of the family chaos that is going on is absolutely fabulous, and everybody who has been involved it – some of them kicking and screaming, the DA the defense bar, the probation department – agree it is a wonderful program. One of the biggest questions we had is are we going to have two lawyers for dad, one for the PV and one for the juvenile dependency case. And the answer is sometimes we have to have two lawyers, but sometimes we don't. And when we don't have to have two lawyers is when Jim Hennings, operation involved in the case. Then we have one lawyer. We have lots of lawyers out in the community who are getting involved in this, but the consistency saves money and it is a very good system.

I guess the real point I want to make is that we have had very good luck with the very collaborative approach that we have here in Multnomah County. We have had great support in the past from the State Court Administrator being able to flex around and do some of these unusual things. Basically, there is nothing terribly wrong with our system and please don't do anything to that.

**COMMENTS OF JOHN CONNORS
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 21-26 of the Minutes)**

258 J. Connors

Well, the obvious questions for you are the cost of cases and efficiency. I wanted to address both of those. Just by way of background, I think keeping in mind the volume of work we do, the Portland office does 13,000 cases per year, which range all the way from second chair in a death penalty cases, seven murder cases, to a substantial, 60 percent, of the Measure 11 cases in the county and all of the other felony cases. Juvenile cases, the lawyers typically handle about five or six termination cases a year. We do almost all of the civil commitment cases for the whole county and we staff most of the specialty courts including STOP, which some years has been as many as 700 cases a year, with one lawyer and one team. We also have the case assignment project, which I will talk about more in a little while. It is important to see that the Portland office does 13,000 cases with a staff 40 of lawyers; a total staff of 96 people, six of whom are administrative. The studies we have done show that that is a significantly low amount for that big of a staff.

Of course I am biased, but I think in terms of a quality issue, just about any way you can measure that or anyway you can test it, I think the quality of our work has been excellent. I mentioned that an 18-month statistical study showed that about 60 percent of the charges we handle go away. More specifically, that breaks down to about 1/3 of the cases where our clients are found guilty of lesser crimes. Only about 1/3 of them are actually found guilty of the charges against them. The office historically has had about a 7 percent trial rate. We have had about a 9 or 10 percent trial rate on the Measure 11 cases, which is way above the national standards that I understand is between 1% and 3% in terms of trial rate. Obviously, we are concerned about the conflicts. About a year or a year and a half ago, we instituted a practice within the office that no one could get off a case without it being reviewed by a manager. I would say almost all of the cases we get off of are based on actual conflicts. We have worked hard and struggled with conflicts, and we are optimistic that the rules

will get changed so we are not getting off cases we don't want to get off or where witnesses or victims in cases are former clients and the lawyer that handled the case is long since gone. But it has been my experience that there are very few cases that we are getting off of, based on personality clashes or that type of issue. Judge Frantz mentioned the list of cases over 150 days old. When that study came out, we were glad to hear that only 15 of the 89 cases were ours. Again, we handle almost 60 percent of the Measure 11 cases, and again six or seven murder cases a year, so I think that is statistically significant. That is in addition to all of the anecdotal stories about some of our programs that result in drug-free babies being born to the STOP program and things like that. So you can ask me what I think about the quality, but any of standards that I have heard about being used, the quality is high and the description that it is very high to excellent is an accurate one.

So the bulk of my comments are about this efficiency question. Just to be really clear on the charge and the cost per case, I think it is important to keep in mind a couple of things. Maybe I have mentioned this in the past but because this is such an important issue and you want to be fair in terms of the cost per case and be efficient. Keep in mind our cost for the case involves the cost of the investigation. We do those 13,000 cases with 11 investigators, and that means we can investigate every misdemeanor. We don't have to go back for state funds on those seven murder cases. That is all included, and I think that is an important part of your analysis. The second thing that we have in-house, a crucial part of our legal system, is the alternative court. Part of what they do is find drug treatment programs, so that people don't come back. They get people hooked up in anger management programs. They help people find contacts for jobs, and we work closely with some of the employment offices – not only on specific cases, but on a system-wide basis. People that work on tracking these resources throughout the state have done studies on things like juvenile sex offender treatment programs. That information is available simply by people calling and asking for it. People from around the state call and use our office for that resource, not to mention some more specific things along the lines like a list of experts that we keep in our database and make available to people, like the clothing room that through donations we make available to anybody that has a client who needs to get dressed up for court, like our training sessions that have always been opened to anybody who wants to attend, and we have a library that is frequently used by lawyers outside our office.

- 341 Chair Ellis How many lawyers outside of your office are coming to the training sessions?
- 343 J. Connors Not enough. When we specifically advertise it, we typically get between four or five. Some of trial skills programs that we have put on, we have specifically invited people from other offices and have let them participate. But it is not as big a number as it should be. I think that is for a lot of good reasons and probably the main one is that people are busy.
- 347 Chair Ellis Would you share your brief bank?
- 348 J. Connors We would. I don't know of any specific requests that have come from outside recently. But I know historically we have. Part of what is happening based on the lists is a lot of documents get sent back and forth and it is sort of the same answer with respect to the training because OCDLA has so many programs in a year. I think a lot of the people outside our office rely more on them. But that is something we talked about a lot, and have talked with John Potter about. We would be glad to work with the Commission to try to get a more coordinated effort along those lines.

Getting back to the cost per case issue in the memo, I mentioned that the duty attorney calls and literally we take turns dealing with those calls and questions. Typically, I would say there are 20 a day. The expungements – there are all the people who are coming back to court after three to 10 years after their convictions, usually because they want to get a better job. We literally handle hundreds of those cases per year, in coordination with the Federal Defender's Office. That was a program started when Judge Abraham was Chief Criminal Judge about 10 years ago, and Steve Wax realized he was calling me on a pretty regular basis to coordinate records on cases. We went to Judge Abram to formalize that process. It is usually two or three cases per month and it is usually people who get charged in state court. We get appointed and get credit, but just as often, it is the behind the scenes coordination that doesn't count as a case for us. The out-of-state warrants, again probably between three and four cases a month, people calling or writing from places like Oklahoma, Georgia, Florida, those are all examples within the last month. They have been kicked off their SSI because they have an outstanding warrant. These are people who are usually very, very sick and often mentally ill. Again, this is a task that we agreed to do because we were in the best position to do it. Some cases, Judge Frantz would call and ask us to do it. Sometimes the DA would call and ask us to do it. In terms of the amount we get paid, in terms of the number of cases, it is not counted anywhere. Juvenile cases – I am pretty confident we are not the only office that does this, but there is a lot more that we do, like early expulsion hearings, if someone is looking at getting kicked out of school, like appearing with some of our child clients at Grand Jury when they have been victims of abuse. More and more we are pushed to handle aspects of family law cases, such as custody issues with respect to divorce proceedings that might be going on at the same time as a juvenile case. That is something I know Kathryn and others have tried to be fair about the payments. But the resources, as I understand it, haven't been there and that is an issue. We just try to do the right thing without it being counted as much as it needs to. Appeals – lawyers will handle appeals often because they want to protect the judge's ruling or just because they want to protect what was good law. We recommend and encourage the newer lawyers to handle appeals early on in their careers. Again, that is something that is not specifically counted toward our quota, but it something we have done. I think a fair estimate would probably be about six appeals per year, which isn't a huge number.

I think you are starting to get the message here that there is a lot more that we do than initially meets the eye. The case assignment project was a good example of this approach. I think Ann Christian was frustrated that newer judges and JC threes that didn't know who should get what case. There would often be quarrels bordering on fistfights among the contractors on who should get a case. The court really didn't have the staff to provide any real guidance on those issues. Finally, we agreed to do that for money credit, but not for case credit. It is a significant project, and it eliminates a lot of conflicts up front. I think Jim undersold our work in that department somewhat. The problem came when the DA's office changed computer systems and they could no longer get us the list of co-defendants and potential co-defendants. So we could check our computers and send out a list to the other contractors, but we still captured many, many conflicts before they are even assigned and avoided the issue of whether or not anybody has to be paid. Then, finally, Judge Frantz touched on this, but there is quite a bit of start-up work with things like the STOP court or the Community Court. Literally, when the Community Court was being started, a lawyer that was going to staff that was going to meetings in the community on a weekly basis to listen to people in the community, to hear why they thought somebody

who had left a vacant car in the neighborhood should be punished more severely than somebody who was actually charged with theft or prostitution. It is just part of the infrastructure that we provide. Part of the point I want to make is the cost per case is misleading, unless you find a way to count all these things, and I think it would be counterproductive to make us count all these different things because of all the time we would spend doing that.

- 438 Chair Ellis I was going to ask as I was listening to you whether you think we ought change the contracting method to buy these extra services on a disaggregated basis?
- 442 J. Connors No, I think if it is not broken don't break it would be my notion. But I'm just trying to give you a more complete and accurate picture of that infrastructure and some of what we have able to learn and do over the last 33 years. We have learned from our mistakes. We have had a lot of wonderful opportunities to help be part of Community Court and STOP Court and those sorts of things. I think right now our biggest practical problem is going to be the change in the federal law with respect to hourly workers and the fact that our investigators and legal assistants are now going to be limited to a 40 hour week because we can't pay overtime, and how we are going to struggle with getting the 13,000 cases done within those 40 hour limits. But that is something that we have a good start on. We are confident we can get the work done with a lot more organization and planning, which to me is more important than having us count all this other stuff. I think you should just let us deal with that issue. The ethics and flexibility that has been a hallmark of our office –
- 461 P. Ozanne May I follow up on that? John, there have been comments over time, and I am sure you have heard them too, that we should disaggregate or at least more closely track what we are paying for in the context of our duty to administer limited taxpayers' funds. And how can we be assured that we are getting some savings through economies of scale? In fact, we have listed some of the same factors in the staff report that you have mentioned as needing to be accounted for. But should these factors also be quantified in dollar terms? And at some point, aren't there presumably some offsetting savings that come from a large office with lots of cases? How can we be sure that we are getting those advantages? Is it realistic to try to determine that we are getting these advantages with an office like yours?
- 275 J. Connors I think it is a very realistic and very important. The memo was sort of the first try to capture some of that. I know, based on the meetings I have attended of the Contractors Advisory Group, that it is a whole mind-set that you are trying struggle through, in terms of how do you measure quality and how do you measure contribution. All I can say it is an important issue and that we will keep working with you and the Commission.
- 484 P. Ozanne Not only quality, because you have spoken to that, but also dollars and the sense that are we, by configurations like your office compared to others, enjoying economies of scale and getting some dollars savings. I'm trying to figure out how we can measure that, and maybe disaggregating and costing out the services provided would be one way. I'm just wondering if you have any thoughts on that.
- 496 J. Connors Well, I think it does get into the issue. We have struggled to get the work done and be everywhere we are supposed to be. The reality that Judge Frantz described is a very real reality. You know, you talk about economies of scale, and part of why we were able to deal with the BRAC crisis, and in part why we are able to work with new programs such as when Mike Schrunck gets a federal

grant to start new Community Courts, we can make our best efforts to staff these functions within those our current budget and within our current structure because we have some flexibility. You know part of that is the whole CSL case-weighting system that helps us. For example, when there aren't as many Measure 11 cases assigned in a year but there are more misdemeanors, which is currently what is happening, we can adjust. So the significance and the savings based on economies of scale are usually significant. The terms of how you actually count all that, I can say is based on things like the fact that our structure and the economies of scale allow our lawyers to do way more cases than national standards. Juvenile lawyers handle somewhere between 400 and 500 cases a year. The misdemeanor lawyers handle somewhere around 500 cases a year. The minor felony lawyers handle somewhere in the neighborhood of 350 to 400 cases a year. Major felony lawyers, people handling Measure 11 and murder cases, do significantly more. The only thing I think, it is just sort of an attitude and an ethic, that because we are a public defender office and we are non-profit organization for many years, we do more cases than we have contracted for because, come December, we don't want to say to the system, "No, we are done, we are not going to pick up cases." So those are all hard things to count and measure, but it all adds up to a picture that I think says we are very cost efficient.

Let me just – I see Judge Welch has arrived – there are just a couple of reasons why I think the structure works, and I just want to touch on those before you call Judge Welch. One is we have always hired people and trained people under the notion that being a public defender is a vocation. I will talk about that in a second. But we not only see ourselves as needing to be excellent legal technicians, we really train and hire people with good trial skills and constantly push that. We try to have our written product as legal technicians to be excellent. We don't want people to ever feel that they get second rate lawyers. We feel that we really are the experts because this is what we do all the time.

- 557 Chair Ellis Is your hiring still predominately entry level lawyers, or do you do much lateral hiring?
- 559 J. Connors Predominately. We do some. I guess no more than 10 percent. The other part of that is we really do hire people and train people to be counselors. They have to be able to talk to clients about problems. They have to be willing to talk to clients to encourage them to do things to get them out of this system, and that has been a really important part. We don't have a lot of rules in this office. But the ones we do have are really important things, like the client comes first. And a big component of this is that, if you really train and teach people that part of what we do, it give clients respect. And hopefully, when we give clients respect, they will develop respect for themselves and the system, society and laws. Maybe that is the reason they don't come back through the system and cost the state more money.
- 574 Chair Ellis Can you give us your opinion on the issue that Judge Frantz is addressing – not conflict substitution cases, but relationship substitution cases. How much of that do you see, and how does your office handle it?
- 581 J. Connors I believe that I get most of the complaints by phone and I am very confident that almost all of the written complaints get directed to me. Both Jim and I review all of the post conviction claims and any other claims along those lines. In part, because of the structure and because we have the team approach – a legal assistant and an investigator working on almost every case – we really do make it a priority for somebody in the office to see their clients within 24 hours. And

we make it a big priority, in terms of the structure, that when the client calls somebody from the team he or she should be available. So, if the lawyer is in court all day, the legal assistant should be back in the office and they can field questions from the client and the client's family, and do all the kinds of things that relieve the kind of pressure that Judge Frantz described. From my experience, there are complaints and we try to meet them both in terms of the client and their family. When Peter had his former job as part of the study on minority representation in Portland, he brought to my attention some families of clients of minorities in prison on Measure 11 cases. They weren't even necessarily our clients, but we met with them and tried to resolve their issues and garner respect for indigent defense, particularly from the black community. We have always been very, very careful to communicate to the judge that, if there is any kind of complaint, we want to know about it right away. We would much rather deal with the problem early on and consistently than to have it fester. I think we have a good record with the judges. I can tell you from at least a half a dozen uncomfortable meetings I have had with judges about complaints that they also go the other way. I think part of the system Mike Schrunk described of the system working well together is absolutely true. I'm sure there are complaints but, if we can deal with them, I think they are pretty minimal.

626 Chair Ellis

Going back to the disaggregation issue, if I can call it that. I am kind of torn listening to you and reading your report because, on the one hand, all of the things you describe are valuable and good. And they are important to do. I also think it important that Salem doesn't direct everything in terms of complete disaggregation. On the other hand, I am sure you sense that there are other defense providers who feel aggrieved at the rate disparity that exists. They may understand some of what you said, and they may have the sense that it is more that you guys have been good bargainers, and you that have been at it for a long time and history kind of unfolded and it happened that way. Is there some way that, without converting the contract to a complete disaggregation where, for example, we buy X dollars worth of community involvement and, you know, that is just taking a nonsensical example –

TAPE 3: SIDE AB

001 Chair Ellis

Is there some way to build in enough information to be able to better understand both, at the Commission level and at your compatriots' level, what this incremental cost is producing in the way of services?

003 J. Connors

Well, let me try to answer your question in the way Judge Frantz addressed it. I think she really hit the nail on the head when she said the issue is not so much whether we get paid more than anybody else. It would be easy for you to just let us divide and conquer each other. I think we all lose in that sort of situation. And the quality and leadership we provide would be severely damaged. Once you lose all those efficiencies, I don't think you get them back. It is different to be a public defender. The real issue is we do make 30 percent less than the DA's. Over the course of the first 10 years a Deputy District Attorney is going to make a \$100,000 more than one of our new lawyers. Coincidentally, that probably matches the debt load of that new lawyer. We don't have the opportunity for a client to come in and put down \$40,000 to handle a Measure 11 case because, by law, we are only allowed to do the cases we are assigned. That ethic and that notion that being a public defender is a special vocation had the entire office sign up for two weeks of unpaid leave during BRAC, and some people went more than that to get through the crisis. If you start to nickel and dime public defenders, and disrespect that notion that it is a vocation, all the kinds of efficiencies that I described, and all the leadership and the kind of

quality that the whole system comes to expect because of the way we have done business for 33 years, will be lost. You are going to lose a lot. I will think more about how you disaggregate that out and measure it. But I guess my message to you is you have got the record. I don't know how else you want us to demonstrate cost-effectiveness or quality. I think the record speaks for itself. If you want us to think more about exactly how to line item all these factors, we will. But I think it is sort of missing the boat and missing the point. There is a lot we do that you can't really quantify in terms of a dollar cost. The state has learned the hard way for many, many years. We can't afford the \$40 an hour rate. If you want to get into that mentality, it won't cover our costs anyway. That is probably not a direct answer to your question.

MULTNOMAH COUNTY RATE COMPARISON

Case Type	MPD Rates*	MDI Rates*	PDC Rates	JRP Rates*	B & T Rates	M & B Rates	L & L Rates	NAPOLS Rates	MCIDC Rates	RCDC Rates	Kliewer Rates	Case Type
MURD	\$19,837		\$13,000	\$16,500	\$12,012							MURD
AFEL	\$936		\$773						\$788	\$775		AFEL
AM11	\$2,976		\$1,600						\$995			AM11
BFEL	\$527		\$469				\$460		\$476	\$468		BFEL
BM11	\$2,976		\$1,600						\$900			BM11
CFEL	\$457	\$500	\$412				\$390		\$410	\$410		CFEL
EDP	\$198						\$230			\$120		EDP
EXTR	\$298		\$274				\$220			\$225		EXTR
DUIS	\$377	\$375	\$300				\$220		\$300	\$375		DUIS
DWSS	\$377	\$375	\$300				\$220		\$300	\$225		DWSS
MISS	\$377	\$325	\$300				\$220		\$300	\$225		MISS
OTMS	\$377	\$375	\$300				\$220		\$300	\$225		OTMS
SCDV	\$377	\$375	\$300				\$220		\$300	\$225		SCDV
Trailing/Comm.Crt.	\$179		\$160			\$155			\$154			Trailing/Comm.Crt.
DPV	\$198	\$170	\$138			\$135	\$170		\$134	\$150		DPV
FPV	\$198		\$138			\$135	\$170		\$134	\$150		FPV
MPV	\$198	\$170	\$138			\$135	\$170		\$134	\$150		MPV
CPV						\$125						CPV
CONT	\$397		\$300			\$235						CONT
FAPA	\$397		\$300			\$235						FAPA
SUPP	\$397		\$300			\$235						SUPP
CVHC										\$600		CVHC
CVPC									\$1,000			CVPC
MHMI	\$198											MHMI
JDEC	\$595	\$580	\$510	\$580	\$520	\$500		\$596			\$525	JDEC
JDEP	\$793	\$580	\$510	\$580	\$520	\$500		\$596			\$525	JDEP
JPDC	\$278	\$270	\$195	\$285	\$235	\$230		\$300			\$235	JPDC
JPDP	\$298	\$270	\$195	\$285	\$208	\$230		\$300			\$235	JPDP
JUDF	\$536		\$428	\$516	\$395	\$390					\$390	JUDF
JM11	\$1,488		\$1,275	\$1,548	\$988							JM11
JUDM	\$317		\$295	\$310	\$297	\$280					\$280	JUDM
JUDO	\$317		\$274	\$260	\$255	\$280					\$280	JUDO
JPV	\$159		\$115	\$130	\$109	\$130					\$135	JPV
JUTC	\$2,579	\$2,500	\$1,735	\$2,475	\$1,456	\$1,500		\$2,500			\$1,500	JUTC
JUTP	\$3,769	\$2,500	\$1,735	\$2,475	\$2,080	\$2,000		\$2,500			\$2,100	JUTP
SO12					\$4,160							SO12
OTHR	\$198	\$270	\$274			\$280	\$220		\$265			OTHR

* Includes Investigation

Notes:

1. MPD AFEL, BFEL, and CFEL rates are converted from crime seriousness level based on 2002 - 2004 case mix.
2. MPD is paid annually to staff felony arraignments.
3. MPD handles STOP Court (Drug Treatment Court), MHMI Docket (Civil Commitment), and Community Court (Misdemeanors).
4. MDI is paid annually to staff Westside Community Court.
5. MDI CFEL cases are only DUII Felony and trailing CFEL.
6. PDC PV caseload is primarily trailing from felonies and misdemeanors.
7. M & B handles Contempt Court and PV caseload is primarily trailing from Contempt Court.
8. L & L handles the X-Docket (fast-track drug felonies) and the PV Court.
9. L & L BFEL and CFEL cases are STOP and X-Docket rejects.
10. NAPOLS only handles Indian Child Welfare Act cases.
11. MCIDC is paid annually to staff Misdemeanor EDP Court.
12. MCIDC handles conflict cases
13. MCIDC also handles PCR cases from Multnomah County Jail.
14. RCDC handles Gresham Courts (Early Resolution Program & DUII Diversion).
15. RCDC handles a very small portion of felonies that MPD, PDC and MCIDC cannot take.

KEY

AFEL	Class A Felony
AM11	Class A Measure 11
B & T	Bertoni & Todd
BFEL	Class B Felony
BM11	Class B Measure 11
CFEL	Class C Felony
CONT	Contempt
CPV	Contempt Probation Violation
CVHC	Habeas Corpus
CVPC	Postconviction Relief
DPV	DUII Probation Violation
DUIS	Driving Under the Influence of Intoxicants
DWSS	Driving While Suspended
EDP	Early Disposition Program
EXTR	Extradition
FAPA	Contempt for Violating Family Abuse Prevention Act Restraining Order
FPV	Felony Probation Violation
JDEC	Juvenile Dependency w/Child Appointment
JDEP	Juvenile Dependency w/Parent Appointment
JM11	Class A or B Measure 11 Felony Where a 15-, 16- or 17-year-old Is Indicted as an Adult in Circuit Court
JPDC	Postdispositional Proceeding w/Child Appointment
JPDP	Postdispositional Proceeding w/Parent Appointment
JPV	Juvenile Probation Violation or Motion to Modify
JRP	Juvenile Rights Project, Inc.
JUDF	Juvenile Felony
JUDM	Juvenile Misdemeanor
JUDO	Juvenile Other
JUTC	Termination of Parental Rights w/Child Appointment
JUTP	Termination of Parental Rights w/Parent Appointment
Kliewer	Law Firm of Ronnee S. Kliewer
L & L	Liebowitz & Lopez, Inc.
M & B	McKeown & Brindle, P.C.
MCIDC	Multnomah County Indigent Defense Consortium
MDI	Multnomah Defenders, Inc.
MHMI	Civil Commitment
MISS	Misdemeanor
MPD	Metropolitan Public Defender Services, Inc.
MPV	Misdemeanor Probation Violation
NAPOLS	Native American Program/Legal Aid Services of Oregon
OTHR	Other
OTMS	Other Traffic Misdemeanor
PDC	Portland Defense Consortium
RCDC	Rose City Defense Consortium
SCDV	Show Cause Diversion
SO12	Class A or B Measure 11 Felony Sex Offense With Alleged Victim Under Age 12
SUPP	Contempt for Violating a Support Order
Trailing/Comm.Crt.	Trailing Misdemeanor (felony client's additional misdemeanor cases) or Community Court Misdemeanor

Salary Comparison
Deputy DAs & Deputy PDs
(2004 Average Salaries)

Public Defender	County(s)	Deputy DA Annual Salary	Deputy PD Annual Salary	Difference	PD FTEs	Total
MDI	Multnomah	\$72,412	\$53,840	\$18,571	18	\$334,285
MPD	Multnomah/Washington	\$72,889	\$51,882	\$21,007	57	\$1,197,382
JRP	Multnomah	\$72,412	\$48,465	\$23,946	11.75	\$281,367
NAPOLS	Multnomah	\$72,412	\$34,800	\$37,612	2.5	\$94,029

Preliminary Review of Conflicts of Interests in Public Defense Cases
 Ethical, Resource and Client Issues
 Recommendations
 Ann Christian
 November 12, 2004

Overview of Primary Issues Relating to Public Defense Attorneys and Conflicts of Interest and the Scope of This Preliminary Review

On an annual basis, public defense attorneys are appointed by Oregon's trial courts to represent persons determined financially unable to retain counsel in over 160,000 cases. The nature of these cases range from non-payment of a court imposed financial obligation (e.g., non-payment of child support or a criminal fine) to aggravated murder. Public defense cases also include those where a child has been removed from her parent's custody by the State due to alleged abuse and neglect and cases in which the person has been taken into State custody based on an allegation the person is psychologically a danger to oneself or others.

Of the more than 160,000 cases annually, some number have more than one attorney appointed to represent the client during the course of the case. In what appears in the total scheme of public defense representation to be a relatively few cases, a client entitled to public defense counsel may have, as was the case in one recent case in Multnomah County, six attorneys appointed to represent the individual prior to the court allowing the person to represent himself.

This preliminary review of public defense conflicts of interest is not intended to be a treatise on the case law, disciplinary rules and Bar opinions governing attorney conflicts. And it is not a legal review of the courts' authority to allow withdrawal and substitution of appointed counsel; i.e., how many attorneys is an individual entitled to in order to ensure the person receives "adequate" or "effective" representation required by the federal and state constitutions? At what point, after how many attorneys, can or should a court deny a person's request for new counsel? Or, legally and practically, at what point should a judge deny a request for new counsel, allow a person to proceed with his case with no representation or with the assistance only of a "legal advisor."

Rather, this preliminary review of public defense conflicts of interest is intended to:

- identify the *practical issues* and *adverse impacts* that result from attorneys' ethical obligations to current and former clients and ethical issues that arise in representing some individuals who have significant mental health or social issues;
- identify the *practical issues* and *adverse impacts* that arise and result from legal representation provided by multiple attorneys;
- assess the extent and nature of the multiple representation "problem" – to the extent current information allows such an assessment; and
- provide recommendations to public defense administrators and providers for what steps should next be taken to improve the practical issues and adverse impacts of multiple representation of public defense clients.

The primary issues relating to public defense attorneys' conflicts of interest and multiple public defense attorneys appointed to represent an individual appear to be:

1. the financial cost to the state;
2. the adverse impact on public defense attorneys (both the former and future appointed attorneys);
3. the adverse impact on the court, prosecutors, and others (e.g., victims) involved primarily in the criminal and juvenile justice systems; and
4. the adverse impact on clients of public defense services.

An Illustration of the Conflicts “Problem”

To illustrate the above primary issues related to “conflicts,” consider the following example.

Tom Smith is 40 years old and in custody at the Multnomah County Detention Center. Mr. Smith is charged with a Ballot Measure 11 offense and violating his probations on multiple drug, theft and firearms convictions.

Mr. Smith's OJIN court records in Multnomah County alone date to 1985 (the year to which the Court back loaded records into OJIN). *Excluding* numerous infraction and violation cases, Mr. Smith has 56 closed felony, misdemeanor, domestic restraining order, and other domestic relations-related cases, including contempt for non-payment of child support. Multiple violations of the many probations that Mr. Smith has served are not counted in the court's OJIN records. Mr. Smith also is listed as a party in his son's Minor in Possession of Alcohol case and his parental rights were recently terminated by the court. Finally, Mr. Smith is known to be a “difficult” client to represent.

The former Mrs. Smith has a similar OJIN record and is the named victim in Mr. Smith's new Attempted Murder/Assault I case. Both Smiths have been appointed counsel by the court on their criminal and juvenile court cases over the years.

Although this example is not the norm with respect to clients of public defense services, it is this type of scenario that does occur (seemingly, more and more frequently) and brings to everyone's attention within the system the difficulties presented in appointing an attorney to represent the “Mr. Smiths” and appointing an attorney that will be able to stay on the case from start to finish. In Oregon, there is an emphasis on appointing counsel at the defendant's first appearance. This is good for Mr. Smith and for the court and prosecution. In a county with multiple felony contractors and contract offices which handle juvenile cases, as well as criminal cases, the challenge has been and continues to be how best to determine which attorney should be appointed to represent Mr. Smith – today, at 1:00 p.m.

The example of Mr. Smith is primarily based on a real case for which counsel recently was appointed. In this example, Multnomah County public defense contractors whose attorneys previously have been appointed to represent Mrs. Smith in her criminal and juvenile court matters and those whose attorneys have been previously appointed to represent the Smith children in juvenile court all have an actual conflict of interest in representing Mr. Smith on his new felony case. The victim of the alleged assault is Mrs. Smith.

Prior to November 2000, what likely would have occurred with respect to the appointment of counsel for Mr. Smith?

Prior to November 2000, it is most likely Metropolitan Public Defender Services (MPD) would have been appointed to represent Mr. Smith at his first court appearance. This is because MPD is the county's primary major felony contractor and because no review occurred prior to Mr. Smith first court appearance, with respect to "conflicts" that may readily be identified by a review of OJIN case records.

Because MPD had represented Mrs. Smith previously, MPD would identify that conflict after having been appointed and would then file a motion for substitution and appointment of another public defense attorney. The court's staff, at this point and assuming time and resources are available that day, may be able to identify that Contractor X previously represented the Smith children and as a result, avoids the court appointing that contractor to represent Mr. Smith. But the court's staff does not and cannot know that Contractor Y, which is "next in line" for consideration of appointment, currently represents the state's primary witness to the alleged assault. Contractor Y is appointed, discovers the conflict after interviewing Mr. Smith, and requests the court substitute new counsel.

Attorney Homan with Contractor Z is substituted by the court. Mr. Homan reviews the discovery that became available today; e.g., two to three weeks after Mr. Smith's first court appearance. A check for conflicts based upon information included in the discovery results in no conflicts being identified. Mr. Homan interviews Mr. Smith and returns to his office with the name of a witness not listed in the discovery. This witness is identified by Mr. Smith as his self-defense witness.

That witness is a former client of Contractor Z's office eight years ago, well before Mr. Homan was employed by Contractor Z. The attorney who represented the defense witness is no longer employed by Contractor Z. Attorney Homan has the file on the former client retrieved from the office's storage unit. He reviews the file and determines the former representation creates an actual conflict, under DR 5-105(C)(2) and the OSB's Formal Opinion NO. 2003-174. Historically, the most difficult of ethical conflict issues for public defense counsel have been related to this "former client representation" type of scenario.

But DR 5-105(D) does allow the attorney to continue his representation of Mr. Smith if both Mr. Smith and the former client consent to the representation after full disclosure. Even if Attorney Homan were to seek such consent, assume that Mr. Smith would not consent, not because of disclosed conflict, but because Mr. Smith was not impressed with Attorney Homan, in part because he looks so young and has a 2001 bar number.

By now, four weeks have passed since Mr. Smith's grand jury indictment and there is a concern Mr. Smith may not consent to waiving "the 60-day rule." The court considers the third motion for substitution of counsel in this case. Mr. Smith now informs the court that he wishes to represent himself, as he knows well from experience that his court-appointed attorneys are "not real attorneys." He knows what happened that horrible evening and he simply wants to present his case to a jury. The court does not allow Mr. Smith to represent himself and appoints an attorney from the court's private bar list. That attorney files a motion for substitution two weeks later, based upon a "breakdown" in the attorney/client relationship.

This illustration, based on fact in again a relatively few but notable cases, could continue with even more attorneys being appointed or Mr. Smith eventually representing himself, with the assistance of a "legal advisor."

What actually occurred recently in Multnomah County with respect to the appointment of counsel for “Mr. Smith”?

Beginning in November 2000, MPD and the former Indigent Defense Services Division implemented an “appropriate case assignment” process within the MPD office. MPD staff reviews *felony* first appearance dockets the morning prior to the scheduled court appearances. Staff check OJIN to determine whether a defendant currently is represented by an appointed attorney. If that is the case, that attorney will be appointed on the new case, provided the contractor/attorney also takes felony appointments. One client, one attorney.

If a defendant is not currently represented by appointed counsel, MPD performs a conflicts check to determine whether (without benefit of formal discovery) MPD has an apparent conflict in being appointed to the case; e.g., OJIN and MPD records. In our example, this review would show that MPD previously has represented Mrs. Smith. To the extent the District Attorney’s office is able, information on co-defendants, victim names and prosecution witnesses may also be provided to MPD staff.

The goal of the “appropriate case assignment” process is to identify as many potential conflicts for MPD and other felony contractors as is humanly possible within a very limited time prior to defendants’ first court appearances.

In the recent *real* case on which the Mr. Smith illustration is fashioned, it appears MPD staff’s review of the defendant’s OJIN history (56 closed cases) also disclosed the fact that the vast majority of other contractors’ attorneys previously had represented the defendant. At the defendant’s first appearance in court later that day, the court appointed a non-contract, Private Bar attorney.

Of course, it remains to be seen whether the Private Bar attorney will remain on the case through its conclusion. But, the fact of having the “appropriate case assignment” process in place avoided the delay and disruptions resulting from many of the multiple substitutions that would have occurred prior to the implementation of MPD’s “appropriate case assignment” process four years ago.

The purpose of the Mr. Smith illustration and discussion is three-fold:

- to provide a sense of the nature of conflicts in public defense cases;
- to provide a broad sense of how conflict issues adversely impact public defense resources and providers, public defense clients, and the court system overall; and
- to explain one of a number of improvements already in place in Multnomah County that decreases the likelihood a client will have multiple attorneys appointed during the course of the client’s case.

Examples of How Competing Goals and Demands Affect Appointment and Substitution of Counsel

Contract and Private Bar Representation

In the Mr. Smith illustration, Private Bar counsel was first appointed to represent “Mr. Smith,”

based upon the appearance from OJIN records that all other contractors in Multnomah County likely would have a conflict of interest. Is that the answer? When in doubt about contractors' ethical ability to represent a client at the outset of appointing counsel, appoint Private Bar in every case? But even in Mr. Smith's case, if given the time (prior to actual appointment of counsel) and resources (e.g., available staff, state witness/co-defendant names), there likely may have been one of the ten law firms that are members of the two Multnomah County contract consortia that may have been able to accept Mr. Smith's case, without conflict.

Particularly in this time period when public defense caseloads are not those of the 1990s where there were more than sufficient numbers of cases available for all contractors and private bar, public defense administrators and contract providers want contractors to get as many cases as they possibly can. The two Multnomah County consortia were established for the very purpose of being able to accept appointment to cases in which MPD has a conflict. Consortia contracts are intended to decrease the need for Private Bar, hourly-paid attorneys.

But then, State Bar Task Forces and others have long advocated for the maintenance of a strong (well-trained and experienced) Private Bar component of public defense as a matter of good policy. If having a strong Private Bar is not given priority, who will handle the cases that continue to have substantial multiple conflicts?

The answer by some may be that contract attorneys from neighboring counties be appointed to such, again relatively rare, cases. But with the workload demands of most existing contractors and court docket issues in many courts, appointing out-of-county contract attorneys may not be the best solution, unless there is no other solution.

The goals of immediate appointment of counsel and continuous representation by appointed counsel (no periods of time where a client is unrepresented) and the goal of avoiding multiple appointments due to conflicts

If a person who is determined financially eligible for appointed counsel at that person's first court appearance could wait to learn who his specific attorney will be until the prosecution provides discovery, conflict appointments would decrease. However, the competing goals of best ensuring a public defense client actually has early contact with his attorney and makes his future court appearances is better attained if the client leaves his first court appearance having met his appointed attorney. At the first court appearance, at least preliminary legal advice and contact information can be exchanged. But by appointing a specific contractor or attorney at the first appearance, the potential for a conflict withdrawal of that public defense provider is greater than if counsel could be appointed after for example, preliminary discovery is available.

By raising these competing demands, I wish to make it clear that I am not suggesting or recommending the initial appointment of counsel, particularly for clients in custody, be delayed to sometime after first appearance. My point is simply that it is important to identify what are often different and competing demands and goals within the system that impact the potential for conflict substitutions of appointed counsel.

With respect to the appointment of counsel at the *outset* of a case, ORS 135.045 and 135.050 and constitutional mandates support appointment of a specific contractor or attorney immediately. In addition, the practical side effects of delaying appointment of counsel, such as the possible loss of a critical defense witness, support appointment at the first court appearance. However, for cases in which counsel has been appointed and there is a need to substitute new counsel, one may consider delaying the new appointment of counsel for what likely would be no more than 24 hours in order that other contractors or Private Bar being

considered by the court for substitution could review discovery and conduct a conflicts check prior to the court actually ordering appointment of new counsel. A trade off with this approach is that there may be out-of-custody clients who do not re-contact the court or who will be required to make yet another court appearance to learn who their new attorney is.

The Need to Retain Experienced, Quality Public Defense Attorneys and Firms

Another set of competing goals is minimizing the number of instances where multiple public defense attorneys are appointed to a case and retaining experienced public defense providers. More time and experience means more conflicts for individual attorneys and firms. Particularly with the issue of “former client” conflicts, public defender and law firm offices that have existed for decades are “ripe” for conflicts and withdrawals, particularly under existing Disciplinary Rules. Rather than recommend consideration be given to “shutting down” such offices and seeking out new attorneys and firms, I am pleased to discuss below that the historical issue and impact of “former client” conflicts will likely be mitigated with the adoption of new disciplinary rules, effective January 1, 2005.

Retention of Client Files

A final example of competing goals or demands that impact the number of instances where substitution of appointed counsel is necessary involves retention of public defense files. Clients, the Oregon State Bar, the Office of Public Defense Services under the contract terms, and subsequent lawyers for the client all want clients’ files to be preserved – for probation violation proceedings, and state and federal postconviction relief proceedings. But keeping files for extended periods of time creates often significant ethical issues. As is the case with the experienced attorneys and offices discussed above, the new disciplinary rules will likely lessen the adverse impact of retaining client files.

It also needs to be noted that lack of adequate resources within public defense providers’ offices, prosecution offices, and the courts impact the number of cases in which appointed counsel will need to be substituted and the time within which conflicts can be determined. Both result in delays in the resolution of a case and generally adversely impact the client and all others within the justice system. If the District Attorney’s office cannot provide discovery to defense counsel in a timely manner, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a public defense office has insufficient resources to timely check for conflicts or to maintain regular contact with clients, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a court’s docket is such that cases are repeatedly set over, attorney/client relationships can deteriorate or clients are more likely to eventually fail to appear in court, resulting in issuance of a bench warrant and beginning the appointment of counsel process anew months or years later.

Primary Reasons for Withdrawal by Appointed Counsel Due to a Conflict of Interest

- Current representation of two clients in any matters when such representation would result in an actual or likely conflict
- Prior representation by attorney or office of state’s witness under certain circumstances

- Prior representation by attorney or office of a defense witness under certain circumstances
- Prior representation by attorney or office of co-defendant or other party (e.g., juvenile case) under certain circumstances
- Breakdown of the attorney/client relationship

Representation of Multiple Current Clients

The first listed reason for withdrawal by appointed counsel due to a conflict of interest is best illustrated by a situation where two co-defendants are indicted and separate counsel is appointed to represent each of the co-defendants. The county's primary felony contractor is appointed to represent one of the co-defendants. Two months later and perhaps as a result of information provided to the prosecution by one of the co-defendants with the advice of counsel, a third co-defendant is indicted. Unless co-defendant #3's charging instrument or OJIN for the brand new case number indicates the "tie" between the earlier two cases and the new case, it is likely the county's primary felony contractor will be appointed to represent co-defendant #3. In reality, these conflict situations are rare.

The more frequent situation where one encounters the "current clients" representation conflict issue is in juvenile dependency cases. It may appear tempting, at least fiscally, for a court to appoint one attorney to represent both the mother and the father in a dependency proceeding. Even if there appears, at least at the outset of the case, to be no "actual conflict," there often will be a "likely conflict of interest" under DR 5-105(A)(2) of the Oregon Code of Professional Responsibility (ORCP).

Under DR 5-105(F), an attorney may represent multiple current clients in instances where there is no actual conflict, but there is a likely conflict, if each client consents to the multiple representation after full disclosure. Should there be independent counsel appointed to represent mother and father to ensure full disclosure and knowing and voluntary consent? What if a likely conflict later becomes an actual conflict, the court then will be requested to appoint two new attorneys, one each for the mother and father. In an effort to save the cost of appointing individual counsel for mother and for father in a proceeding that ultimately may result in their parental rights being terminated, a court may wind up appointing a total of three attorneys to represent the parents versus having appointed two separate attorneys at the outset of the case.

I believe the "best practice" with respect to cases in which there is a potential for current client conflicts (co-defendants, multiple parties) is for the court to appoint separate counsel at the beginning of the case. Every effort should be made to identify such multiple party cases at their outset.

The following is an excellent example of "the system" talking to and working together to avoid public defense conflicts. In one Racketeering case involving, I believe, 18 reportedly gang-affiliated co-defendants (almost all of whom had previously been represented by appointed counsel), the Multnomah County District Attorney's office contacted both the court and the Indigent Defense Services Division well in advance of serving the arrest warrants. This allowed all possible conflicts checks (which were very time consuming) to be made by court and IDSD staff to best ensure "appropriate assignment" of attorneys originally appointed to represent the co-defendants.

Former Client Conflicts, With Emphasis on Instances Where the Former Client Was Represented by Counsel No Longer With a Firm (Contractor) and the Closed Case File is in Storage

With respect to the next three reasons listed above for withdrawal of appointed counsel, Paul Levy, Attorney Trainer for MPD, recently wrote:

“Without a doubt, sorting out conflicts of interest is the most frequently encountered ethical inquiry criminal defense lawyers make. But it’s an inquiry that we very often get wrong, at tremendous cost to our firms, the state’s public defense system, local courts and jails, and especially our clients. And we get it wrong, I submit, because we’re afraid to do the right thing.

* * * * *

Consider how often you have heard criminal defense attorneys tell a judge they must withdraw from representation because ‘our firm previously represented a witness,’ and that request is allowed without further inquiry or explanation.”

The Oregon Defense Attorney, September/October 2004.

Paul, whom I view as one of the state’s experts on the issue of former client conflicts, is of course correct. During a visit of Multnomah County’s Criminal Procedure Court (CPC) to observe the handling of substitution of counsel motions in misdemeanor cases, I overheard an attorney inform his client he needed the court to appoint new counsel, because his office previously represented a witness in the client’s case. The attorney later informed me no review of the former client’s file had been done. His motion to withdraw was simply based upon a check of state’s witnesses against the office’s database of former clients. Of course, if the attorney had reviewed the former client’s file, there may have been a clear factual basis to request substitution of counsel. Or, there may not have been a basis to support the motion.

One of the recommendations included in the January 12, 2001 addendum to the OSB’s Indigent Defense Task Force #3’s report, included at my and others’ requests that the OSB consider a modification of DR 5-105 in regard to the “firm unit rule” for former client conflicts. The Legal Ethics Committee considered the recommendation and decided in 2001 to include the discussion and consideration of a change in the “firm unit rule” as a part of its then-new Model Rules of Professional Conduct review.

As stated at the beginning of this paper, a detailed review and discussion of the relevant Oregon Code of Professional Responsibility provisions with respect to conflicts of interest is outside the scope of this paper. This is due in significant part to the fine work done on the issues by individuals like Paul Levy. In addition to the article previously referenced, Paul’s written materials, “Ethical Minefields: The Changing Landscape of Client Conflict of Interest Analysis,” prepared for the May 1, 2004 OCDLA Trial Preparation and Investigation Conference are an excellent resource.

Based upon my review, I agree with Paul that at least some of the ethical “minefields” appear to have been destroyed with respect to former client conflicts by the adoption of Rule 1.10(b) of the Oregon Rules of Professional Conduct (ORPC).

Under current, soon to be replaced, DR 5-105(C) and DR 5-105(J), an attorney appointed to represent a client must pull a former client’s file to determine whether the attorney has a conflict

of interest in representing the new client. The question the attorney then must answer is: did the former representation provide the attorney confidential information about the former client that is capable of adverse use on behalf of the current client? If the attorney is the same attorney who represented the former client, he may know the answer to the question from memory or from reviewing the former client's file. Or if the attorney who represented the former client is another attorney in the office, the attorney with the new case can consult with that attorney and review the former client's file.

But what if the attorney who represented the former client is no longer employed with the office? Or what if the attorney who represented the former client is still employed at the office and has no memory of the former client's case? And with respect to the latter question, does it matter at all whether the former client's file remains on-site at the law firm's office or the file has been stored (often years ago) at an off-site storage facility? Under DR 5-105(C), DR 5-105(J) and OSB Formal Opinion NO. 2003-174, the newly appointed attorney must pull the closed file, unless the file "is no longer at the firm."

The question of whether a file is "no longer at the firm" if the file long ago has been archived for example, in the basement of the law office's building or at an off-site storage location is not addressed in the formal opinion. An email reply to a public defender director who directly asked this question of the OSB's General Counsel staff upon receiving a copy of the formal opinion in late 2003 suggests storing a file off-site does not mean the file is no longer at the firm. Similarly, OSB General Counsel George Riemer, in an Informal Written Advisory Ethics Opinion (November 12, 2003) to Metropolitan Public Defender Services states that even when the former client's lawyer is no longer in the office, "...it is important for you to understand that 'sealing' the file and putting it in storage does not alter the fact that any information in your office is imputed to everyone, hence the vicarious disqualification ('firm unit rule') of DR 5-105(G)."

Given the opinion and the above responses from the Bar, the attorney with the new case is required to retrieve and review the file (wherever the file may be or for how long) and even if the attorney who represented the former client is no longer employed at the law firm, the attorney must withdraw from the case if the file review discloses a conflict of interest.

All Oregon lawyers will be governed by the newly adopted ORPC, including public defense counsel, effective January 1, 2005.

A comparison of Rule 1.10 (ORPC) and DR 5-105(C) and (J) is provided on the following page.

**Current DR 5-105 Conflicts of Interest:
Former and Current Clients**

* * * * *

(C) Former Client Conflicts - Prohibition. Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

(2) Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

* * * * *

(J) Effect of a Lawyer's Departure. When a lawyer has terminated an association with a firm, **the firm** is not prohibited by reason of the formerly associated lawyer's work from thereafter representing a person in a matter adverse to a client that was represented by the formerly associated lawyer unless **one or more of the lawyers [any lawyer]** remaining at the firm would be disqualified pursuant to DR 5-105(C) **or unless the closed file or other confidential information remains at the firm** and consent is not obtained pursuant to DR 5-105(D).

(Emphasis added)

**Rule 1.9 Duties to Former Clients
(effective January 1, 2005)**

* * * * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known;

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest; Screening (effective January 1, 2005)

* * * * *

(B) When a lawyer has terminated an association with a firm, **the firm** is not prohibited from thereafter representing a person with interests **materially** adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) **any lawyer remaining in the firm has information protected** by Rules 1.6 and 1.9(c) that is material to the matter.

(Emphasis added)

Of greatest significance, in my opinion, is the fact that new Rule 1.10 no longer references “closed files” as does DR 5-105(J). In addition, the new rule applies only to “any lawyer remaining in the firm” as opposed to DR 5-105(J) which applies to the firm as a whole. The focus appears to shift from lawyers and files with protected information to simply lawyers who remain employed at the firm who have protected information.

In response to an email from Paul Levy, Peter Jarvis, an editor of the OSB’s *The Ethical Oregon Lawyer* and expert on conflicts analysis, Mr. Jarvis submits that “the shift from the ‘firm’ to ‘any lawyer’ makes no sense if a firm can be knocked out by dead files that no one still there [at the office] has ever seen.” He goes on to say “but even if ... I am reading too much into the language of the new rule, the worst that could be said is that the new rule is arguable ambiguous.”

Further review and consultation with OSB General Counsel is warranted. But it appears that the new rule may no longer require that archived files be pulled and reviewed. It also appears that any attorney at a law firm, even the attorney who represented the former client, may continue representation in the new case in which the former client is a witness, if the attorney or another attorney in the office does not remember any protected information obtained from the former representation.

Cases in Which an Attorney/Client Relationship “Fails to Succeed” – Sometimes Despite Multiple Attorney Appointments

It is my belief that the most significant issue with respect to public defense conflicts of interests and substitution of appointed counsel is not with the cases where a contractor discovers a conflict, for example when discovery is received. But rather the most significant issue and challenge for courts and public defense administrators and providers involves cases where there are multiple, sequential appointments. These cases range from the most serious to the least serious of cases; e.g., from Measure 11 or Termination of Parental Rights cases to Criminal Trespass II cases involving homeless individuals.

Although relatively rare in comparison to the total public defense caseload, cases in which multiple, sequential attorneys are appointed tend to involve clients who have mental health or other social issues (e.g., distrust of government including “government attorneys”). They may also occur in instances where counsel is unable to (e.g., due to workload) or fails to establish a good, working attorney/client relationship early on and maintain that relationship.

The underlying impetus for the 2003 legislation that the PDSC adopt substitution of counsel policies and the amendment of relevant statutes that courts “...may not substitute one appointed counsel for another except pursuant to the PDSC’s policy” was based upon concerns raised about cases in which multiple attorneys are appointed, not the case where one counsel is substituted because a conflict is identified when discovery is received.

One recent misdemeanor case in Multnomah County in which a total of four public defense attorneys were appointed involved the son of an individual who has been before the court numerous times since the early 1980s and has been represented by numerous attorneys. Part of the attorneys’ difficulties in establishing and maintaining an attorney/client relationship with their client involved the client’s father.

Courts, correctly, wish to have counsel available to every defendant who is financially eligible and does not waive that constitutional right. This is so because it is the court’s responsibility, but also because a *pro se* individual is at substantial risk without counsel and frequently

demands more of the court's resources. However, at what point does a court refuse to appoint new counsel? After two attorneys have been appointed and the court is assured that the breakdown of the attorney/client relationships is not attributable to counsel? After four attorneys? And what about appointment of a "legal advisor" versus an attorney, which has been done in cases as serious as intentional murder?

Whenever contacted by a court in the past with a case in which multiple attorneys already had been withdrawn due to a "breakdown" in the attorney/client privilege, I would suggest the court allow one last substitution, making it clear to the client that this attorney would be his last. In addition, we would attempt to locate and appoint an attorney who without question is well qualified and who has the time to devote to the case, to be compensated on an hourly rate basis. This seems to be the best approach given all the circumstances, but is not something that can be accomplished in very many cases.

Historical and Present Public Defense Model Contract Provisions Re: Withdrawal of Counsel in Relation to Case Credit (Financial Impact of Withdrawals)

In addition to the disruption in representation of a public defense client and the added delay that generally occurs with substitution of counsel, substitutions (to the extent they might otherwise be avoided) are costly in public defense resources, both human and financial. The following chart provides a history of public defense contract provisions governing the financial impact on a public defense contractor, if contract counsel withdraws from a case.

Time Period	Public Defense Contract Provisions Regarding Withdrawal and Case Credit
7/1/83-6/30/85	If motion to withdraw is granted within one judicial day, contractor will accept on that day a case of equal value. If motion is granted within ten judicial days on a traffic or misdemeanor case, no case credit. If motion is granted within five judicial days in another other case type, no case credit
7/1/85-6/30/87	No credit for case if withdrawal occurs within two weeks of appointment; however, court may, in its discretion, approve credit up to the full unit value of the case if the court finds the degree of services already rendered in the case should merit credit. Full credit for case for withdrawals approved by court more than two weeks after appointment, except in murder cases where the court will determine the appropriate number of units earned based on services rendered, up to the total murder unit value.
8/1/87-6/30/88	No credit or other payment for a case where a request for withdrawal is filed within 14 calendar days of appointment, unless, upon request, the court otherwise expressly orders. For cases where a request is filed more than 14 days after appointment, the contractor who withdrew and the contractor (or private bar attorneys) who was substituted onto the case submits hourly fee certifications to the court. At the conclusion of the case, the court determines each contractors' pro-rata share of credit for one case based on the number of hours each contractor expended on the case; e.g., if each contractor expended 3 hours, each contractor receives one-half case credit.

7/1/88-6/30/89	If contractor withdraws and reassignment to other appointed counsel outside contractor's group is necessary, no case credit, but such cases will be reported as assigned. Murder cases are counted on a "credited" basis, so if withdraw, no credit. All other case obligations are on an "assigned" basis, so if withdraw on a non-murder case that case "counts" as a case under the contractor's caseload obligation. No withdrawal within 180 days of loss of contact or issuance of bench warrant. Contractor keeps credit for these cases.
7/1/89-6/30/90	Except for cases in which contractor withdraws due to loss of contact or issuance of a bench warrant after 180 days have passed, contractor receives no case credit (i.e., loses case credit) for all cases in which contractor withdraws where reassignment to another appointed counsel outside the contractor's group is necessary.
7/1/90-12/31/91	No loss of credit for cases in which contractor withdraws. Contracts were negotiated to factor in historical withdrawal rates. For example, if a contractor during the previous contract period was compensated \$300,000 per year for 1,000 credited cases (\$300 per case) and if contractor's withdrawal rate during the previous contract (where cases with withdrawals except for loss of contact/bench warrants were subtracted out of previously reported appointed cases) was 10% (100 cases), then contractor's base caseload was adjusted to 1,100 cases and compensation for those 1,100 cases remained at \$300,000.
1/1/92-12/31/93	Loss of case credit for cases in which counsel is withdrawn due to determination by court the client is not financially eligible for appointed counsel or client withdraws request for appointed counsel prior to completion of financial eligibility verification. Addition of "payback cases." If contractor withdraws from a "payback case" (generally, murder cases), contractor does not receive a payback case credit for that appointment. For Consortium contractors only, only one contract case credit for cases where another consortium attorney is substituted for another consortium attorney.
1/1/94-present	No significant changes with respect to withdrawals/case credits, except the following: 1. Loss of credit for an appointed case if contractor's attorney is subsequently retained on that case; and 2. "Payback cases" became "complex cases" and a complex case was defined as a case where the case value is \$1,000 or more. Withdrawal from a complex case changes the original case credit to "other."

For much of the 1980s, contract provisions ranged from loss of credit for cases in which contract counsel withdrew within certain periods of time (one, two, five judicial days, two weeks, 14 calendar days) to sharing of credit with other contractors or Private Bar attorneys. In 1988, contractors were allowed to keep credit for cases in which counsel withdrew, except murder cases. And in 1989 contracts, cases in which counsel withdrew resulted in loss of that case credit, with an exception only for loss of contact/bench warrant withdrawals.

The record keeping and reconciliation efforts necessitated by the provisions that based the "credit" or "no credit" (more properly, subtraction of credit previously reported to the court or IDSD) determination on the timing of a motion to withdraw were significant. In addition, such provisions at least created the perception that an attorney had a financial incentive to **not** check for conflicts in a timely manner. The era of sharing credits between counsel appointed in a single case was extremely time consuming for courts and contractors, as well.

The general rule of loss of all credit if counsel withdrew (regardless of the reason) that was adopted in 1989 was viewed as unfair by contractors. At the same time, IDSD was too dependent at that time, in my view, on relying on contractors to report to the office "withdrawal" cases, to be subtracted from appointed cases reported to the office often in previous months.

Beginning in 1990 and continuing today, contractors retain case credit for cases in which no attorney within the contract is able to represent the client. Consortium contractors do not receive additional credit for cases substituted within consortium members. As stated in the chart, the conversion from “loss of credit” in 1989-90 in the vast majority of withdrawal cases to “keep the credit” in the vast majority of cases was accomplished by determining historical withdrawal rates and adding those cases to the contractor’s quota. No additional compensation was provided for what appeared on paper to be an increase in quota. Basically, the contractors were paid the same amount of money for the same workload and the bookkeeping and adjustments previously required were no longer necessary.

Under this approach however there is no financial disincentive for an attorney to withdraw from a case – which can be viewed as both good and bad. This is an area that I recommend be reviewed by the work group I recommend at the conclusion of this paper.

How Big is the Conflicts/Withdrawal “Problem”?

One of the largest public defense contractors’ conflict data for CY 2004 to date indicates a projected conflict/withdrawal rate of 6.9% of cases for the year. That conflict rate is higher than other contractors based upon the fact the office has been in existence for decades and is a public defender office.

For counties with consortia contracts, the conflicts rate – cases in which counsel outside the consortium must be appointed – is substantially less. For example, the number of private bar appointments in Clackamas, Linn, Union, Wallowa Counties for FYE 2003 was zero. Private bar appointments in Lincoln, Josephine, Klamath, Lake, Douglas, Coos, Curry, Umatilla and Morrow Counties was less than one percent.

If the new “former client conflict” rule is as suspected less likely to generate conflict withdraws, a decrease in the financial part of the conflicts problem will occur. As alluded to elsewhere, there also are “system-related” methods to reduce the number of conflict/substitution cases (e.g., early discovery and assurance of early conflicts checks performed by public defense providers). Collectively, the system needs to work toward decreasing the reasons why public defense counsel discovers an ethical reason to withdraw and seek substitution in public defense cases.

No Centralized, Good Data on Cases from Which Public Defense Counsel Withdraws

In Multnomah County, for example, one generally can assume that any case where private bar, non-contract counsel is appointed is a case from which a contractor or multiple contractors have withdrawn. The following chart displays private bar appointment data for Multnomah County for the past three years.

Multnomah County Private Bar (PB) Cases
(not the same as *all* conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Misdemeanor	402	3.4%	380	3.6%	206	1.6%
Probation Violation	54	0.8%	29	0.6%	7	0.2%

Juvenile	303	2.1%	263	1.9%	357	2.7%
Other *	108	4.6%	42	2.0%	30	1.7%
Total	1,270	2.9%	909	2.4%	680	1.7%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

Total public defense caseloads for Multnomah County for FYE 2002, 2003 and 2004, respectively: 44,356; 38,008; and 40,824.

However, the Private Bar number of cases does not reflect ALL of the cases in which appointed counsel has withdrawn. For example, if MPD withdraws and the Portland Defense Consortium is substituted on the case, there is no current electronic or OJIN-query system that readily captures the number of conflict substitutions that occur between Multnomah County contractors or the nature of the conflicts.

Further complicating any analysis on a county-by-county or statewide basis, one need only look at Private Bar data from Lane County.

Lane County Private Bar (PB) Cases
(not all PB cases are conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	1691	38.9%	1451	40.4%	1139	26.0%
Misdemeanor	925	31.3%	657	22.6%	435	14.8%
Probation Viol.	3	0.2%	4	0.3%	114	5.6%
Juvenile	39	0.7%	53	0.9%	41	0.7%
Other *	189	42.2%	197	41.2%	138	30.8%
Total	2853	18.4%	2366	16.6%	1869	11.9%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

NOTES:

1. Lane PD is the only contractor that handles criminal cases and probation violations. Therefore, all cases in which Lane PD has a conflict are assigned to Private Bar (versus another contractor, as is the case in Multnomah County).
2. Until June 30, 2004, Lane PD did not necessarily accept case appointments every single court day. As a result, some of the Private Bar cases included above are **not** cases in which Lane PD had a conflict. This is different from Multnomah County Private Bar case numbers where close to 100% of private bar appointments are the result of contractors' conflicts.
3. A consortium of attorneys under contract also handle Juvenile cases. Private bar appointments are limited to those cases neither Lane PD nor the consortium can handle.

In Lane County, unlike Multnomah County, it is not a safe assumption that the vast majority of Private Bar appointments were conflicts cases from which the Lane Public Defender's office withdrew.

My recommendations include two that address the critical issue of the current lack of good data that is needed to monitor attorney and contractor withdrawals and compare withdrawal rates between contractors and between counties. The latter comparative analysis would allow better

assessments of obstacles (e.g., late discovery) and “best practices” with respect to handling the issue of conflicts and substitution of counsel.

Systems in Place in Multnomah County and Lane County to Identify Conflicts Early On and Efficiently Handle Substitution of Counsel

The Lane County public defender’s office has an effective early and ongoing conflicts review process in place. Prior to court first appearances, the public defender’s staff checks the court docket prior to the attorney attending court. Any apparent conflicts are identified prior to court. At first appearances, the attorney from Lane PD has a computer in the courtroom that is linked to the office computer. Checks for conflicts based upon new information provided in the charging instrument or otherwise can be made immediately in the court room.

In addition to the “appropriate case assignment” process performed by MPD in Multnomah County since 2000, the court has made, in my estimation, every effort to establish the best possible system for the handling of motions for substitution of counsel. Key aspects of the court’s policy include the following.

- All motions for substitution of counsel in felony cases where the defendant is in custody and the motion is scheduled more than 21 days after the date of arrest and there is no signed waiver by the defendant of the 60-day rule are scheduled to be heard by Chief Criminal Judge Julie Frantz. Particularly in cases involving an allegation the attorney/client relationship is irreparably damaged, the assignment of such motions to one judge allows observation of attorneys who more frequently than others are involved in such cases, and allows continuity with respect to multiple requests made by a client for new counsel.
- Attorneys requesting to be withdrawn from a case are required to provide the court with available information regarding other individual attorneys or firms which either currently or previously represented any of the alleged victims or witnesses, co-defendants or other potential adverse parties, to avoid creating a subsequent actual conflict.
- Attorneys requesting to be withdrawn must provide a copy of the attorney’s file materials to the court at the court appearance or no later than 9 a.m. the following day, allowing substituted counsel to immediately review the case file to determine any conflicts that attorney may have immediately.

One may conclude that there are more questions than answers or more problems than possible solutions in the area of better addressing conflicts of interests in public defense cases. However, I can attest to the fact that many improvements have occurred (e.g., current Multnomah and Lane County procedures adopted in the 1990s and 2000s and the addition of a five-office felony consortium in Portland in 2002). As a clear example of progress, the number of private bar appointments in Multnomah County has decreased almost 50% since FYE 2002.

Many more improvements are within reach, given proper study and resources.

Recommendations for Improvements in the Handling of Public Defense Conflicts of Interest

1. A detailed review of new Rules 1.9 and 1.10 (ORPC), regarding representation of clients in

cases that involve a former client of that office, should be undertaken, including further consultation with the OSB and a review of:

- a. case law from other jurisdictions that have the Model Rules of Professional Conduct – including state appellate and postconviction relief and federal Habeas Corpus cases addressing related effective representation of counsel issues;
 - b. other “Model Rule” jurisdictions’ Bar Opinions and any available information on disciplinary actions related to former client conflicts; and
 - c. Restatement of Law: The Law Governing Lawyers, Conflicts of Interest.
2. Although Paul Levy’s article in OCDLA’s publication has alerted public defense counsel of the likely change in former client conflicts requirements, the fruits of the detailed review provided above should be communicated to all public defense attorneys.
 3. Attachment #1 to this paper is a draft survey I recommend be distributed to public defense contractors for completion. The survey is intended to gather “benchmark” data on withdrawals of counsel, as well as information from contractors on their local practices and environments relating to conflicts. With the likelihood that conflicts should decrease under new Rule 1.10, baseline data is critical to measure whether that occurs and to what extent that occurs.
 4. Consider requiring contractors provide reports to the Contract and Business Services Division on cases from which contract counsel withdraws. The reports would be similar to the report included at the conclusion of the attached draft survey, except consortia contractors would report only cases in which counsel outside the consortium was required for substitution. For a number of contractors I have talked to about their databases, such a requirement may likely result in a *de minimis* increase in cost or time to the contractor, particularly if for example, information is reported on a periodic basis.
 5. Consider requiring Private Bar attorneys to provide additional information for cases in which they withdraw, including the date the withdrawal was granted and the reason for requesting counsel be withdrawn from the case. Private bar attorneys previously were required to provide this additional information on their fee statements.
 6. Establish a “conflicts” work group comprised of public defense contractor staff, one private bar attorney who routinely is appointed to conflict cases, and CBS staff (I have recommendations with respect to specific individuals).

Among the issues for the workgroup’s review and recommendations, I suggest the following.

- a. Technological and human resource improvements that likely will decrease the number of instances in which counsel is substituted
 - within contractors’ offices (e.g., more staff resources at MPD in order that the morning check for appropriate case assignment includes more than just pending cases where counsel already is appointed or one court reports an inability to reach a live person when trying to reach a contractor to best determine whether that contractor has a conflict in accepting a substituted case;
 - the courts (e.g., possible OJIN improvements); and

- prosecutors' offices (for example, potential for electronic provision of discovery speeding the identification of conflicts and possibly reducing current discovery costs of approximately \$950,000 per year).
- b. Other contractor staff issues that would better ensure:
- early and regular client contact (phone, video and in person)
 - early review of discovery as it is received by the office, as well as information provided by any defense investigator; and
 - early interview of the client and defense witnesses.
- c. Possible methods to obtain court dockets sooner, particularly in misdemeanor, out-of-custody cases for "appropriate case assignment" review similar to that currently done by MPD.
- d. The possibility and efficacy of contracting with an attorney to serve as the centralized substitution review attorney for Multnomah County. This person would review motions for substitution prior to submission to the court, maintain a database with respect to conflicts, evaluate data and trends based upon the central database, and coordinate substitutions in an effort to better determine which contractor/attorney ought to be substituted.
- e. The relative advantages and disadvantages of delaying (for no more than 24 hours and only when necessary) the appointment of substituted counsel in order that contractors or Private Bar attorneys being considered by the court for substitution are able to conduct a conflicts check prior to the court actually ordering appointment of new counsel.
- f. The effectiveness of the PDSC's substitution of counsel policy.
- g. Changes in public defense model contract terms, including but certainly not limited to:
- differential payments for contract offices where the attorney is substituted onto an in-custody felony case more than 40 (or some other period of time) days after first appearance;
 - contractors lose case credit if a motion for substitution of counsel is filed more than five (or three?) court days after discovery disclosing the conflict is received by the attorney's office; i.e, contractor keeps case credit if motion is filed timely; and
 - contractors lose case credit if counsel seeks to withdraw more than 30 (21?) days after appointment, unless counsel includes in the motion information supporting the fact the conflict could not reasonably have been identified sooner.

Second Draft (11/9/04)
Public Defense Contractor Survey
Conflict/Withdrawal Cases

The following survey is a component of the Office of Public Defense Services' (OPDS) review of service delivery in Multnomah County. Please complete and return the survey to _____ (_____) by _____, 2004.

Contractor: _____

Name of Person(s) Completing this Survey: _____

1. At first appearance, how are co-defendants (or multiple parties in juvenile cases) identified (for example, same charging instrument/petition or sequential case numbers)?
2. What, if any, changes would better help identify inherent, clear conflicts (such as co-defendants) at first appearances?
3. How frequently is a case appointed under your contract where the client already is represented by a different contractor in another pending case?
 - rarely (less than twice a month)
 - sometimes (2-5 times a month)
 - frequently (6 or more times a month)

Comments:

4. Prior to the appointment of a contractor/attorney, what (if any) methods are in place to identify whether a person requesting appointment of counsel:
 - a. already is represented by a contractor in another pending case?
 - b. previously has been represented by a contract attorney?

5. How important is it that one contractor/attorney represent a defendant or probationer on all pending cases?

6. How important is it that one contractor/attorney represent a child if the child is subject to both dependency and delinquency proceedings?

7. What advantages and disadvantages are there (to the client and to appointed counsel) of having the attorney who originally represented the client appointed to represent the client on a probation violation matter?

Advantages:

Disadvantages:

8. If a client is appointed to contractor/attorney and it is learned the client is already represented by another contractor/attorney, what is done?

a. One attorney contacts the other attorney and a motion for substitution is submitted so the client is represented by one attorney?

- Always
- Only if: _____
- Rarely

Comments:

b. Each attorney remains on each case?

- Always
- Only if: _____
- Rarely

Comments:

9. Describe the process by which the FIRST check for conflicts is made.

a. When is the first check made?

- Prior to first appearance
- Immediately upon appointment (within one day)
- More than one day after appointment

Comments:

b. Who makes the first conflicts check and based on what information?

- non-attorney staff with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- non-attorney staff with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- the assigned attorney with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney only after review of discovery and an interview with the client; OR
- Other (please describe):

Comments:

10. After the initial conflicts screening, appointed counsel discovers contractor's office previously represented a state's witness in the present case.

Describe how the attorney/contractor determines whether the present attorney will withdraw from the present representation or not?

What if any difference does it make if:

a. the file(s) for the prior representation is no longer available at the immediate office location?

- b. the attorney who previously represented the witness is no longer employed by contractor/a consortium office?

11. Is contractor's former and present client information maintained in a database?

- Yes
- No

If yes,

- a. what data is maintained; e.g., client name, DOB, case number, case type, attorney's name, withdrawal?
- b. data is available back to _____ (year)

What improvements in the database would improve contractor's ability to screen for conflicts?

12. Discovery – when generally is (at least initial) discovery received by appointed counsel for the following types of cases?

Drug Felony cases:

Property Felony cases:

Person Felony cases:

Misdemeanor cases:

Juvenile Delinquency cases:

Juvenile Dependency cases:

13. Generally, closed case files are archived (moved to a storage area outside the attorney's immediate office) on the following schedule:

Felony cases:

Misdemeanor cases:

Probation Violation cases:

Delinquency cases:

Dependency/TPR cases:

14. Please complete the information requested on the following page.

Code	Description of Reason
PWD	Attorney or Contractor's other attorney withdrew from representation of client in the past (for whatever reason)
WTA	Attorney previously represented a witness in the present case
WTO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a witness in the present case
CDA	Attorney previously represented a co-defendant in the present case
CDO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a co-defendant in the present case
CON	Ethical conflict of interest – only if a conflict other than WTA, WTO, CDA or CDO; e.g., "breakdown" in attorney/client relationship
CLN	Client's request – no clear ethical conflict
ONE	Withdrew so client represented by one (or at least one less) attorney on pending cases
RET	Client retained counsel
INL	Court withdrew counsel based on determination client not financially eligible for appointed counsel
LOS	Loss of contact with client or client failed to appear
OTH	A reason other than those listed above – please describe the nature of conflict, without disclosing any confidences or secrets, in Column #8

