

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, December 9, 2010
9:00 a.m. to 2:00 p.m.
Office of Public Defense Services
1175 Court St., NE
Salem, Oregon 97301

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's October 22, 2010 Meeting
<i>(Attachment 1)</i> | Shaun McCrea |
| 2. Action Item: Approval of the Minutes of PDSC's October 23, 2010 Retreat | Shaun McCrea |
| 3. Action Item: Discussion and Possible Approval of Updated Strategic Plan
<i>(Attachments 2 – 5)</i> | Shaun McCrea
Commissioners |
| 4. PDSC Training Session – Update on Ethics Rules for Public Officials
<i>(Attachment 6)</i> | Paul Levy
Chip Lazenby |
| 5. Information for Legislators regarding Impact of Decriminalization/Charge Reduction on Costs of Public Defense
<i>(Handout)</i> | Shaun McCrea
OPDS Staff |
| 6. OPDS Monthly Report | OPDS Staff |

Notes

Please note: Lunch will be provided for Commission members at 12:00 p.m.

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

The next PDSC meeting is scheduled for January 13, 2011.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Friday, October 22, 2010

12:30 p.m. to 4:00 p.m.

Agate Beach Hotel

Cove Room

3019 N. Coast Hwy

Newport, Oregon 97365

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Shawn Wiley
Paul Levy
Billy Strehlow
Amy Jackson

The meeting was called to order at 12:30 p.m.

Agenda Item No. 2 Looking Ahead: Crime Rates, DA Charging Practices, Judicial Resources and their impact on Public Defense Services in '11-'13 and Beyond

Multnomah County District Attorney Michael Schrunk described changes in district attorney charging practices that had been implemented in Multnomah County in July of 2010. A group of non-person misdemeanors are now being prosecuted as violations. It has been the practice for some time in Multnomah County to treat some misdemeanors as violations. When additional deputies were lost to budget cuts the office increased the number of misdemeanors handled as violations. There was no initial reaction by the public until a story was published in October. Costs are reduced for the district attorney's office whenever there is a reduction in the number of times a deputy needs to handle a file. With violations, the deputy usually sees a file only once; with misdemeanors the involvement is much greater. He recently attended a national conference on court innovation where the focus was on preserving the rule of law. Other district attorneys offices are dealing with similar issues to those in Multnomah County. Most DAs agree that they need to focus on violent crime, but even with behavioral and property crimes when someone breaks a law something probably ought to happen. At the current time, crime is going down, both violent crime and property crime.

Chair Ellis asked about the implications of the change in charging practices for public defense. Mr. Schrunk said he thinks a defense lawyer should be present to

provide at least some review for cases being handled as violations. Chair Ellis thanked Mr. Schrunk for his presentation and for his testimony to the legislature in 2003 in support of funding for public defense.

Jeffrey Ellis, Capital Resources Counsel for Oregon, described his legal background and experience in Oregon, Washington and Texas. He said there are significant differences in how death penalty cases are handled in Washington and Oregon. Washington has twice as many murders as Oregon but only seven men on death row compared to 34 in Oregon. Washington prosecutors seek the death penalty in only two to five cases per year compared to 20 – 30 cases in Oregon. The scope of the statutes in both states is similar. Washington invests prosecutors with discretion at the outset of a case to decide whether or not to seek the death penalty by requiring that they file a notice of the intent to do so. Such motions are filed in only approximately 20% of the cases. In the great majority of cases in which they do not seek the death penalty they do not ask for a guilty plea. Long time King County Prosecutor Norm Maleng said that he would never use the death penalty as a bargaining chip, believing it to be too coercive. Oregon prosecutors express the belief that the value of the death penalty in many cases is that it will produce a guilty plea. After Washington prosecutors make a decision not to seek the death penalty the case is treated as an ordinary murder case and the costs associated with it are significantly less than those in a death penalty case. In Oregon cases plea agreements that result in non capital sentences usually do not occur until just prior to the time set for trial, so that most of the costs of capital litigation have already been incurred. Washington prosecutors are required to file the notice of intent to seek the death penalty within thirty days, although the date is usually extended by agreement with the defense for six to 12 months. Prosecutors decide not to file such notices in the great majority of cases, filing it only in “the worst of the worst” cases. Mr. Ellis said the question in Oregon is whether our system is working in an effective way to identify the true death penalty cases early enough in the case to prevent wasted resources. Mr. Ellis said that he did not believe prosecutors make decisions about whether to seek the death penalty based on the costs of prosecution. If Oregon were to give prosecutors discretion to seek the death penalty, he believes there could be substantial savings. The Washington defense bar is under pressure to complete its mitigation investigation but the system is working for defense lawyers.

Chief Justice Paul De Muniz testified that the state is facing what has been described as a \$10 billion deficit in the next decade. The current projection is a \$3.2 billion deficit in the next biennium. The Judicial Department started the biennium with less funding than it had in the prior biennium and has recently been asked to reduce its current budget by an additional \$13.3 million. Despite these cuts the courts will remain open during business hours and will process all case types. Currently there is a 10 to 20% vacancy rate in judicial staff. He met with staff in all 27 judicial districts this year and explained that the department would need to undertake an aggressive reengineering of the courts to continue to operate on fewer resources while maintaining or improving services. The department will need to make more effective use of resources, leverage technology to become more efficient and accessible, and align resources with essential services. He provided examples of how staff functions had been realigned to cover vacancies and how technology was creating savings. An implementation committee is focusing on centralizing the administrative functions of the courts, while attempting to promote convenience for litigants, reduce the cost and complexity of the judicial process and maintain or improve access to justice. The Department maintains good relations with public defense, which is a critical part of the justice system, all of which should be funded in balance. E-court implementation in the appellate courts will be complete by the end of the biennium. There are pilot projects involving electronic content management in five trial courts and the Department is processing a request for proposals for a single source provider to complete the E-court transition. It is not yet clear whether funding will be available to go forward. Passage of time and rapid technology changes have made the total cost less than originally anticipated. Commissioner Lazenby inquired whether the courts were looking at alternative

means of resolving cases. Chief Justice De Muniz said that some states, such as California, are moving in that direction because their courts can no longer support the civil justice system. Unfortunately this creates a two tiered justice system, one for the wealthy and businesses and one for criminal cases and self-represented litigants. Commissioner Lazenby asked whether one way to reduce the demands of the criminal system would be to adopt limits on charging decisions. The Chief Justice responded that he could not comment on that approach but noted that the governor is creating a sentencing commission to review Oregon's sentencing scheme and its costs.

Marion County District Attorney Walter Beglau is the vice chair of the Oregon District Attorney's Association. He testified that Marion county has had a case reduction policy in place for two decades following the adoption of Measure 5, which he has adjusted over the course of the six years that he has been in office. His office, which lost five percent of its staff in 2009, assigns priority to cases involving violence, including domestic violence, and child abuse. It takes no action on another group of cases including Criminal Mischief III, Criminal Trespass II, Disorderly conduct, Failure to Appear II, Frequenting and Harrassment unless there are aggravating circumstances. The office uses an early disposition program for a third group of cases including Misdemeanor Driving While Suspended, False Information, No Insurance, Offensive Littering, 911 calls and Theft III. There were 1900 such cases that were treated as violations through the EDP program in 2009. Defendants who go through this program get a fine and restitution but no probation and no one is working with them to address mental health or substance abuse issues. The total number of cases in Marion County has decreased by several thousand over the last couple of years. Another category of cases that has been triaged is the offenses that occur in the institutions – the prison and the state hospital. There is a written policy that provides that no action will be taken regarding certain offenses. Finally, there are some felonies that are given misdemeanor treatment such as felony possession cases that go to drug court. If resources become even more stretched, the next step may be to treat some felony possession cases as violations. One area of concern in Marion County is that the District Attorney's office may not be able to continue to provide representation for the state in juvenile dependency cases.

Chair Ellis inquired whether Mr. Beglau had heard Jeffrey Eillis' testimony. He said that he had. He said that he would be willing to sit down with the defense on this issue and talk about ideas. The Oregon District Attorneys' Association had not been in favor of establishing a timeline for deciding whether to seek the death penalty and thirty days would clearly not be enough time. Commissioner Lazenby asked whether the potential expense of a capital prosecution ever affected the decision to seek the death penalty and Mr. Beglau said that it had never been a factor for him and is not one of the criteria used to make these decisions. Chair Ellis inquired whether Mr. Beglau had any comment on the public defense providers in Marion County. Mr. Beglau said that he worked well with both organizations and has seen improvements at MCAD in the areas of concern identified by the Commission. Both prosecutors and defense attorneys need adequate training.

Craig Prins, the Executive Director of the Oregon Criminal Justice Commission, made a video presentation on Oregon crime rates and discussed some of the factors affecting crime rates in Oregon and elsewhere. He said that much of the information he would present comes from *The Great American Crime Decline* by Franklin Zimring. Both violent and property crime have been declining for the past 15 years and dropped 40% in that time. Much of the information relied upon comes from Uniform Crime Reports but he said it is also reflected in victimization studies. In Oregon the violent crime rate dropped 2% to the lowest rate since 1969. Oregon's decrease is second only to New York's. Oregon's rate dropped while it increased the use of incarceration but New York's dropped while it decreased use of incarceration. In terms of longer term trends, the crime rate was flat in the 1950s and '60s, it increased in the 1970's and '80s and has been dropping since the early '90s. Portland drives Oregon's crime rate because it is our largest city. In Portland there

was a 71% drop in violent crime from 1985 to 2009. Portland used to account for more than half of the state's violent crime but by 2008 Portland accounted for only 35%. Crime rates vary from one part of the state to another because crime is a complex local problem. Oregon's property crime rate dropped 10% from 2008 to 2009. Oregon was in the top five highest states for property crimes but has now dropped to the middle, with the greatest decrease in the country in the last five years. Victimization surveys reveal similar trends.

The volume of cases being processed has not declined as rapidly as the crime rate because in the 1980's the system was really at capacity. Among the possible explanations for the falling crime rate are unemployment or poverty, incarceration and demographics. Most economists and criminologists don't think there is much of a link between unemployment and crime but there is between habitual poverty and crime. Incarceration is a part but only a small part of the reduction in crime. It has been estimated that a 10% increase in the incarceration rate would result in only a two to four percent drop in the crime rate. Only 13 to 15% of Oregon's 45% drop in the violent crime rate is attributable to increased incarceration. Many say that the one trend over time that is consistent with a decline in the crime rate is demographics – the percentage of Oregon's population that is male and between the ages of 15 and 39. Juvenile crime rates have also declined and this is a good indicator of future crime rates. These trends are national. Community policing, elimination of methamphetamine labs, use of risk based probation techniques, and other factors have also been important. Perception of crime prevalence by the public, however, is not based on actual crime rates but on media coverage of high profile crimes.

While crime rates have dropped significantly, Oregon's population has grown and therefore the total number of crimes has declined only 10% since 1991 and the arrest rate only 2%. Felony convictions are actually up since 1991. Prison population has more than doubled and prison intakes have doubled. Even if Oregon wanted to incarcerate more individuals than it does now, it will not be able to do so in the current budget environment. It is expected that expenditures will exceed revenue in the '11-'13 biennium by \$3.5 billion. We will probably be shrinking our public safety system since we have to have a balanced budget and the Department of Corrections accounts for 60% of the public safety money. Crime has declined, Oregonians are safer than they have been in decades. There is a diminishing return on incarceration and the great majority of offenders need alcohol and drug treatment. Oregon needs to consider moving to a modern sentencing guidelines system along the lines of the federal system, as well as adjusting some sentencing provisions like Measure 11 as recommended by the Governor's recent cabinet. To maintain our current 14,000 prison beds, the rest of the public safety system would have to shrink between 40 and 60% to afford those beds.

[Recess]

Agenda Item No. 1 Approval of the Minutes of August 5, 2010 Meeting

MOTION: John Potter moved to approve the minutes; J. Stevens seconded the motion; the motion carried without objection: **VOTE 4-0.**

Tom Crabtree advised the Commission that Commissioner Stevens had recently been inducted into the Bend High School Hall of Fame in recognition of her career in journalism and her dedication to advocating for persons with disabilities and the importance of voluntarism. Her service on the Commission was noted. Chair Ellis congratulated her and thanked her for her service.

Agenda Item No. 3 Contract Approval Jackie Page – Mitigation Contract

Kathryn Aylward described the proposed one year contract with death penalty mitigation specialist, Jackie Page.

MOTION: John Potter moved to approve the contract; Chip Lazenby seconded the motion; the motion carried without objection: **VOTE 4-0.**

Agenda Item No. 4

Approval of Service Delivery Plan for Clackamas County.

Chair Ellis reminded Commissioners that they had been presented with a proposed service delivery plan for Clackamas County at the previous meeting and had asked that the report and plan be amended to reflect their concerns and the likelihood that they would need to revisit the county in the next several years. An amended report was submitted to the Commission for approval.

MOTION: Shaun McCrea moved to approve the report; Janet Stevens seconded the motion; the motion carried without objection: **VOTE 4-0.**

Agenda Item No. 5

Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel

Paul Levy said that some judges had expressed concerns about the need for better guidance about the amount that public defense clients should be required to pay for recoupment of defense costs at the end of the case. Although there is some ambiguity in the current statutes, a statutory change is not required for PDSC to adopt a compensation schedule since Chapter 151 already authorizes it to adopt such a schedule. Many courts currently rely on the use of PDSC's hourly rate to establish a recoupment amount even though most attorneys are not paid by the hour. This approach has presented difficulties since most lawyers do not keep track of their hours, may not know the amount paid for the case under their contract with PDSC and are uncomfortable providing information that will be used to impose a recoupment obligation on their client. The proposed compensation schedule reflects the typical cost for each case type, including the average cost for non routine expenses. He noted that the Commission was being asked to approve an amendment to its policies and procedures establishing such a schedule. Since OPDS is awaiting further comment from the Judicial Department on the proposed schedule PDSC action was not being sought today. Kathryn Aylward explained that determining an average cost for each case type would have been very difficult so the mode was chosen since it reflects the most frequently encountered value in PDSC's contracts. Greg Hazarabedian expressed concern about imposing greater costs on indigent clients. Commissioner Lazenby said that the adoption of the schedule would not affect the court's discretion regarding the amount of recoupment to order in a particular case. Commissioners discussed the potential impact on both public defense clients and clients with retained lawyers of learning the actual costs of public defense representation. Chair Ellis proposed moving forward with approval of the schedule subject to change if objections are received from the Judicial Department.

MOTION: John Potter moved to approve the schedule; Janet Stevens seconded the motion; the motion carried without objection: **VOTE 5-0.**

Agenda Item No. 6

Amendment to Eligibility Standards

Kathryn Aylward said that verification specialists in five counties had agreed to track denials of counsel and provide their worksheets so she could determine what assets had been reported by the applicants who were denied. Ultimately verifiers from only three counties provided data. She received worksheets on 60 denials. She then reviewed the data to determine which of those who were recommended for denial would be eligible for appointment under two eligibility standard options. Option 1 had been presented to the Commission at an earlier meeting and the Commission found it too low. Option 2 represents a doubling of the amounts in Option 1. In 28 of the 60 examples, the court appointed counsel despite the recommendation of the verification specialist. These applicants may have had assets that could not be liquidated. In two of the examples the defendant failed to appear so no outcome was indicated. Twelve of the applicants decided to represent themselves. It cannot be

determined whether they had the money and chose to represent themselves or were simply not successful in retaining counsel. She said that the data indicates that it is only in the lower end cases that counsel is being denied. Commissioner McCrea said that the impact of conviction for even the lower level offenses can be significant. Kathryn Aylward estimated the annual fiscal impact of each proposed option. Chair Ellis said he preferred Option 2 because there is greater harm in denying someone counsel who can't afford it than occasionally appointing counsel for someone who can. Commissioner Potter said that Option 2 is closer to the actual cost of privately hired lawyers than Option 1. Kathryn Aylward said that it is sometimes very difficult for clients to liquidate assets and doing so might significantly delay a case. The court can always order recoupment of the costs at the end of the case.

MOTION: John Potter moved to adopt Option 2 of the privately hired attorney fee schedule; Janet Stevens seconded the motion; without objection the motion carried: **VOTE 5-0.**

Agenda Item No. 7

OPDS Monthly Report

Ingrid Swenson reported on the new office and the open house that was held in October. She noted that the new location is much more convenient for staff.

Peter Gartlan reported that the Appellate Division's regional contact project had been inaugurated at the management conference the preceding day. He summarized the recent Oregon Supreme Court holding in *State v. Partain*, which removed the ceiling on the sentence a successful appellant could receive upon remand from a successful appeal. The Division is now trying to assess the risk for each client of a harsher sentence on remand. Chair Ellis said that there would be additional system costs imposed on appellate lawyers as a result of the change. In addition the ruling creates an incentive for a defendant not to pursue a legitimate appeal. Commissioner Lazenby said that it is probably not a lot different from telling a client about the risk of going to trial. Peter Gartlan said that a legislative proposal had been submitted to restore the ceiling. The Appellate Division submitted two other legislative proposals, one of which would allow involuntarily confined defendants to have the mailing date of a document sent to the Court of Appeals be treated as the arrival date since they do not have access to certified mail like other litigants. The other legislative proposal would bring Oregon law into conformity with a recent United States Supreme Court ruling on forfeiture by wrongdoing of the right to confront a witness whom the defendant has intentionally prevented from testifying. Mr. Gartlan reported that the Appellate Division currently has several cases pending in the Oregon Supreme Court. He also discussed the new two judge appellate panels and the types of cases the Appellate Division believes are appropriate for the panel.

Ingrid Swenson and Karen Stenard described the legislative proposal being prepared by the Interbranch Workgroup that would increase resources available at the time of shelter hearings in juvenile dependency cases.

Chair Ellis said that he probably would not be able to attend the December 9 PDSC meeting but Commissioner McCrea said she would be available to chair the meeting.

MOTION: Chip Lazenby moved to adjourn the meeting; Shaun McCrea seconded the motion; the motion carried without objection: **VOTE 5-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

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

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Shawn Wiley
Paul Levy
Billy Strehlow
Amy Jackson

The meeting was called to order at 12:30 p.m.

Agenda Item No. 2 Looking Ahead: Crime Rates, DA Charging Practices, Judicial Resources and their impact on Public Defense Services in '11-'13 and Beyond

0:07 Chair Ellis I encountered Mike earlier today. He was totally lost, looking for a courthouse and I explained that it has been a problem for him to find the courthouse. Mike has been a good friend of the defense community and we welcome you here.

0:30 M. Schrunk Thank you. I have given you three handouts and we can talk about those. One is what is called the Violation Program, the second is a graph with three different colors, about what we have done and we can track...

0:49 Chair Ellis The Multnomah DA has gone high tech on us.

0:54 M. Schrunk No. I had to go to Kinko's for this one. We still haven't been able to talk them into funding us right. Let me tell you. It is my understanding that you wanted to hear some of the things and some of the trends we are doing. Let me first say that the one that is really heating up and there is a little bit of sadness but there is a little bit of humor in it. With the budget cuts we have lost lawyers like everyone else has. How do you cope with that? I believe that we should pay adherence to the rule of law as best we can, and in that regard I think there ought to be a consequence for violation of the law. That leads us into - we started a violation court, a violation procedure. I thought with some of the misdemeanors instead of filing them as misdemeanors we would file them as violations. We gradually expanded that. The bottom half of the pages are cases that would be filed as violations. The upper ones are ones, and we tried to take the most serious violations, that we will file as misdemeanor crimes, at least expose someone to a criminal sanction if they committed these. The interesting part of this is that we have gradually done this over a period of time. We have worked with the court and with the defense very successfully in creating what we

call a “community court” or “violation court” really where there is certainly no jail sanction. So with the last budget cuts with the stealth operation we said if we lose misdemeanor deputies we are going to have to increase this program and readjust the crimes we are doing. We had the public hearings and it went through. You hem and haw and you argue about these things and the budget cuts happen. We told people it was happening and we told them we would implement it the first week in July. Well we did. Business as usual. No one mentioned a thing. In October, Lars Larson’s favorite fish wrapper decided to write an article about the DA who is kissing off crimes. I couldn’t believe it. You get people saying, “The sky is falling. The sky is falling.” My answer is it didn’t change much on the street. If you take, and you have the list here, but if you take a look at the graph, the red is your misdemeanor crimes and the yellow is the violations. You will see that from the number when we started in July that we dropped down. It comes down and is plus or minus a few points, but you can see that we stopped issuing about 25% of the cases, misdemeanors, but we increased about 25% of the violations.

- 4:16 Chair Ellis The top line is (inaudible).
- 4:21 M. Schrunk The top line are the ones that are issued. Actually all three of them have a downward slant. That could bode well for us. I think it probably does. If you have questions...
- 4:42 Chair Ellis Walk me through how the violation process works.
- 4:52 M. Schrunk Alright. You, Barnes, commit something and the police get called. If it is a crime, which it probably is, a shop lift or something, they would arrest you, cite you, what they would do for a misdemeanor. Now the issuing deputies have this list and unless there are aggravated circumstances or multiple offenses, they stamp on the file “violation treatment” and it goes right to violation court.
- 5:31 Chair Ellis Which immediately means no risk of jail?
- 5:35 M. Schrunk Absolutely. It means we have not filed anything where there is exposure to jail. Then we try and put it in as fast as we can in court. We have a relatively rapid docket except on three day weekends. There is an arraignment.
- 5:56 Chair Ellis A violation charge gets appointed counsel, right?
- 6:03 M. Schrunk I think that is probably what you would want to talk about. But do you have appointed counsel at the same rate that you pay a felony case, a misdemeanor case, you would have consult. A long time ago when we started this, and I have learned – been beaten over the head by - I suspect some of the people who are sitting behind me. The first stop I make is with my public defender and defense bar and say, “Hey, I got this goofy idea and what do you think? Should we do it or should we not do it?” Jim Hennings was a great sounding board. He would scream at me frequently when I would try and do something.
- 6:50 Chair Ellis We have all had that experience.
- 6:53 M. Schrunk So it goes in. It is a plea court. There can be a court trial. The sentences are community service - Clean and Safe. We have a crew that cleans up downtown - the minimal amount of hours. Usually a very minimal or non-intrusive sentence. That is it. It is a violation. End of story. Now instead if you are one of the aggravated ones so that a misdemeanor was filed, you would be arraigned. You would go through and end up with a court appointed attorney. There would be a plea offer and normal discovery goes on.
- 7:52 Chair Ellis What do you do with a person who recidivates? They come back.
- 8:00 M. Schrunk In the criteria we have tried to provide for that person. If they continually get arrested for sleeping in the doorway or things like that – it has got to be a real

problem before they get the misdemeanor filed. The other thing we have learned is that violation court and community courts, as we have set them up, the population comes in there. Let me just give you a quick history. When we started a community court we started one in the King neighborhood, the King School, and then we put one out in the southeast and we did the west side downtown and one out in Gresham. We had four of them going but with budget cuts we had to consolidate. So we kept alive the community court dockets in Gresham and in the downtown area. We still try to use that as a violation court, a plea court. You still have that and it works, although it is not a true community court.

- 9:19 Chair Ellis How does this work from the standpoint of your saving the cost of deputies?
- 9:30 M. Schrunk As you certainly know from the practice of law, anytime you give a file to a lawyer and they touch it more than once it is costly. These are usually a one touch. They are a review and a deputy in court. But now the misdemeanor you got charged with you could be going through a lot of touches by the defense, by the prosecution, witness control, witness notification. Cases do not get assigned out on the first trial setting as people sadly learn. It's continual re-contacting, re-subpoenaing, which is an expense to the prosecution and then they go – as those who have practiced in the Metro area know – to pretrial Friday. If you walk in the Multnomah County Courthouse you will see the staircase filled with people. There are deputy prosecutors, defense counsel, and defendants and their families are queued up outside the assigned judge's courtroom to work out a plea and close the case.
- 10:54 Chair Ellis Are other DAs following this practice, or are you kind of doing your own?
- 11:02 M. Schrunk Walt is here and is going to talk to you. I think every DA is struggling with the same things that we do when you talk to people around the country. Some people shut the door completely on cases.
- 11:18 Chair Ellis Just do nothing.
- 11:19 M. Schrunk Yeah. Do nothing. I am still trying to limp along and I think there ought to be some sort of consequence. I truly believe that police many, many times, probably 90% of the time, solve the problem on the street, whether it be an arrest or a trip to a jail or a written citation, they remove them from that street corner or that store front where the problem is.
- 11:53 Chair Ellis Are you getting any push back from the police?
- 11:56 M. Schrunk There is certainly push back. There is push back from police. There is push back from the merchant community. Again, I guess I shake my head. In the last three months we filed a whole lot of those and hardly a peep until someone writes about it. I don't believe we should operate in a stealth operation and hide things. I have an obligation to be up front and tell people what we are doing. If you were my county commissioners I would tell you that this is what I am going to do. I am not recommending it to you. It is not the public safety plan or the prosecutorial plan that I would recommend to you, but if these are all the dollars that you have to fund my operation this is what you will get.
- 12:56 Chair Ellis What do you see as the implications for our task which is provision of defense at the lowest cost consistent with standards of quality?
- 13:10 M. Schrunk I think there needs to be a lawyer present. I know people will argue that there is no jail potential because you have removed that. I think someone that can sort and pull this out and look and see if you have an issue that this ought to go a different route and often bang heads with my deputy district attorneys if they should. I think there needs to be a presence, but does it need to be ...
- 13:44 Chair Ellis But Steve Houze doesn't have to do it.

- 13:48 M. Schrunk Although I'm sure given the appropriate case he would come in and stand beside you, Barnes, should you get cited into violation court.
- 13:58 Chair Ellis That is always comforting to know.
- 13:59 M. Schrunk I met with a number of people earlier this week from around the country in a meeting sponsored by the Center for Court Innovation in New York. They have been big pushers building on the mid-town Manhattan Community Court, of pushing that in. We in Portland became the second place to start the "Community Court," but we did it on a docket level, not the \$50 million building and service level that mid-town was able to do. I think you are seeing more and more of that around the country - trying to figure out how to preserve the rule of law. When you make a law something probably ought to happen. It is like when I got caught jaywalking, the shame factor will keep me from jaywalking certainly within a two block radius of the courthouse. I think you are seeing this and I would expect the people from this association that go to their national meetings, they are faced with a dilemma that you are because prosecutors are faced with the same dilemma. What are we going to do? How are we going to finance this? I can say thankfully we have not seen a big increase in crime going up. But you are going to have crime and it is pretty simple. I think most prosecutors are going to say "TCB" - take care of business and that means you have to do something with the violent crime and you are going to do that. The rest of the things we are grappling with. What do we do with the behavioral crimes? What do we do with the property crimes? I told my commissioners when I gave a talk about public safety down at the Benson not too long ago to a business group. Afterwards they were talking about the cost of prosecution, defense, and incarceration. I went through the same triage. Finally somebody said, "That is great. Spend all you want on violent crime. You do everything you can on your very serious crime, your Ballot Measure 11, your murders, and your aggravated murders, but just make the other people stop." This is the Q and A after the talk. It was actually a woman and she runs a business. I think she was jerking my chain a little bit. I said we are trying everything. I told them we do drug courts. We do diversion. We do this probation stuff. We do start court. I said, "but that is expensive too." She just said to make them stop. I said, "Do you have a solution how to do this?" She said, "Can't you just give them a pill?" If only it was so easy. You are going to get push back. We get push back. The police get push back when they don't respond. We get push back when we don't file something whether it is a commercial resident of the community or a residential person, someone who is actually living there whether it is business or not. That is the dilemma we are facing. We are really trying to telegraph what we are doing. You have got 36 different district attorneys around the state that your men and woman are dealing with. You have to ask them what they want to do. You might want to take a look at the last one. That is the stats. It gives you the behavioral, property, and the person crimes. You know they are not that much changed. Then I put your homicides down there. Homicides are down although I checked the cold case stack before - yesterday I checked and there are over 200 that are sitting in the cold case file. Are they all going to pop? Are any of them going to pop? Who knows. I don't know how you forecast budgeting for that. That is what I see coming. I see crime going down. You have had violent crime go down and you have had property crime go down. The solution is how do we keep the low end, the misdemeanors and the property and behavioral people from re-offending? It is policing, prosecution, court, the probation department and Max running his corrections and local sheriffs. We have gone from 2100 beds in the Portland area down to about 1300 right now. We are surviving. People are grumbling. It is a minor crime and everyone in here knows what a minor crime is. It is when Potter is the victim and not Barnes. Any questions? I am not thin skinned. If you have a better solution for God sakes say so.
- 20:17 J. Potter Did I miss hear you or I am misreading the chart here? It looks to me as though homicides have gone up.

20:25 M. Schrunk Overall they have gone down. They go in batches.

20:32 J. Potter But for the year you have 19?

20:33 M. Schrunk Yeah.

20:33 J. Potter And last year it was 11?

20:42 M. Schrunk Yeah. Now I started in the ancient past and I had a full head of hair, but I used to talk to people and we would talk about 60 and 70 in the Portland area yearly. Now you have fewer, which is good.

20:56 Chair Ellis Okay. Thanks Mike.

20:59 M. Schrunk Thank you.

21:02 Chair Ellis I think this is about the 10th time that you have appeared before us.

21:08 M. Schrunk You know I will come down there. I believe strongly in the defense.

21:10 Chair Ellis Your testimony in 2003 was really wonderful. We all have a strong memory of that.

21:19 M. Schrunk I think that was because I was sitting alongside your Chief Justice. People were saying, "What is the Chief Justice and the DA from Portland here for? Why are they doing that?" I think it is because we all believe in the system. Thank you and keep up the good work.

21:35 Chair Ellis We all have a fond memory.

21:37 M. Schrunk I apologize for leaving you. I am due back up at Portland.

21:40 Chair Ellis I think you can find the courthouse up there. Jeff? For the record this is Jeff Ellis. We met for the first time today. Unless there is something in our DNA that neither of us knows about, I don't know that we are related.

22:07 J. Ellis Thank you. I am Capital Resource Counsel for the State of Oregon. This marks a full circle return to the State of Oregon. I went to law school here. I worked in law school at the Department of Justice writing appeals in their division with now Justice, but then Solicitor General, Linder. After leaving the State of Oregon I skipped across the river to the State of Washington and skipped across the adversarial divide to defense where I did defense work and did capital work in the State of Washington for approximately 20 years. I also practiced in the State of Texas, the heart of the death penalty for a number of years, and have taught both at University of Texas Law School and Seattle Law School. I taught capital punishment. What I want to do today is talk initially about some differences between the Washington death penalty experience and the Oregon death penalty experience, then invite a conversation about why those differences exist and whether it makes sense to talk about changes. Washington has about twice the number of murders that Oregon does, but its death row currently has seven men and Oregon has 34 individuals on death row. In addition, the number of cases that are potential death cases, where the prosecutor in the State of Washington has sought death, tends to range from year to year of an average of about two to five, whereas in the State of Oregon we have about 20 to 30 pending death penalty cases every year. They are fairly stark differences especially given the murder rate. The question then becomes why? Is it because, for instance, the Oregon capital murder statute is broader, that it involves a greater scope of crimes? I think the answer to that is no. They are roughly the same in terms of the potential scope of murders that can fall into the capital murder group. So instead what I think you are seeing is you are seeing a system in Washington that invests the prosecutors with discretion at the front of the end of the case to decide whether to file a death penalty notice and decide whether

the case is going to be a death penalty case or not thereafter. In about 80% of the cases in Washington, and it will vary from county to county obviously, but overall in about 80% of the cases the prosecutors choose not to seek the death penalty and thereby eliminate the possibility of the death penalty very early in the case. They also do so in a large majority of cases without asking for a guilty plea in return. So while there are certainly cases in Washington State where a prosecutor would agree to take death off the table in return for a guilty plea, in many, many more situations the prosecutor is simply making a qualitative judgment that this is not a case that qualifies as the worst of the worst, that this is not a case, although it falls within the aggravated murder statute, where death ought to be sought. I think as a result of that, what you see in Oregon and Washington in terms of juries returning verdicts is that in both states juries, more often than not, don't vote for death when they have that option. The big difference, of course, is the number of times that the jurors are given that opportunity to make that decision. The other thing that happens when a prosecutor in Washington State takes death off the table is all of the resources that come with the prosecution and defense of a capital case fall away. The case becomes an ordinary murder. That doesn't mean it is not well defended or adequately funded, but I think anybody who has done any amount of death penalty work recognizes that the costs associated with the death penalty really are far more significant than any other case that we have in our system. Consequently you have decisions that are being made at the 60 or 90 or 120 day mark in a case that that no longer is a death penalty case and all of the resources that normally would accompany that fall away. One of the things that we have been looking at here in Oregon is the difference between the amount of time that it takes in capital murder cases to get to a plea versus the difference in the time it takes to get to a trial. Again, in Washington if you saw that graph there would be remarkable differences because the capital cases would take three, four, five times as long as the non-capital cases. Here there is very, very little difference between the two in part because the pleas are happening really on the eve of what would be the trial. So even in those cases where there is a guilty plea, the cost associating with getting that case to a guilty plea...

27:15 Chair Ellis

Are the same as if you went to trial.

27:16 J. Ellis

Are the same as if you went to trial. The only thing you are taking off, obviously, is the costs that would have been associated with the trial and perhaps with the review thereafter.

27:25 Chair Ellis

Now your predecessor, Matt, spoke to us about two years ago and my memory is that he explained that in Washington there is a period of time before the prosecutor decides whether to seek capital or not. In that period of time the defense has the opportunity to try to dissuade, present mitigation, whatever. It takes it out of the publicity limelight that often accompanies an arrest. He attributed a lot of this difference to that procedure. What is your thought?

28:15 J. Ellis

Well, what happens in Washington State is after an arrest, and when a capital murder charge is filed, every prosecutor will say, "I am not deciding today whether this is a death penalty case or not. I am going to listen and hear what the defense has to say. I am going to talk to the victims. I am going to talk to the police officers. We are going to evaluate all of the circumstances and then decide." There will be some date set out in the future at which the prosecutor will announce this decision. It has become very common in Washington State for prosecutors then at the end of that period to say, "I don't think this falls into the category of the worst of the worst. I am not going to seek death in this case." Again, in many, many cases, in a large majority of cases, it is not because the defendant is offering up a guilty plea or the prosecutor has asked for that in response. That happens from time to time, but there is a remarkably different culture that developed in Washington State over that issue. Norm Maleng, who was the King County prosecutor for about 30 years, the largest county ...

29:19 Chair Ellis

The Mike Schrunk of Seattle.

- 29:21 J. Ellis Exactly. He said that he would never use the death penalty as a bargaining chip. He felt it was far too coercive. He would make a decision about whether a case was a death penalty case or not. In fact, he famously refused offers to plead guilty in exchange for taking the death penalty off the table.
- 29:42 Chair Ellis So are you agreeing with the summary that I gave of what I recall Matt telling us?
- 29:48 J. Ellis I am agreeing completely. I think prosecutorial discretion is the main reason that there are seven individuals on death row in Washington State and 34 here. Because it is a formalized system, the statute is set up in a way that tells the prosecutor, "You don't have to make a decision at the beginning of the case whether this is a death penalty case or not. You have the discretion to do that." And there is an expectation that the prosecutor will then make that decision and in most cases choose not to seek death penalty, and in what the prosecutor views to be appropriate cases, choose to seek it.
- 30:26 Chair Ellis This data discrepancy, which is amazing to me, has to be apparent to people on both sides of the system. I assume you have had discussions with some of the DAs in Oregon. Is there any interest in shifting to this delayed announcement system to give a little more time? Or is that an article of religion that they don't want to touch?
- 31:00 J. Ellis So far I haven't heard an overwhelming response about the movement towards it. I think, again, it is in part because of the way the systems have developed according to the statutes. I think prosecutors here will tell you they do have the authority not to seek the death penalty even in a case where they have charged capital murder. The reality though is it doesn't happen all that often where a prosecutor will simply pull back. I have also heard there is a strong belief that the value of the death penalty in many cases is that it will produce a guilty plea and that will result in closure for the victims. It will result in an end to the litigation in the case. I certainly recognize that there are those cases where the prospect of a death sentence would produce a plea. But I think if you look at a much bigger system wide analysis, the ultimate cost savings, and I am now pulling very far back from an individual case, the ultimate cost savings happen if prosecutors use discretion not to seek the death penalty in the majority of cases even without asking for a plea in return.
- 32:18 J. Potter How many days does the Washington statute permit the DA to make the decision in?
- 32:21 J. Ellis The Washington statute works within Washington's speedy trial rule. For an individual who is in custody, he or she has a right to go to trial within 60 days. So the statute sets 30 days because you have to give notice before trial starts. But in reality it doesn't really happen that way. There is a good cause extension that happens in almost every single case. What you are dealing with, again there is some variance, but I would say probably that it is in the neighborhood of six to 12 months that the initial decision making process happens. In all candor there is some tension around that. I think there is some push by prosecutors to try to shorten that period of time. There is some push by defense attorneys to try to lengthen that period of time. I think that is a natural tension that always exists within the system. But at a minimum there is some decision at a much earlier date than what we see here in Oregon about whether the case is going to be a death penalty case or not.
- 33:27 Chair Ellis Other thoughts? To me it is just an amazing data variation. The Columbia River can't explain it.
- 33:44 J. Ellis Again, I lived in Washington and I have lived in Oregon. I don't see tremendous differences in the population. I think the statistics bear that out in terms of how often jurors return death. They don't return death all that often. Certainly not what I saw in Texas where you put any case in front of a jury and it is likely that it is going to be returned a death sentence. I think what we are talking about is how many cases are potentially in that pool. There are two things that I can say. Is our death row too

large comparably speaking, and is our system at the trial level working in an efficient way to figure out which was cases are truly death penalty cases and which cases are not, and doing it an earlier enough point that there could be substantial savings?

- 34:36 J. Potter Are there economic/political interests in Washington that are different than Oregon? In Washington they fund their public defense on a county by county basis, correct?
- 34:44 J. Ellis That is true.
- 34:44 J. Potter As they fund their prosecution function. We don't do it that way here. Do you see that there is pressure from county commissioners on DA offices to make decisions not to charge death because it is costing the county not only to fund the prosecution function but also the defense function?
- 35:05 J. Ellis I have never heard of a case where a prosecutor says we are going to spend millions of dollars to try to execute this person. If we talk about the number of executions Washington actually leads Oregon. They have executed five and we have executed two.
- 35:41 Chair Ellis Two that...
- 35:39 J. Ellis Two that volunteered. There are greater efficiencies at work in Washington State if the ultimate goal is to seek an execution. That is a goal that is abhorrent to me personally, but it is the goal that the system is attempting to achieve.
- 36:04 Chair Ellis Do you recommend that we move down the track of trying to change the procedure in Oregon to match this procedure in Washington?
- 36:13 J. Ellis I am a big believer that prosecutors, if given that formalized authority, will exercise discretion and will look at a case early on and ask that very difficult and multi-faceted question, is this truly a death case? Although there will be variance from county to county and I certainly respect the right of each county prosecutor to make that decision for herself, what we will see is that in many cases the death penalty goes away because it doesn't simply fit into that increasingly narrow category of the worst of the worst.
- 36:52 Chair Ellis I know it is a sensitive thing for us to be the ones to propose it. I would really like to see a dialogue with the DA community to see if there isn't some interest on at least some of their parts to work on this. So in terms of where we go, I know when Matt spoke we kind of got excited about it and then we were told it is too close to the legislative session. I would be very interested if you could prepare a draft of what you think – I don't think it is horribly complicated – what legislation would look like. Let me know and Ingrid and see if there isn't a way that we could try to get a dialogue going on this. I know for us to just try to push it is not the most politically savvy way to try to get there.
- 37:57 J. Ellis Right. Ultimately what we are talking about here is prosecutorial discretion. Investing prosecutors with the opportunity to make a choice in a very formalized way.
- 38:09 Chair Ellis Nobody is arguing that they don't have that discretion. The issue is it is just amazing that the culture would be that different in what otherwise seems like the same kind of people on both sides of the river.
- 38:25 J. Ellis I agree.
- 38:26 I. Swenson Jeff, if I could just ask you to talk a little bit about what the defense does during that period of time. Do they do the same things you are observing here in terms of mitigation investigation and that sort of thing?

38:42 J. Ellis Yeah. What happens during the initial period of time, when the prosecutor needs to make a death penalty decision, is the defense team puts together and does what we call a mitigation investigation. It is the same thing that happens here in Oregon. I think the difference is that the defense also recognizes that they are working under a bit of time pressure. Prosecutors are not going to agree to an unlimited amount of time to get it done. There is very much a focus in that initial period of time on what are the most important things for me to discover and to put together and let's get it done right away. Anybody who is a lawyer recognizes that working under time pressure forces you to get things done. I think the difference is that all of those things have to be done in a very compressed period of time.

39:34 Chair Ellis That is why merchants encourage Christmas shopping.

39:37 I. Swenson And does the defense generally consider that they are able to do the job the way they want to in that time frame, or is that not the case?

39:46 J. Ellis I have never heard a single complaint from the defense about the system working to their disadvantage. Again, the complaint is how much time do I need to get mitigation packages done. I have never heard a defense attorney or defense team say that I hate the system and it doesn't work. Nor do prosecutors complain and suggest that it needs to be fixed.

40:14 Chair Ellis Great. Thanks a lot.

40:14 J. Ellis Thank you very much.

40:17 Chair Ellis Chief, you occupy both a presenter role and a Commission role. Which one would you like to do?

40:21 Chief Justice
De Muniz I'll be the presenter. Do you want me to sit up there?

40:30 Chair Ellis No, no.

40:32 Chief Justice
De Muniz Good afternoon everyone. Ingrid asked me if I would come down and address all of you with regard to the judicial budget. I am pleased to do so. Let me start with just a little bit of background. In 2003, when Oregon became the poster child nationally for a state that inadequately funds its education and inadequately funds its courts, the cumulative state government budget deficit in this country was \$40 billion dollars. Today the cumulative state government budget deficit throughout this country exceeds \$150 billion and is expected to continue to grow. The governor's reset cabinet, which produced its report a few months ago, contains a projection that stated in two different ways that the state economists described it as a \$10 billion dollar budget deficit over the next decade. Another way to look at is that we experience \$2 billion dollar budget deficits each biennium through 2019. Right now the projected budget deficit in Oregon going into the 2011-13 biennium is projected at \$3.25 billion. We have had to balance this biennium to end the '09-'11 biennium at \$1.25 billion. The Oregon Judicial Branch in the 2009-11 biennium started at \$32 million less than the cost of services for the 2007-09 biennium. I received this morning from Senator Courtney and Speaker Hunt, a confirmation that I needed to reduce the judicial budget to balance it for this biennium by another \$13.3 million. I started reducing the judicial budget voluntarily many months ago starting with an \$8.3 million dollar reduction. I am pleased to say, however, that even with this \$13.3 million dollar reduction Oregon courts will remain open and accessible through this biennium. That means they will be open eight hours a day, five days a week. They will process all case types and we will not be entering into the case type prioritization process that occurred in 2003, when we refused to process any small claims or FEDs, adjudicated no misdemeanors or low level felonies and did only serious person felonies and child dependency matters. We continue to remain open

and accessible because we started over a year ago, in anticipation of this, holding vacancies open. Our courts are operating around the state right now many of them at 10 to 20 percent vacancy rate. However, we have undertaken ...

44:35 Chair Ellis

Vacancy is judicial vacancy?

44:41 Chief Justice
De Muniz

No. Staff vacancy, the people who operate the counters, the people who do all of the hard work that goes on in our branch of government. I concluded almost two years ago, particularly in consultation with the governor who repeatedly in many meetings told me, "Mr. Chief Justice, your problem isn't 2009-11, it is going to be 2011-13." That is proving to be true. This summer I visited all 27 judicial districts and spoke to over 1700 employees to explain to all of them the context in which I would make decisions about where we go with this branch of government. I explained to them I do not see furloughs, hiring freezes, freezes on cost of living, step increases, the variety of things that we have done in the past to balance our budgets as a solution to a long term or decade of deficits. I explained to all of our employees that we needed to undertake an aggressive reengineering of our courts so that we could find alternative efficiencies that would permit us to operate on fewer revenues yet maintain or improve our judicial services, that we needed to ask the hard questions - why do we do things and why do we do it this way? We needed to confront our culture and our traditions to operate and, 1) to actually make more effective use of the resources that we have; 2) to leverage our technology to make us more efficient and provide the public with greater access to the courts; and, 3) to question what are our essential functions and decide which things we should be doing and perform a legal triage to determine where our resources are more properly aligned with our essential resources. I called this re-engineering. There could be other more radical words for it. One of the reasons that we are able to operate at this 10 and 20 percent vacancy rate is because of this re-engineering program and this willingness to confront our tradition and culture. Let me just give you one example that I think you will find interesting. Probably for nearly 150 years the traditional unit of operation, or the judicial unit, has been one judge and one judicial assistant, supervised by the judge. Let me use the Oregon Supreme Court as an example. Traditionally there was one justice and one judicial assistant. So there were seven justices and seven judicial assistants. The job descriptions for those positions as judicial assistants were likely written when those judicial assistants were typing 50 page opinions on an Underwood typewriter with onion skin copies. The technology world has passed all of that by. We no longer operate that way in the Oregon Supreme Court. For seven justices we have three judicial assistants supervised by one appellate office manager. Those three continue to do all the work necessary for the seven justices. Ten months ago I transferred all of the operational data entry work, case management work that the records department did for the Supreme Court to those three JAs. They perform all of it. That was the equivalent of creating two and a half to three new FTE in the records department to devote themselves to the Court of Appeals work, which is our busiest appellate court. That is a small example of making more efficient use of our resources which we are duplicating throughout the state. I will use one more example. Multnomah County, our largest court, followed that and ended the tradition of the judicial assistant being supervised by one judge and a number of months ago, as part of the budget reduction process, transferred all 38 judicial assistants and the supervision of those judicial assistants to the trial court administrator, and mandated that each judicial assistant devote 25% of their day to operations. That is the equivalent of adding seven new FTE to operations. It is one of the reasons that Multnomah County remains current and operationally efficient in what they are doing. Those are small matters but they are being repeated throughout the state. We also are saving thousands and thousands of dollars. We did away with transferring the appellate record by paper from the trial court to the appellate court. If they are not already in an electronic form then we scan it and put it in a PDF and off it goes to the appellate records department. Frankly, I question whether we even need to send it anywhere because the data simply exists anyway, but we do create a file in the records department for it. When I was undertaking change, I received a

great deal of pushback that said, “You will be creating more work if you have to index these appellate records electronically.” Well, 75% of the Court of Appeals cases are affirmed without opinion, which means that no one looks at the record. They simply read the briefs and decide what to do. Only in 25% of those cases does anyone ever look at the records, so we no longer index the record. I have personally looked at the appellate records we are receiving now electronically. Without an index they are completely navigable and searchable anyway. We are saving thousands and thousands of dollars in paper and postage. Some people might call that tinkering around the edges but we have a very bold reengineering program that we are involved with now. I formed an implementation committee and they are doing the following things: 1) Centralization. Where can we reduce costs and trial court workload through central processing of our payables, collections, handling traffic citations, and other areas? We are going to centralize our functions. 2) Regionalization. How can we manage processes regionally or modify venue to expedite case processing or adjudication, including developing our specialized dockets to better utilize judicial resources. One of the things we are going to be doing is trying to make much more efficient use of our judicial resources statewide through video and a variety of state docketing efforts. 3) Leveraging our technology. We are going to go to online access to pay fees, fines, jury management, and access to documents, and, again, make more effective use of our judges statewide. Then I will be seeking legislation to permit me the authority to create administrative judicial districts. I believe that we can provide a more efficient use of our judicial resources through creating a larger administrative apparatus, not the smaller judicial districts that we are operating in now. I am going to seek legislation that allows me to create these administratively. I don’t have authority to change the county boundaries, but to create administrative districts in which we can manage this process a lot better. It will permit greater staffing and better delivery of trial court services. We are undertaking to restructure ourselves to permit us to operate on fewer revenues, which I think is the reality that we are going to have over the next decade and at the same time maintain or improve our judicial services. The committee that is charged with looking at these four areas and making recommendations, also is charged with the responsibility of looking at restructuring and transformation efforts through the lens of a litigant, asking ourselves each time, “Are we promoting convenience for litigants? Are we reducing the cost and complexity of the judicial process? Are we maintaining or improving access to justice, and are we improving case predictability?” So that is the bold course that we have set ourselves on to deal with this very difficult economic crisis.

55:48 Chair Ellis

Any suggestions how we can help or not hinder?

55:58 Chief Justice
De Muniz

I don’t know about answering your question directly. I can tell you this. We have a wonderful working relationship with Ingrid and your organization. Obviously, indigent defense is a crucial part of the system. My position is that the justice system must be funded in balance. We will have to continue those collaborative efforts. I think you have done a tremendous job. I think the legislature has been very sensitized to the defense function because of the good work that all of you have done over the last decade, honestly. I think if we ask Ingrid, PDSC is not suffering near the deficiencies and reductions that we are as a whole. That is to your credit.

57:00 Chair Ellis

I may have missed it but I didn’t hear you talk about electronic filing.

57:05 Chief Justice
De Muniz

We already have it in the Oregon Supreme Court and the Court of Appeals. We will complete the whole e-court for the Supreme Court and the Court of Appeals by the end of this biennium. We have five pilot projects in large, medium, and small courts operating right now on small claims and FEDs. They are not e-filed; they use what we call “electronic content management” that allows us to move the documents and the data in a certain way. We have an RFP in the process right now on the street asking for a single source provider. I cannot tell you right now, because I don’t have

it on the top of my head, when we will have statewide e-filing for all case types. I can tell you it won't be this biennium. Of course, the legislature has continued to reduce our e-court budget as we go forward. There is talk now that I have had with the legislative leadership, I am not sure that they are going to sell the bonds that we need to continue to debt finance this project as we go forward, so we are making contingency plans to get us through this biennium and part of the next. But the good news is because technology is changing so rapidly, a single source integrator or provider will be able to do what we need cheaper than we originally anticipated and faster than we originally anticipated. So all of our efforts are in trying to husband our resources to make sure that we can do that and that will result in e-filing.

58:58 C. Lazenby

Just out of personal curiosity as you are going through the reengineering process, Mr. Chief Justice, are you looking at – I know it is a judicial model - but are you looking at more enhanced alternatives to seek resolution to lessen the demand on the judicial resources that are out there, an expanded way to resolve a lot of these matters before they need to have a judicial person make that decision?

59:26 Chief Justice
De Muniz

Chip, I am going to answer that in two ways. The answer is yes. There is a certain triage that this has to do with, determining what our essential functions are and where these cases should go. If they should go to some form of alternative dispute resolution this triage mechanism would do that early on. I have another response to you. I think that the kind of severe budget cuts and destabilizing budget reductions that could be visited upon us if we don't do this reengineering, and what is happening in a number of other states right now, is that when you move, because you no longer can handle the civil justice system because of your lack of resources, when you move to the alternative dispute resolution idea you create two tiers of justice in a state. One is for rich people and companies and businesses who can afford to hire reference judges, who can afford to do ADR and all of these things. What you leave in the courts is you leave a ghettoized process in which you have criminal cases for which the judicial branch has no discretion whatsoever about anything, and self-represented litigants and people who cannot afford to get themselves into this other venue. That would be California today. You can't get a civil jury trial there for six years.

1:01:23 C. Lazenby

Can I follow up on that? I apologize for being late but I kind of came in on the tail end of the conversation about the death penalty and charging decisions and the disparities between Oregon and Washington. If we are truly reengineering the way we have done the judicial system, isn't it fair that one of the things that needs to be on the table is the statement that you just made, which is in the criminal area we don't seem to have any legal limits on the discretion of what gets charged and what doesn't get charged. If you are really going to reengineer a system to save billions of dollars shouldn't that be on the table too so maybe there is some objective criteria that applies statewide in terms of charging decisions and how that occurs. I am not being a Pollyanna about the legislative process. I am just saying that if are we really serious about reengineering the judicial system shouldn't that be on the table.

1:02:15 Chief Justice
De Muniz

Well, you are entitled to say what you think. I don't know that the – I am having a hard enough time managing my aspects of the public safety system. I will leave it to them to talk to you about that. I will tell you this. The governor is getting ready, by executive order, to create a sentencing commission or something like that. I will be one of the members of that commission that will try to make public what our sentencing scheme actually means in terms of dollars and cents and human lives. That is not an answer to your question but a response.

1:03:10 Chair Ellis

Other questions for the Chief?

1:03:09 J. Potter You have piqued my interest now since I am not aware of this sentencing commission. Can you tell me more about who is going to be on it and when they are going to start?

1:03:15 Chief Justice De Muniz I really can't. I have had some preliminary discussions with the governor but I should leave that to him. It is just something I am aware of.

1:03:29 Chair Ellis Thank you.

1:03:32 Chief Justice De Muniz You are welcome. Thank you for having me.

1:03:36 Chair Ellis Walter or Craig?

1:03:42 W. Beglau Thank you. Well, Mr. Chair, members of the Commission.

1:03:53 Chair Ellis We appreciate you coming.

1:03:51 W. Beglau This is my first time in front of the Commission. It was Mike Schrunk's 10th and my 1st. Hopefully I may get invited back depending on how I do today here in terms of my presentation, but thank you, thank you for having me here. My name is Walt Beglau. I am the Marion County District Attorney and vice-chair of the Oregon's District Attorney's Association as it stands right now. Ingrid asked me, and I think it kind of dovetails with what Mike was talking about relative to charging decisions and the local economy and the resources there, to talk about the Marion County experience. I did a little research. I have had a chance over the years to speak to this quite extensively because Marion County has had a significant case reduction policy in place for two decades. It really came with the onset of Ballot Measure 5. My predecessor, Mr. Penn, Dale Penn, actually coined what he worked through as "budget immunity" when he was speaking to our local commission in terms of not having the resources to get the job done and what was coming in the door and him asking for that local general fund and that was he who coined that phrase. I don't speak much that way. We clearly have a firmly rooted policy in place that has been adjusted over time, including during my six-year tenure of district attorney, and it is a blend of two things. Mike is not doing this in Multnomah County. It is a blend of no action in cases, good solid cases that are investigated and have evidence to charge them, just shutting them down at the door and then dispositionally handling them different. We have talked a little bit about those, treating them as violations or reducing them. I want to speak very clearly to the process in which we do that in Marion County and many other counties and that is early disposition, EDP, the process in which we fast track, so to speak, misdemeanor cases. Those are the two routes that we have in place in Marion County. I am going to kind to speak to them because we literally have 20 years doing that. The current landscape of financial reductions has not dramatically impacted our policies right now, but there is no doubt in my mind that in the next couple of fiscal years, as signaled by our local chief administrative officer and our board of commissioners as the state grapples with shared revenues and all of that totality of resources in public safety that we are going to be cutting prosecutors. We are going to be cutting more staff. In 2009, we lost five percent. I lost an attorney there and some support staff and cut back on materials and services. Last year we tried to hold ground. That was kind of the expectation and now they are signaling as we go into the next budget cycle through June 30, that there are going to be more cuts. So clearly there will be adjustments to these in place policies that I have and will talk a little bit about with you. The only respite, and Craig will talk to this, the only respite has been that the total numbers are down. I have looked over them every year and we had about 13,500 a couple of years ago. We are down to 10,799 cases ...

1:07:45 Chair Ellis That is felony and misdemeanor combined?

1:07:46 W. Beglau

Correct. That is the total number. You can see it edged down a couple thousand during that period of time. I have looked at this year's numbers and it seems to be kind of stable. You will see that in the way we are handling cases too. How did we make those decisions about how we were going to do early disposition or what cases am I just going to flat out shut down? It has been, as you know, a very predictable process, actually, just prioritization. We put a premium on violent crime, child abuse, domestic violence, and then there are three categories that we have taken our swings at. One of them is unique to Marion County that I will mention here. The first category is misdemeanors. What we do with those are two things. One is flat out don't file them. Those cases that we don't, by policy, file unless there are aggravating circumstances are Criminal Mischief III, Criminal Trespass II, Disorderly Conduct, Failure to Appear in the Second Degree, Frequenting and Harrasment -offensive physical contact that is non-sexual in nature. We did about 3,000 no actions in 2009.

1:09:20 Chair Ellis

You have gone the no action route as opposed to the violation route?

1:09:21 W. Beglau

We do all of them. We stage them and we have three categories. The first thing in our policy is the cases we have shut down and the ones I just mentioned, Mr. Chair, are the ones we don't file unless there are aggravating circumstances. That might be a substantial criminal history or a repeated problem, but that is no guarantee that we are actually going to do anything with that case. We have guys that are rearrested five or six times and we still no action under this policy. The second category is the EDP cases. Those are the misdemeanors. In 2009, we handled 1,900 cases through early disposition. The way we manage EDP is we work very closely with our defense bar on these. They come in the door. A citation is a charging instrument. We will reduce it to the misdemeanor and they will get discovery in advance and go into court the day of arraignment and resolve the case. It is a total package thing where there is representation and the Deputy DA in the court trying to resolve those cases. We did 1,900 of those in 2009. As of this morning, 2010, we are on the same track. We had 1,307 we have done through this morning in Marion County. Of those EDP cases we take a bunch of them and we treat them as violations. They are crimes coming in the door. They are violations at the time they go into the courtroom by interlineation. Those cases are driving while suspended, not felony, giving false information, failure to carry and display, no insurance, offensive littering, 911 calls, and most importantly, Theft III, which is a high volume misdemeanor crime. Those get violation treatment and go through this fast track process. What we do with EDP, and we can all argue about the value, it is kind of a double-edged sword when you are talking about fast track processes. They happen quickly and for the defense to get a chance to take an earnest look at them is often a challenge. I have heard that from our defense bar. I know Tom is here and he has probably handled some of these before. Also we don't do anything with them. We don't put them on probation. We don't treat the underlying issue. It is what I would call almost resume building. They just get a fine and restitution and a conviction and then we don't treat the underlying issue. We are getting efficiencies in a court system but we might see those folks back. I have a tough time. I go like this with EDP because we all know what is driving the criminal justice system and that is mental health concerns and substance abuse, particularly with these front end crimes that we are treating pretty much across the state through early disposition courts. There is a risk involved for the system with EDP, but that is what we are doing with them. The rest of the misdemeanors that I do in the normal course with supervision and treatment programs and that kind of thing is DUII, misdemeanor sex crimes, and misdemeanor domestic violence. Those do not go through that fast track process essentially in Marion County. So that is that first category and that is the lion's share of how Marion County for quite some time has done things, I guess, differently to resolve cases. It has almost been institutionalized in Marion County. I want everyone to know what we are doing. I go and talk to Rotary and say, "This is what I am doing." They come at me and I say it is the system. The second category is correctional cases. Marion County has a high percentage of those.

1:13:41 Chair Ellis

Is this what you referred to as unique?

1:13:47 W. Beglau

Yes, unique because we are one of just a few counties that have the institutions and we have the only maximum security facility, the state penitentiary, and as you know there are some significant concerns about safety issues, not only for the inmates but for the corrections officers as well. We reduce and have reduced to writing a policy around supplying contraband and weapons, again triaging the level of crimes that occur in there and treating them differently. We “no action” them and we have some criteria we have set up. Clearly those are kind of cemented in policy for Marion County to not file cases. We work closely with the Department of Corrections. One area that is very ripe for further discussion is the state hospital, which I can assure you is the number one driving investigative force for criminal activity for the state police by far. I am in this constant dialogue about how we manage criminal activity in that facility. Those are the unique parts. The third area is felonies. We do have a few felonies that we take out of felony land and do something different. Some of them get a misdemeanor through early disposition process. Then I take some felony possessions and I run them through our drug court and I give them misdemeanor treatment. We have created a theme for drug court around children and family. That is where I feel you get your biggest return on investment in terms of costs and, of course, the human side of it as well. I take some of these PCS cases where there is an endangering or some mistreatment involved and we put them into our drug court. We give them a misdemeanor and if they treat that then that case gets misdemeanor treatment. That is another category of felony that we are trying to do something different with in Marion County. Those are the main ways that we are doing things differently in Marion County. Some of the areas of concern that I thought might be interesting for your discussions or for you is juvenile court. We have extraordinary numbers of delinquencies. My biggest area of concern is the area of dependency. In terms of looking in my crystal ball in the future here, many of the counties have a contract to do juvenile dependency enhancement through the Department of Justice and our attorney general, to bring in prosecutors and staff to help manage those families and get deeper into the courtroom with those particular cases in representation of the Department of Human Services. I have done that in Marion County and it is a very valuable asset. It is going to be on the chopping block again through this next biennium. I am looking at now pulling back out of that process because I am not going to have the ability to maintain services when my commissioners are faced with cutting dollars at the general fund level, in other words back filling state money. I think you are going to see that paradigm kind of replicated in other counties. I can’t keep doing that if that funding isn’t retained. I think we ought to have our eyes on our juvenile departments about doing delinquency and doing dependency work. I think one of the biggest concerns is going to be preservation. I know the chief justice spoke of this. I don’t want to be an alarmist but that figure he gave us today is concerning. We all know the system doesn’t function without the court. That is the gatekeeper for all that we do. Of course the criminal bar eats up all the resources. I am worried about the court getting hit and then pulling back from some of the good programs in treatment that we have done. We have a mental health court in Marion County. We have parallels in our juvenile court. We have a drug court. We are doing some good work there, but with the court getting impacted and if we are pulling back there I am worried about us getting straight back to what are ultimately considered core services and not being able to move those things forward. We are going to have a disruption in that balance. I am concerned about that and I have heard that in my discussions locally about how can we sustain those programs that are working? In fact with the Criminal Justice Commission we have talked quite a bit about that particular issue. Next steps, if I get hit hard in Marion County, what else am I going to stop doing? I think I will have to start taking felony drug cases and treating them as violations or not doing anything with them. We all know that if you are not involved you are not going to address the substance abuse issues. We are going to be in trouble. Those are those areas of concern that I thought I would leave you with today. I am certainly glad to answer any questions that you have.

1:19:15 Chair Ellis Were you here when Jeff Ellis spoke?

1:19:15 W. Beglau I was.

1:19:22 Chair Ellis Any reactions? The disparity between Washington DP cases and Oregon cases is amazing. I am curious.

1:19:33 W. Beglau Mr. Chair, I knew that that was coming. I listened with great interest to that conversation. Is Steve Gorham still here? Let me just say this. We have a death penalty case pending in Marion County right now with Steve Gorham. The court has issued a gag order on all parties even to talk about general cases in our county. I need to be cautious and Steve would agree with that. The bottom line is that I am more than willing, to the extent that I can on behalf of the organization, to sit down and talk about ideas that are out there in the resource context. Bottom line is the association has not been, in the past, in favor of setting a timeline around that decision making process given that it is an extraordinary complex process, and a lengthy process to do a penalty phase investigation so that you have all of the assets and information in front of you. The thought of 30 days from the time that they are actually charged and in custody, having made 12 of these decisions myself, gives me great consternation. I guess I will leave it at that with the door open. I would be glad to sit down and discuss.

1:21:03 Chair Ellis Any other thoughts why the data would be so remarkable comparing Washington and Oregon. We are focusing on this one. Are there other factors that are going on here?

1:21:15 W. Beglau He mentioned that there is a 80% decision point up front for them to not go forward. It is obvious that Oregon prosecutors move forward in a greater percentage. Maybe the timeline is persuasive to just not go forward because of that. They don't have the necessary information or they are just choosing to not go that direction and resolve. I honestly don't know. Some of that information I learned about Washington was news to me as well today.

1:21:52 Chair Ellis We may well take you up on your offer to talk further about it. It is just amazing. You know that four years ago we started a public defender in Marion County. There have been significant, at least from our perspective, changes - we think improvements - in MCAD. I am very interested how you are reacting to those two organizations. Any comment?

1:22:24 W. Beglau I think we work tremendously well with both organizations. With MCAD I think the areas of concern that were identified by the Commission have had great improvement. I really could not speak to any specific concerns of communications and relationships. Probably the only area that we all work on is – not only for deputy district attorneys but for entry level defense attorneys is training and getting them adequate resources so that when they go into the courtroom they are really comfortable with the cases that they are getting. That process of triage and the training piece I think we can always push in that direction. I would encourage that for both organizations. I would encourage that for our organization and we are doing that. It is very, very important that the defense attorney and the deputy district attorney sitting in the courtroom know what they are doing and they are both equally competent and capable and getting the job done for their respective points of view. I really think things are going well.

1:23:42 Chair Ellis We are very glad to hear you say that.

1:23:42 W. Beglau Yeah. Paul Lipscomb and Tom Sermak - we work together on different issues and serve on joint community organizations. They call me when there is a concern or an issue. I can't complain today.

1:24:03 Chair Ellis Good. You get invited back if you say that. Other questions?

1:24:09 C. Lazenby I just want to ask one follow up question. I am not trying to be snide or anything. One of the things that Jeff said in his presentation was that one of the differences that may exist between Oregon and Washington is the way in which death penalty decisions are funded. You spoke pretty eloquently – by the way I am the new county counsel, so I am back doing that again so I am very sensitive to the way that the counties provide support services for things in the justice system. When you made those 12 decisions about the death penalty, to what extent did the expense of that decision go into your decision making about whether to go with the death penalty or not. Is it a little bit of a factor? Is it somewhat of a factor? Does it factor in at all or is it really just on the merits of the case and the aggravating factors in the case and the victims and all those other pieces?

1:25:05 W. Beglau When I took over in 2004, I set up some very, very specific criteria to make these decisions. I am thinking back and I know every single case by name that I have decided. I have never thought about money in that decision. The kind of central piece has always been an evidence based approach on the four questions. I guess that answers your question. I don't think about money when I make that decision. I have looked at the costs internally to doing these cases and it might surprise – maybe it won't – they don't cost the district attorney that much. It is all FTE. It just depends on who you put on the case.

1:26:04 C. Lazenby They are already there. You have some additional costs in terms of trial preparation, etc., right?

1:26:09 W. Beglau Right. I speak to my board of commissioners about that and I can tell you one death penalty years ago cost \$15,000 in our office. The current one is at \$7,887 and then my people. That is not where the cost is. Sure I have people doing the work and that draws down the capacity to do the other work, but that is what our job is - balancing that. I had a child abuse case last week that cost more than a death penalty. That is the tough part because justice can be expensive.

1:26:59 Chair Ellis I think on the defense side DP cases are considerably more expensive. Other questions? Thanks a lot. We appreciate your time.

1:27:11 W. Beglau Nice to see you all.

1:27:13 Chair Ellis Craig?

1:27:19 C. Prins Thank you. Am I the last speaker for the afternoon?

1:27:20 Chair Ellis Well, you are the last speaker in this segment.

1:27:24 C. Prins Okay. I am Craig Prins from the Criminal Justice Commission. Ingrid asked me to put together some of the things that Walt and Mike have talked about which are crime rates in Oregon. I also looked at some of the factors for that. I know a lot of folks in the room, so if you have questions please interject. It might make it more interesting. I don't know if this is going to work very well to have this setup like this with graphs. I don't think you will be able to see them from back there. If you find what is going on with crime interesting, you might want to move up or you are going to get a crick in your neck. Chair Ellis, this is kind of following what Mike and Walt were talking about. It is a little different because this is looking at crime trends. Not just filings but reported crime and victimization and trying to get an idea of prevalence of crime. Crime is complex and a lot of this I have taken out of a book by Franklin Zimring called The Great American Crime Decline. It is an excellent book. If you are interested in kind of an overview of somebody who looks at the – the big fact is if you look at the last 15 years we have had a long period of declining crime. It has been violent and property crime and it has been deep. It is a 40% drop. Franklin Zimring has written a good book on this, kind of the why and why not. This is kind of looking at that. Whenever we look at crime prevalence, and when I

am saying prevalence you are always looking at a rate. How many people have reported crime per thousand because obviously we have more Oregonians now than we did back in the 1980s or '90s. Whenever folks are talking about, in *The Oregonian* or whatever, is crime going up or down, they are talking about the Uniform Crime Reports. When a victim lets law enforcement know, makes a crime known to law enforcement, they categorize that and they give it to the state police who then give it to the feds. The FBI prints that as the Uniform Crime Reports. You can see the crimes that are in the crime measures. Aggravated assault is by far the most common violent offense. Larceny theft, which includes predominantly misdemeanors, is by far the most prevalent in the property crime index. We use this because it has been used since the '30s. Hoover started this with the FBI. It is the best way to get long-term comparisons of crime. It also has problems which would be like, well, what if reporting has changed, and I will talk about that. We use a couple of things to look at that. We look at the victimization survey that is national as well.

- 1:30:26 Chair Ellis Where do drug crimes fit in all this?
- 1:30:28 C. Prins Mr. Chair, the violent and property crimes do not include behavioral but I have got some data on there that I would be happy to look at. Behavioral crime is so different and I hope you have heard from Walt and Mike, it really depends on how it is enforced. You also don't have that many reported behavioral crimes. Usually the person trying to buy the drugs is seeking the person that is selling the drugs, and there is not a victim in the way there is for violent property offense. It is more of a drug market. Does anyone else have any questions? Just holler if you do. The latest we have got is 2009. The 2009 reports came out a little while ago. I have been watching the 2010, and Greg from Lane and those of you in each of your individual counties can look at those as well and probably tell me what is going on in your county, but from '08 to '09, violent crime dropped two percent. That is the lowest crime rate we have had with a violent crime rate since 1969, which is the year I was born, sorry. From '04 to '09 it has dropped 15%. That is the second largest drop behind the State of New York. What is interesting is New York and Oregon are a good comparison. Oregon has had reduced crime while increasing incarceration. New York has had reduced crime while reducing incarceration.
- 1:32:05 Chair Ellis Where does that lead us?
- 1:32:11 C. Prins We are going to talk about that, Mr. Chair. We are going to talk about the usual suspects of why crime drops. I just wanted to give you some of the long-term trends.
- 1:32:17 A. Hamalian Craig, you have said that you have taken a look at the 2010 numbers and what is the trend?
- 1:32:24 C. Prins Yeah, so, Lane is way down. Portland is up. Specifically it looks like a lot of burglaries, Alex. You still work in Portland, right?
- 1:32:31 A. Hamalian It seems to be up for burglaries, aggravated assaults and homicides.
- 1:32:38 C. Prins The homicides that Mike showed are predominantly domestic, I believe. The burglaries are way up in Portland, but Lane is way down on property crime which started at the end of '09. Marion is also down and Gresham is way down too. You all can tell me more about that then I can tell you. I get kind of a
- 1:33:07 A. Hamalian I will say what they have been pushing in Multnomah is that there is an increase in gang related violence. I doubt if that is reflective of the numbers.
- 1:33:21 C. Prins I just watch what is going on and you can see that you guys have had some high profile shootings in Portland, but the overall trend for the state I think 2010 will be about flat from '09. So, Mr. Chair, if you looked at this really long-term you would say from the '50s and '60s it was flat, '70s it began to go up and now since the early

'90s it has been dropping. That redline is the United States average and the black line is Oregon. Alex, this is probably going to be interesting to those of you who practice in Portland. Portland drives Oregon's crime rate because it is our largest city. What is interesting is like Mike was saying in the mid-'80s is when I looked at Portland's violent crime rate it was right with Detroit's in the '80s. When you look at where violent crime was in Portland in the '80s to where it is now, there was a 71% drop in violent crime from 1985 to 2009. The important thing in 2008 Portland was only about 35% of the violent crime. It used to be more than half of the state's violent crime. What has happened in Portland has really changed the violent crime rate in Oregon.

1:35:04 C. Lazenby

Just to take a little bit of the fun with numbers out of that is that because the rest of the state has become more urbanized and has more violent crime around the state so that the Portland share is smaller? Or does that mean overall there is just less violent crime happening?

1:35:19 C. Prins

This is Oregon's total. It has been pretty flat. I think Portland has changed pretty dramatically since the '80s. It is fun to talk to someone like Chuck French or someone who was doing gang cases in the '80s and it is just totally different.

1:35:38 A. Hamalian

I don't know if this has any input because I practice in Oregon and Washington and in a rural county and a urban county. Folks in Clark County Washington will tell you that their increase in violent crime is in direct relation to a certain income level of folks being priced out of the low income market in Portland who have ended up in southwest Washington. Does that figure in?

1:36:14 C. Prins

I will show you that. I think Gresham certainly felt that as well, but Gresham's crime has stabilized too. I think you can think for a short term, especially on enforcement changes. You know this one is a mess. So Oregon's crime dropped in the '80s. That doesn't mean crime in every city and every county has dropped. Gresham has bounced up and down quite a bit. Eugene's violent crime rate has gone down, but Greg can tell you that the property crime rate in Eugene is really high. Crime is a local, complex problem. If you are at U of O and you have a lot of bicycles that are not locked up you are going to have property offenses. If you have gang issues you are going to have violent crimes. You have to remember that this is a 30,000 foot view. We always check murder rates because murder is always reported, basically, and you can see the murder rate trends are almost exactly the same trend that we showed in the violent crime indexes. Property crime – I am going to go through this pretty quickly. I asked Ingrid, I do have kind of the budget look at public safety too which might be more interesting to you to kind of see what is going on with that. I am going to go through this fairly quickly. Mr. Chair, this is the property crime rates. The property crime dropped from '08 to '09 ten percent. We had some sizable drops in property crime. The big one that I remember was in 2000 - let's see when Kevin Mannix filed Measure 61 and then we filed Measure 57, when we were doing that, property crime dropped 16% and we will talk about that, but if you try to say that to the media or the citizens they will be like, "You are out of your mind buddy. Go back to your graphs because that can't be right. Go look at the 6:00 news." I have a couple of things we are going to get to perception of crimes as opposed to this, but property crime did drop very dramatically in Oregon. We were in the top five highest states for property crimes for years, and we now dropped down to right smack dab in the middle. We have had the biggest property crime rate drop in the country in the last five years. Here are different ones to look at in Oregon. The big cities drive property crime and that is the red one. This is preliminary data. This is victimization surveys. Really when we talk about this you can see the numbers that Mike gave you there is not a big difference. The concept is our response to crime is here. This is arrests. All of this reported crime is down just means that per arrest we are handling more of the actual offenses, but when you look at how many get arrested, charged, convicted, and I will show you some of that data. It is a much smaller number, which I think shows we don't have the capacity. We were way over capacity and we are less so now.

- 1:39:35 C. Lazenby Isn't there also this feature that there is a small group of folks within the crime demographic that are doing 60% of all the crimes, so that low arrest rate is because – you never really charge them.
- 1:39:53 C. Prins Yes there is a concentration of crime. Just like hot spot policing showed us, there is definitely a small group of people that do most of the crime. Reported crime can be way down but as we start to talk about how many cases are you going to have, it has not dropped 45%. I am going to show you that that is because our ability to actually handle crime was really at capacity or more than saturated in the '80s. So why is this? This is where it gets really interesting. This is where you realize that crime is so multifaceted that everyone has a theory about why crime dropped. You have heard some of the ones that are more colorful. I am going to hit the usual suspects of the three you hear a lot. One is unemployment or the economy or poverty, incarceration and then demographics. What do those things say in Oregon about this crime rate reduction? As you know we have had the highest unemployment, the pink line is unemployment. Bottom line is that none of the economists and criminologists think that there is much of a link between unemployment and crime. It is poverty. It is habitual poverty that is a place where crime happens. It is not like a welder gets unemployed or maybe a Criminal Justice Commission executive director in a few weeks. I will try to stay on the straight and narrow. This is an interesting one for you all when you are making your arguments about public safety and sentencing. Incarceration is the black. Here is the Measure 11 effect. From '95 to 2000, we really increased our incarceration rate. This is the number of Oregonians who are in prison per 10,000 Oregonians. We had a big incarceration here with Governor Goldschmidt when they started to do the matrix thing on parole. This would be right before the guidelines. Then we got into Measure 11 and then what is interesting here is since '05, from '05 to 2010, the incarceration rate has been flat. Now Director Williams is still building beds because people keep moving to Oregon even though there are no jobs, and that makes for us having very educated baristas, I guess, but what you see is crime has dropped just as much in these five years as it did in these five years. We did a report that was based upon work by William Spellman that a 10% increase in incarceration, statistically looks like you get a two to four percent crime drop. Most of that is property crime. That would be mostly larceny crime. That is that whole concept that we put together in our report in 2007. That is that law of diminishing marginal returns. To get a 10% increase in incarceration now, Director Williams has to build 1400 prison beds. It used to be 600 in '89. It costs a lot more and you are avoiding less crime because you are putting a more marginal offender in then you were in the '80s when crime was very high and mostly we were locking up really serious offenders.
- 1:43:43 Audience There was an article about that maybe a month and a half ago in *The Oregonian* that they anticipated in 15 years having to build, I think, two additional prisons.
- 1:43:52 C. Prins Correct.
- 1:43:52 Audience Is that solely to take care of the increase in per captia crimes?
- 1:43:57 C. Prins No. It is Measure 57 coming back that is the large part of that, about 1,000 beds of that, and then it is just the sentencing policies that we have in place now, just moving them forward. Incarceration does matter but it doesn't matter nearly as much as we politicize about it. Of the violent crime rate drop of 45%, our big incarceration increase would explain about 13 to 15% of that. It matters, but probably not as much as we tend to focus on it at the statewide level. I think we focus on incarceration because it is the most costly part of the criminal justice system. Incarceration doesn't completely explain it but it is part of it. Demographics is the one trend over this time that we would say is consistent with a drop in crime rate. This is the percentage of Oregon's population that are males between the ages of 15 to 39. From 1965 to 2009, as your population ages, as your male population ages, basically, that is a good indicator that your crime rate should drop. That is favorable unless

you are male and you feel like you are getting older. That would be consistent with crime continuing to drop. Juvenile arrests have dropped a lot. During all these years just looking at the crimes committed by juveniles, and we can only get those that we actually arrest for those, so this wouldn't be reported crime, but you can see that juvenile arrests are down which is another really good indicator that we can hope to see these kind of crime rates for the future. Why? Why? Why? The first thing you have to do is step back and say, "This is not an Oregon trend. This is trend that is national." It has been in place for 15 years. If you look at Canada it actually has a somewhat similar trend. Franklin Zimring points to that several times in his book. These are all things that we have done that have had some type of impact. I don't think any of these will necessarily surprise you. I think that what they have done in old town with some of the community policing, innovations in policing. If you look at Lawrence Sherman's work talking about what happened in New York, our crime rate drops are pretty consistent in Portland with what they saw in New York City that they get so much press about. I think community policing, focusing on the highest concentration neighborhoods, being proactive, has something to do with it. The second bullet – full disclosure – I was a big part of the pseudoephedrine legislation, so I think that is important. I think when we eliminated the labs in Oregon; my fear was that we were going to have more property crime because you would have to steal more to buy meth than actually to make your own meth with Drano and cold pills. I think it has been kind of the opposite. Kind of eliminating those little labs, you know, tweaker sell groups that hung out and did identity theft and were high for a couple days at a time. It seems to have kind of had the opposite effect. I think that is something that is part of this. I think that a lot of it is if you look at probation it is a lot more sophisticated than it was in the '80s. They really use what they call the "risk principle," again, concentrating on those who are highest risk. Realizing that the more they work with low risk offenders they are probably making it more likely that they recidivate because they are making it more difficult for them to keep a job. I think that has a lot to do with it. I also put in that I just think about how different some of the things we do like with child abuse is so different now than it was decades ago. These are some of the things in Oregon that I would point to, to say these are some of the things that we changed that I think have something to do with this. There are the meth lab seizures. Meth arrests are down 30%. The big thing now is the prescription drugs is the thing that we can see on the rise when my guys look at the data, but a 30% drop in meth is a lot more cases than a 20% increase in the prescription drugs. Perceptions of crime, however, for most citizens are that crime is increasing. If you ask, "Is there more crime in the United States than there was a year ago or less?" 74% say there is more crime in the United States every year. The more you get down to their neighborhood they will think there is less crime. I think that is very easy to understand. I have a video that I showed the legislature called The Mean World Syndrome. When you think about cable television and how much crime we watch everyday as we are channel surfing. The crime that makes it to Nancy Grace is the most violent, abhorrent crime. It might have happened in Kansas but it is your room. That is where we get our perception of crime a lot of the time. That perception tends to be out of sync, but I think it is totally rational when you look at where most people get their crime information. We have just done a victimization study with Portland State and a perceptions on crime study. You can see if asked, "Is crime on the increase in Oregon?" that 50% said yes. In the community 26% said yes. If you are interested in that I have a video about it. He does a good job of showing how media has really changed the perception on crime. These last ones I wanted to put something in here that was more about my caseload, right? This is not rates. I was showing you rates because that is how statisticians measure prevalence. When you want to know how many people get victimized by crime you look at a rate. This is just sheer numbers. If you look at all reported offenses, so this is every reported crime that makes it to the local police and state police, since 1991, and you factor in that we have a million more or so Oregonians, the reported crimes have only dropped 10% as a sheer number. The number of arrests has dropped 2% over that time. The misdemeanor charges have dropped 8%. This is what I wanted to ask you all about. The number of felonies charges has dropped 26% since 1991. I don't know why that is. It might be what

Walt and Mike were talking about that they just don't have enough deputies and they are doing more charging as misdemeanors. I know we did that a lot when I was a DA in Portland even in the mid-'90s.

- 1:52:34 A. Hamalian A lot of it is attributable to the drop in methamphetamine labs. Also, my recollection, and I don't know about all counties, but in many counties the pills are a misdemeanor.
- 1:52:51 C. Prins It is a Schedule III substance.
- 1:52:53 A. Hamalian With the lack of meth labs you have seen it switch to difference substances.
- 1:53:09 C. Prins What is interesting if you look at just felony convictions over that time, all felony convictions are up since '91. Prison population, of course, has more than doubled since '91, and intakes, just the sheer number of offenders has doubled. One of the main things that I tell the legislature is sentencing policy tells you how big your prison population is not your crime rate.
- 1:53:43 A. Hamalian Do those numbers include people serving a prison sentence in the county jail?
- 1:53:47 C. Prins Yeah. If the sentence was one where you serve nine months it would include that. It would not include a revocation of a local probation.
- 1:54:00 C. Lazenby Is there anything in the data that would debunk Mannix and Doell saying this is Measure 11 working?
- 1:54:07 C. Prins Yes.
- 1:54:07 C. Lazenby You lock up all the bad guys and that is why this is the way it is.
- 1:54:08 C. Prins I think the first thing that would debunk that is that there has no increase in incarceration rate since '05 and crime has dropped substantially. This is a national trend and if you look at New York they are seeing the same kind of crime drops we are. I think when I talked to Steve about it, incarceration is important and it has a part, but it is a small part, and as we are going forward – Chip, you are kind of segueing into the next part of this which is good timing. If you look at reported offenses by a rate and you factor in there are a lot more Oregonians, you can see all of these measures and not just reported, but arrests are down 22%, misdemeanors charges are down 29%, and felony charges are down 43%. I think what that means is that when Ingrid showed me your data, the numbers of your cases are going to change much more incrementally than what you see in prevalence of crime out there. I want to wrap this up and give you time for your next thing. I don't know how much time I have, Ingrid; I am going to go to the budget conversation. The budget conversation is kind of an easy one for me. Chip, when you say how do you respond to incarceration? If anyone looks at the data I don't think anyone can say it is all incarceration. They rely on our report, the Criminal Justice report, and I'm saying that explains about a 12 to 15% drop and not the whole thing. But you can kind of get out of your philosophical discussion when you start to look forward and realize where we are headed budget wise. It doesn't really matter if you want to build more prisons or not. I will kind of show the numbers on that. This is the general fund budget, the pie. Those of you who do policy work - Bill sees a lot of pie charts, so Bill, I am just getting you geared up for February. This is the state's school fund. This is your funding of K through 12. That is 40% of the general fund. Human services is 25%. Public safety and the judicial budget, which we count you in, is 16%. This is that thing we started talking about in the reset. Ninety three percent of the general fund money is either spent on education, and that is including higher ed, human services and public safety. If you look at where we have prioritized it and where we are going, you see that just reprioritizing is not enough. We are probably going to have to look at shrinking our system. This is what the legislature and new governor are going to face when they come in in February. The revenues

have declined \$3.5 billion dollars. When we got through the '09-'11 budget we had this stimulus money which was about \$1.2 billion. We used a lot of our state reserves. We had the two tax measures. We took money away from basically fees and they swept all the money out of other funds that, like, I would have.

1:58:04 W. Taylor

When you are showing the pie chart, particularly of human resources, my recollection is a lot of that is federal money.

1:58:11 C. Prins

This is the general fund part.

1:58:11 W. Taylor

So that is not even the federal funding?

1:58:13 C. Prins

No.

1:58:20 W. Taylor

But if we don't spend it we lose the federal money?

1:58:22 C. Prins

That is right. When you look at the general fund revenues, this is where we are, which is basically about the revenue we had when we were in 2003. This is why we called this kind of the lost decade. We have kind of a lost decade of revenue and we are really back to where we were right after September 11. I am just going to skip this one. We have all had to do allotment reductions, basically, to get through this biennium so that we can get to the big bloodletting in February. It has been kind of a demoralizing process. I was telling Bill on the drive here, I think the executive branch is already pretty burnt out on this because we have been doing pink slips and things for months. As you know the expenses are expected to grow. This is kind of the one that we show a lot of times. This is where we are going with revenues. These are our revenues and expenditures. This is what it looked like before. This is what it looks like now. Our expenditures are over our revenues to the tune of \$3.5 billion. That is a 10-year look. As you can see Tom is forecasting that we are going to have increases. Our economy is going to increase, but where we are with our expenditures we don't catch up. The other thing that you always have to remember and Ingrid I have to remind myself this about next session, this number is going to meet this number some way in about eight months. They are going to cut and whatever. It is not like we get to glide into this. They have to give us a balanced budget. I have to remember that because I can talk about the decades of deficits. But Chip, you know about that process too. It is going to meet somehow.

2:00:50 C. Lazenby

It is going to collide.

2:00:50 C. Prins

A big part of it is an expenditure problem. This is one of the conclusions from Governor Kulongoski's reset. This is a really scary one. This is showing what it would look like if we had our best four biennia, if our revenues increased like our very best biennia. The last best four we would be cool by 2017, but if it is like our worst then we are in worse shape. It is really a dire picture for next session. I am going to get to some of the reset recommendations. I think the Chief mentioned a little bit of that. Most of the public safety money, 60% of it is Max Williams' Department of Corrections budget. Max has got sentencing policy passed by the citizens. He has got the box with Article I, Section 44 in that he really can't release people like they would have done back in the day with parole. He has got labor costs and he has got reduced revenue. He is really in a box.

2:02:09 Audience

Plus the increased medical costs.

2:02:11 C. Prins

And the medical costs are really escalating. He has got more and more older offenders as we have tacked on time to the end of sentences. These are some of the findings we made in the public safety reset. Crime has declined. Oregonians are safer than have been in decades. There is a diminishing return on incarceration. Seventy percent of offenders need A and D treatment and we have had some successes. We recommended that we want to look at starting afresh and showing the legislature what it would like if we could move to a modern sentencing guidelines.

We have built 9000 prison beds since the sentencing guidelines went in place in 1989. They have not really been changed. Measure 11 is not really designed to allot resources. It is designed to force that the sentence imposed be served. We really think it is time to look at modernizing a sentencing guidelines system. We recommended looking at the federal system where everyone gets 15% earned time unless they are serving a life sentence. We also recommend looking at some adjusting if we can't get the bigger picture looked at, adjusting some Measure 11 sentences and we wrote that in. Continuing the Measure 57 suspension and there has been some interest looking at – as you know when you are talking about a budget and you have to get it right, you are really talking about letting people out early or diverting people from prison to impact the prison population. Because changing a seven year sentence to a five year sentence doesn't save you any money next biennium. It is kind of a two-part discussion. There is the short-term discussion and the long-term discussion. I was pleased that the Chief mentioned that. Here are some of the dollar amounts. We tried to do some do nothing options. This was before our last allotment reduction. We put this together in the public safety reset. You might be interested in it. But let's say that the legislature just says we cannot reduce the prison bed need. We cannot make the sentencing changes to do that. Right now there are 14,000 beds that are needed. If you could keep it at 14,000 and Max didn't have escalating medical costs, both of those things are kind of dubious assumptions. Let's say you had to reduce the other budgets in public safety to get to your 14% reduction. Are you following me? You had to just reduce every other budget in public safety. You would reduce community corrections by 50%. You would reduce state police by 60%. OYA by 70%. I am sure that the drug court grant model would be gone. I don't know what Ingrid's budget would look like. This is really why we have been recommending that we look at sentencing and incarceration policy changes. The current trajectory is to add 2000 beds in the next decade. Operation costs would increase \$407 million dollars over the next 10 years. You can see the debt service if we don't do something. That is in the governor's reset that Max Williams was the chair of. My office did a lot of the policy and fiscal analysis on that. We put that out and I am sure we will be asked by the legislature to look at all kinds of different options come February. I think that is it. Thank you very much for your time.

2:06:59 Chair Ellis

Thank you very much. We will take a 10 minute recess.

(recess)

Agenda Item No. 1

Approval of the Minutes of August 5, 2010 Meeting

2:08:07 Chair Ellis

We will resume the meeting. I am going to go back now to the minutes which we skipped over before. Are there any additions or corrections to the minutes?

If not, I would entertain a motion to approve the minutes.

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

2:08:36 Chair Ellis

We are going to interrupt these proceedings because Mr. Crabtree of Deschutes County has asked for the floor.

2:08:45 T. Crabtree

Thank you, Mr. Chairman. Since the Commission is in the process of reviewing Deschutes County there is some other information that I wanted the Commission to be aware of. In relation to Bend, as you might know, there are three high schools in Bend, Summit High School, which is well known for its track excellence and consecutive state championships; Mountain View High School, which is known for its football and basketball prowess; and Bend High School, which is the oldest and which last year created its own hall of fame. In the first year they had a number of folks that were admitted to the hall of fame. There were a couple of Olympic champions, somebody who invented a treatment for leukemia and some guy named Les Schwab whom you might have heard of. This October they initiated another seven people into the hall of fame including two women, one of whom is sitting at

the table with you there, Ms. Stevens. She was elected for her career in journalism and her dedication to helping and advocating for people with disabilities and the importance of voluntarism. It mentions her service on this commission as part of that. I just wanted the board to be aware of the illustrious person present at the table. Interestingly enough, this article from The Bulletin, which was not searchable, even to us subscribers, so you couldn't find this article with help from there, but somehow when you printed it up it printed everything except her picture.

2:10:58 Chair Ellis

Well, Janet, congratulations. We are very proud of you. If we haven't said it recently, thank you for your service, which goes all the way back to the study commission. You have been doing it, I think, 11 years. It has been great and thank you for that. Okay. Kathryn do you want to talk to us about contract approval - Jackie Page?

Agenda Item No. 3

Contract Approval Jackie Page – Mitigation Contract

2:11:37 K. Aylward

Jackie page has been – was a mitigator in Oregon and she was one of the people who was interested in and talked about for the Death Penalty Resource Center having a mitigation person to help provide training. But she had been working in Alabama and at the time we put out the requests for proposals, she contacted our office and said, "I am not going to be ready to start a contract the first of January, 2010, but may come back to Oregon so can I submit something but not necessarily commit a start date of January 1, 2010." We said that was fine. She is now back in Oregon. She is actually doing mitigation on a capital case right now. We would like, and she would like, to enter into a contract for mitigation starting January 1, 2011, just a one year contract so she will back on the same cycle with everyone else. It is a half-time contract at the same hourly rate as all the mitigators under contract.

2:12:46 Chair Ellis

Any questions?

2:12:46 J. Potter

Do we have a copy of it? What are the numbers involved?

2:12:50 K. Aylward

It is \$59 an hour times 900 hours a year or \$53,100.

2:13:07 Chair Ellis

Any other questions: Is there a motion?

MOTION: John Potter moved to approve the contract; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

2:13:22 Chair Ellis

Next item is still you, Kathryn. You can't get away that quickly.

Agenda Item No. 4

Approval of Service Delivery Plan for Clackamas County.

2:13:38 Chair Ellis

We can do Clackamas. As I think the commissioners will all remember at our last meeting we were close to completing our work on Clackamas, but various commissioners wanted to inject some notes of caution about needing to revisit that county in the next three years or so and wanted that included in the report. Ingrid has revised the report. Are there any questions or comments about the revised report? If not, I would entertain a motion to approve the report on Clackamas.
MOTION: Shaun McCrea moved to approve the report; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Agenda Item No. 5

Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel

2:14:31 Chair Ellis

Now Kathryn and Paul are up on Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel.

2:14:42 P. Levy

I think I can start as Kathryn gets set up here. This is shown as an action item but we are not asking you today to take action. We want to inform you about the issue and I will explain in a moment why we are not asking for action. I am not sure of the

genesis and how long standing the concern has been about how courts go about ordering recoupment of costs for the cost of appointed counsel, but recently, certainly, there have been concerns among judges primarily that the statutes aren't very helpful. There were a few legislative concepts and suggestions about statutory changes. We looked at this and determined we could, and indeed probably should, take action in a way that could rationalize and simplify the process for courts. This memo that you have in your materials says that we don't think a statutory change is necessary to do that. After the memo was written and provided to the Judicial Department along with the suggested compensation schedule for their review, we actually learned of the possibility that the relevant statutes might be looked at in the coming session. Indeed there are ways in which the statutes can be improved to eliminate some unnecessary ambiguity. The scheme overall provides for courts to order recoupment, or some payment toward the cost of appointed counsel, at the beginning of the case through what is called or is commonly called the ACP, the Application Contribution Program, and then at the end of the case. There are no needed changes to the process at the beginning of the case.

2:16:45 Chair Ellis

This was the part that Ann Christian was doing a lot of work on?

2:16:51 P. Levy

The ACP program, yes, and developing that and the statutes describing that. There is a 305 page manual that actually reflects commission policies and procedures which is maintained and administered by the Judicial Department for ordering both contributions to the cost of determining eligibility and also up front contributions to the cost of counsel. The problem that most courts have is figuring out how and what to order as repayment at the end of the case. The statute says that the courts can order a reasonable amount for attorney fees and for other costs approved through the non-routine expense process. Then they go on to say, and there are a couple statutes that have this identical language, that a reasonable attorney fee is presumed to be a reasonable number of hours worked at the hourly rate established by the Commission. Having said that, both statutes that address this then say that in determining a reasonable attorney fee the court should look to a schedule of compensation established by the Public Defense Services Commission. The problem that courts have is that presumptive way of establishing repayment orders doesn't make sense to them for good reason. The only hourly rate that the Commission has set is the non-contract hourly rate for appointed work. It doesn't work both because attorneys generally don't keep track of their time because they are contractors and they just keep track of how many cases they handle, and the number that courts come up with don't usually correspond to what they think is the true cost under a contract. We are proposing the Commission actually adopt something that you have not adopted yet, called a schedule of compensation which the statute calls for. There is actually a history that I will not take your time with, with the idea that there be such a schedule. The idea now is that this schedule reflects the typical costs for cases, including the typical costs for expenses according to various case types. You have those proposed schedules in your materials. Even without a statutory change, the courts would be guided and could use this schedule to arrive at an amount to order as payment. We are not proposing that we dictate or describe to courts, in any more detail than the statutes provide how they go about arriving at a number. We wanted to make sure that they had the schedule that the statutes say they should have from the Commission. We have determined that they don't have that yet.

2:20:30 Chair Ellis

So are you going to present us with a proposal?

2:20:38 P. Levy

You have it in your materials. The reason you have both a proposed addition – it would go in the Commission's payment policies and procedures as an addition.

2:20:59 Chair Ellis

We have two schedules for the next item. I don't think we have any schedule for this item.

2:21:09 P. Levy

This is after the yellow sheet. After my short memo you have just a very short policy that we are suggesting the Commission adopt, although not today, and then a

proposed schedule of compensation. The policy is directed primarily to the Commission and us that we provide a schedule and an updated schedule is necessary. It describes what that schedule is and then you have a proposed schedule here. The reason we are not asking for action today is we are still waiting to hear from the Judicial Department and receive input from them about whether they think this will meet their needs and purposes.

2:22:03 Chair Ellis

So this isn't an hourly? This is a unit type of compensation.

2:22:11 P. Levy

Kathryn can explain this in more detail. This is the typical contract rate and that describes most of the court appointed work. Indeed, it would not be inappropriate, but this is up to a court, of course, to decide to use an hourly rate instead.

2:22:42 I. Swenson

Can I just mention a couple of anomalies and Paul knows these. A court will get to the end of a case and one of the providers will have been there as an hourly attorney and another will be under contract. Depending on the court, the judge will decide to handle these cases either the same, because these people are receiving the same representation, or they will be literal in some cases and say, "Oh, your lawyer was working under the hourly rate and yours was under the contract. How much was the contract rate?" They will give them a number and then the hourly guy will say, "Well, I spent a 100 hours." His client suddenly has huge bill compared to this other guy. Then, too, lawyers at the time do not have available to them, nor do we have available to us, the total costs of the case. So if the judge were to call us up and ask how much the case cost, we would have to say, "We don't know because we haven't been billed for all the services that are outstanding in this case." This would just be a tool to help judges. If they collected this in every case they would be collecting the cost of representation in essentially all of those cases. That is the idea.

2:24:04 K. Aylward

If you are interested in knowing how the numbers were derived, it is very difficult to do an average contract rate because with murder, for example, someone could have murders at \$16,000 and somebody else at \$20,000 in a new contract, but then you won't know until the end of the contract whether this person ended up getting any murders and this person may have gotten a hundred murders. Then the average is scaled down. What we decided to do is to use the mode, which is the most frequently encountered value in a contract. Expenses you can average because we say, "Show me all of the expenses on C felonies and how many C felonies were there in total, not just the ones that were billed on." Then you can get an average of costs for expenses. We rounded them, because I like nice round numbers, and that is our total cost.

2:25:06 Chair Ellis

Great.

2:25:06 G. Hazarabedian

There is a legislative work group that is now meeting in Salem and will meet again on Monday morning. I am on that group for OCDLA and that group is looking at the structure of criminal fines and fees for violations and crimes. It is going to be proposing some legislation through the committee, legislative committee, to revamp how fines and fees are collected and distributed in Oregon for violations and for criminal fees. It is going to be a major change from what has been current policy assuming the bill has the legs that I suppose it does. While I have looked at this schedule proposed to you by staff, and clearly the numbers look about right, I would at least ask this Commission to consider a statement going along with that schedule saying that while this is the actual cost of representation, we do not believe it is appropriate in many cases to impose that on the defendant. The legislative groups are looking for revenue wherever they can find it as you might imagine in this budgetary crisis. I am doing my best in that committee to see that the revenue to fund the court system is not raised on the back of the poorest Oregonians. Many of our clients are the poorest Oregonians. While I understand why the Commission might need to participate in this exercise, I think it would be appropriate for this Commission to take into account that we do work for very poor people. Funding the judicial system on the backs of those people is maybe not very good public policy.

2:26:57 C. Lazenby But the court still retains discretion under the statute. These are merely guidelines. How do you think this is going to work in practice? These are going to be ironclad and this will be the fee?

2:27:10 P. Levy No. This fits within the existing statutory structure which grants the court the discretion to arrive at what is called a reasonable attorney fee. That is meant to include whatever the defense attorney wants to provide to the court about the complexity of the case and the charges.

2:27:34 C. Lazenby Where do the funds go right now that are collected?

2:27:36 K. Aylward They go to the Criminal Fines and Assessment Account.

2:27:40 C. Lazenby So they go into the big pool. Gotcha.

2:27:45 J. Potter But you are telling us, and I appreciate Greg's comments about funding the court system on the backs of the poor is not something we are trying to do, but what the statute is requiring us to do is to come up with some schedule. Is that correct?

2:27:58 P. Levy Yes. We found another project for the Commission. We hadn't quite finished yet.

2:28:08 Chair Ellis You mean you read the bill.

2:28:10 P. Levy We are aware of the effort that Greg is describing.

2:28:19 C. Lazenby So is there a need for us to fulfill this obligation before this legislative process or should we wait?

2:28:24 P. Levy The statute has only been there since 2001.

2:28:31 C. Lazenby That doesn't answer the question about whether it is urgent or not. Do we need to urgently deal with this now, or do we anticipate that there are going to be changes?

2:28:43 P. Levy I think that we would like to make sure that what the Commission does is going to make sense to the Judicial Department. I don't think this is going to change the way courts go about assessing – it is just going to make it easier for them to do it but not the calculation and consideration that they use.

2:29:11 K. Aylward It is my understanding that many courts actually say, "Where is the contract matrix? I will use that as the schedule." For many courts this is just adding a little amount for expenses.

2:29:23 J. Potter It should be noted from the private bar perspective that they have clients in the courtroom when this schedule is being reviewed. There are going to be clients that are just going look at their lawyer and wonder why they were just bilked out of 10 times the number that we are charging.

2:29:43 S. McCrea Actually it is more the opposite. I missed what Greg had to say because I just arrived, but I was sitting in a sentencing yesterday and the Lane County judge asked the defense lawyer how much time he had in the case. He said he had two hours. I am sitting there thinking he must be just saying that so that it won't hurt the defendant but otherwise this is really painful. It was a complicated, multi-count case with a significant sentence and a number of parts. I am not sure what that message sends when the defense stands up and says, "I have two hours in the case," when either it is not true and that sends a message, or it is true and that is even a worse message.

2:30:33 J. Potter This would take away that question would it not? They wouldn't be asking that question anymore. They would be saying, "Let's go to the chart."

- 2:30:39 P. Levy Potentially yes. That question is a problem for the courts and for the defense attorney for precisely the reason that Commissioner McCrea is identifying. When I was practicing in Multnomah County I got that question a lot. I didn't know what our contract matrix was. I didn't know how many hours but I wanted to minimize the burden on my client and that wasn't necessarily the best dynamic.
- 2:31:10 Chair Ellis What if we adopted this today but if you do get input from judicial you can bring it back us to in December and we can amend.
- 2:31:19 P. Levy I would like to hear from our executive director on that.
- 2:31:21 I. Swenson A sort of a conditional approval. We could do that. That would be fine.
- 2:31:34 Chair Ellis It would be approval but with an invitation if they have input that they think is material then come back and modify it.
- 2:31:40 I. Swenson That might be a good way to go. In fact I may have gotten an answer this afternoon. They knew we were trying to deal with this today and I just haven't been able to determine whether that is true. That would be fine.
- 2:31:59 Chair Ellis This advice that we are nine years overdue bothers me.
- 2:32:04 J. Potter It works for me and the numbers are arrived at based on averages and these numbers are low. I think they are great numbers to have out there to show the legislators what it is costing to provide these services.
- 2:32:22 Chair Ellis I was struck by how low they were. Is there a motion to approve?
MOTION: John Potter moved to approve the schedule; Janet Stevens seconded the motion; hearing no objection; the motion carried: **VOTE 5-0.**

Agenda Item No. 6 Amendment to Eligibility Standards

- 2:32:55 Chair Ellis Now for the uncontroversial issue of eligibility standards.
- 2:33:02 K. Aylward I managed to get five different counties to agree to track their denials and provide me copies of the actual worksheets, so I could see exactly what the assets were of each of these people who were being denied. Of the five counties that agreed to do it only three after the time period were able to get me information. A couple of them said, "Oh, sorry, I couldn't do them," or, "My boss said I had to redact them before I sent them to you." I ended up with a small sample of 60 denials. These aren't really in good order. Option 1 is what I presented at the last Commission meeting that everybody said was too low, and Option 2 is pretty much just doubling those figures. After I looked at the data, I really hoped there would be some kind of clear break to sort of say you want to capture all the ones that are getting court appointed counsel anyway, you probably want to capture the ones that are proceeding *pro se* because they went out and weren't able to get an attorney. I sort of thought there would be a magic spot where that would happen and it didn't. After much effort I just said forget it and doubled it. That is what the Commission said, that it would be a good start to just double them. That is what Option 2 is. You have many other options but this chart is looking at the list of the 60 denials. Of the 60 that I saw, 60 are where the verifier recommended to the court that they be denied. The first 28 of them, off to the right the outcome, "CAC" – court appointed counsel, that means that in 28 of the 60 recommendations for denial, the court appointed counsel anyway. If we are looking at the pool of cases it is not going to make any difference. You could quadruple the privately hired rates, make them 10 times as much in some cases and the court is still going to appoint counsel in certain circumstances. The first column is the assets that the client had according to the worksheet. That could be cash in the bank. It could be equity in a home. It could be furniture and any number of things. Column B is the current privately hired attorney rate. You will see in one of these

cases the client had more in assets than the current private attorney rate lists and, therefore, the recommendation was to deny. Column C is the option that I provided at the last meeting. That would show that of that first bunch if you went with Option C, there would be 10 that the verifier would now say they now do recommend counsel and the court would have appointed counsel anyway. Those are kind of a wash. They don't make any difference. If you went with Option 2, you see many more where they would recommend court appointed counsel but they got court appointed counsel anyway. So basically the first 28 rows of this table where counsel was appointed anyway it doesn't matter what you do. The two failure-to-appears, rows 31 and 32, we don't know what the outcome of those cases is ultimately going to be. Then the *pro se* section, rows 33 to 45, there is a question of whether some of those people who chose to go *pro se* actually did have the money. The highest one, the person with \$57,000, who needed to get an attorney on a PV, they probably could have found the money to do that and probably chose not to. What I think you want to do is come up with figures where you are still putting some back pressure on the system, but making sure that little old row 33, who ended up going *pro se* because he has \$682 and couldn't find an attorney to help him, I think that is what we don't want is people proceeding without counsel because they didn't have the money to do it. As far as the retained cases go ...

- 2:37:31 Chair Ellis Go back to him. He would have qualified under both options.
- 2:37:39 K. Aylward That is correct. You can maybe see there is some highlighting in the assets column. I highlighted the ones that Option 2 would capture that Option 1 wouldn't. So if you went with doubling what I brought last week, those are the people you would be scooping up. They still don't have very much money. I look at those numbers and think row 35, 36, and 37, they have got between \$1,000 and \$1,200. That is the margin of error of whether you go out and find an attorney. They are in the pool. That seems reasonable to me.
- 2:38:26 S. McCrea What is "CONT" in your case type?
- 2:38:28 K. Aylward Contempt. What else is interesting in that case type column is you don't see any really serious cases. There are no Measure 11 cases. It is really the low end cases where there are denials.
- 2:38:58 S. McCrea That seems fine in isolation. The problem is that some of these people could get into the criminal justice system and accumulate convictions and then there is a cumulative affect on them down the line. I have a concern about making sure that people have representation at the very beginning even if it is not that important of a case.
- 2:39:24 K. Aylward The very last page sort of summarizes the annual fiscal impact. If you went from current privately hired attorney rates and chose Option 1, I am estimating the annual fiscal impact to be about \$100,000 to \$140,000, something like that. If you went with Option 2 it might be \$300,000 to \$400,000. Then I have listed the incremental costs of going from Option 1 to Option 2.
- 2:39:57 Chair Ellis Any discussion or comments?
- 2:40:00 J. Potter Row 30 where you have an exclamation there. Somebody appears to have some money and yet they qualified for court appointed counsel.
- 2:40:08 K. Aylward I have all of the details. I don't want to say that the court is just appointing where they shouldn't be. There is always more to the story. You can imagine the scenario where maybe there is cash in the bank but it is a joint banking account and the wife was the victim and she has frozen the bank account. He doesn't know this and writes down that he has \$10,000 in the bank. That may come out in court and those funds may not be available.

- 2:40:55 J. Potter You don't have to spend any time for me finding it, but as a legislator if you see that number it will raise a question. I fully understand there are extenuating circumstances that may well justify it. That is not your point. Your point is are we going to take Option 1 or Option 2, or some other option.
- 2:41:29 Chair Ellis I think my own instinct to do is Option 2. I think it is a much greater harm to deny someone counsel who really can't afford it, than to occasionally appoint counsel to somebody who can afford it. Of the two options I would go two.
- 2:42:00 J. Potter Based on what we have learned, certainly, the cost of privately hired lawyers is closer to Option 2 than Option 1.
- 2:42:14 K. Aylward I will tell you what gets most people is equity in real estate. Mr. 30, who apparently has \$109,000 in resources, \$101,000 of that is in real estate and \$8000 of that is in a vehicle. He is going to say, "Your Honor, I have been arrested. I have lost my job. Who is going to give me a home equity line of credit on my double wide?" The court figures, "I don't want to hold the case up while this guy goes and tries to get refinanced. I am going to appoint counsel but then I am going to recoup it at the end of the case. The state is whole again even though it goes from one pocket to another." That is often the rational - not to hold up a case because it is difficult to get funds for counsel. There were some in here where that is all they had was equity in their home.
- 2:43:21 Chair Ellis Their estimate of value may be up or down. Any other comments or questions? Is there a motion? You can see I am shy. I got shot down last time when I tried to make motion.
MOTION: John Potter moved to adopt Option 2 of the privately hired attorney fee schedule; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**
- Agenda Item No. 7 OPDS Monthly Report**
- 2:44:25 Chair Ellis Ingrid. I think I was the only one of the Commission that attended the house warming. You should tell them what a great building you have got. It is really terrific.
- 2:44:36 I. Swenson We do indeed. I think John has been there; Shaun not yet, and Commissioner Stevens I hope will come by sometime. It is indeed a very beautiful building as all of us who work there can tell you. So far it is just exceedingly comfortable for our staff and ourselves. It is a new building, and if we didn't tell you that, it was finished according to our specifications. The lawyers' offices line the building and we have conference rooms and a library and a reception area that are so far working very well. If I haven't told you before, I certainly need to tell you that the move went very well. I think we talked a little bit about that before. It was a pretty painless event for all of us except for those who were actually doing it, which was Kathryn and her staff. We went to work on Thursday in one building. We took Friday off and went to work on Monday in the other building. Everything was up and running. We had a nice open house. Barnes was there and lots of people came by. Not everybody could.
- 2:45:51 Chair Ellis Lots of judges.
- 2:45:53 I. Swenson Yeah. It felt like a real celebration and we heard good things from them too. We are very pleased.
- 2:46:04 Chair Ellis I think the location is really excellent and I think the balance between nice space but not opulent space is also just about right.
- 2:46:10 I. Swenson Yes. It seems to be a very good balance. We are right across from the Department of Justice, so conveniently located for our staff and attorneys and for the legislature.

We used to have to run up there on a moment's notice and that was sometimes hard to do. Now we can just cross the street and there we are.

2:46:32 Chair Ellis

Okay.

2:46:40 I. Swenson

On our monthly report we included a copy of our E-Board report and if anybody has questions we can talk about those. Pete Gartlan and Shawn Wiley are both here. Both of you can come up if you want, or either, and tell us about the legislative proposals that the division is making and maybe update us on the news from your division.

2:47:04 P. Gartlan

Good afternoon. We are the speakers you have been waiting for.

2:47:17 Chair Ellis

If you do say so yourself.

2:47:17 P. Gartlan

A couple of items. One is the attorney regional contact project, which I think I mentioned a couple of meetings ago. I think Shawn reported on it last meeting. Yesterday a group of attorneys from the Appellate Division came here and were seated at tables with the providers. We had our first contact in person. I am being facetious. From what I heard it was a nice get together, and we had discussions about what is happening in their counties and offices and the courts in their area. We are looking forward to a development of that. Hopefully we will have a nice dialogue going on with different parts of the state. There will be a kind of cross communication.

2:48:19 C. Lazenby

Pollination.

2:48:19 P. Gartlan

Thank you.

2:48:21 S. McCrea

I am assuming that the bandage does not mean someone took a swing at you during this process?

2:48:24 P. Gartlan

No. That bandage. There was a child playing in traffic and I ran out.

2:48:35 S. McCrea

Okay.

2:48:41 P. Gartlan

But, again, we are looking forward to that. We hope that this will develop into something really useful. That was Bronson James' idea. He approached us with that a few months ago. Shawn was the MC yesterday. The second item is there was an important case that came down about a month, a month and half ago that will affect our practice somewhat. That is *State v. Partain*. I am going to have to describe this for a minute, but the rule in this state had been that if a criminal defendant appeals successfully that if the case is remanded whatever the sentence had been is the ceiling on remand, so someone could not be punished by successfully appealing and going back and getting a harsher sentence. The Oregon Supreme Court decided to undo that doctrine. It decided that the case that announced that principle probably went too far, back in 1968. It said we are going to undo that doctrine. So now in Oregon if a criminal defendant successfully appeals, there is potential for getting a harsher sentence on remand. We are now in the business of trying to assess risk for clients with respect to counseling them about the risks of the successful appeal. We have also introduced a proposal to the legislature to try to restore what had been the rule, to put it back to what is called the Turner principle, to restore the Turner principle and we will see where that goes.

2:50:33 C. Lazenby

What was the vote in *Partain*?

2:50:35 P. Gartlan

I think it was six to one. I think Martha Walters was the only dissent. We have a couple of other proposals in the legislature. One is kind of a mailbox rule for people who are involuntarily confined. The Court of Appeals has a rule that if you don't use certified mail, when your pleading paper or initiating document arrives and is

stamped “filed” that is the date that it arrives. If you can go certified mail then whatever date is on the mail is the filing date. For people who are involuntarily confined in state institutions, they don’t have access to certified mail or anything like that. We have proposed an amendment that would say, consistent with an Oregon Rule of Appellate Procedure Rule, if somebody is involuntarily confined and they give their document to the person in that institution that is responsible for forwarding it, that is the date that it has been filed. It is kind of a housecleaning bill for people who have been involuntarily confined. Does that make sense?

2:52:04 Chair Ellis

Go back to *Partain*. I have been listening intently but thinking about that case at the same time. Does this now put your lawyers in the position that they have to really work with the potential appellant because I can just see it unfolding if you don’t do that and then the appeal and they get a higher sentence. They are going to blame the guy who filed the notice and took the case that, “You didn’t tell me any of these things.” I could see a pretty good argument for the legislature that that is not a position that lawyers in the Appellate Division ought to be put in.

2:52:52 P. Gartlan

That argument will be used. I can tell you that has affected our practice because we have changed our opening letter and we have a question on our attorney referral form asking the trial attorney if they know of any reasons why there could be a harsher punishment on remand if client is successful on appeal.

2:53:12 Chair Ellis

I am sure the argument the other way is going to be the way the system works now there is no risk for a defendant. They all appeal pretty much automatically. Maybe this will save system costs, but I think there is just as much additional system costs imposed on your lawyers as the arguable savings from appellants who decide not to take that chance.

2:53:44 P. Gartlan

There are more attorney resources used from our perspective just with gathering that information. There is going to be more litigation.

2:53:55 Chair Ellis

There are going to be a lot of post conviction claims. You are going to build a documented file of the advice that is given. It is probably not advice so much but raising the question and putting the burden on the defendant to decide, “Do I want to take this chance or not?”

2:54:19 P. Gartlan

Yep.

2:54:19 Chair Ellis

That is a very interesting subject.

2:54:24 C. Lazenby

I agree with you, Barnes, I am not disagreeing with you, but I think in practice it is not that much dissimilar from the advice that criminal defense lawyers give their clients when they are entering into a plea agreement where they have to say, “Look this a deal between us and the DA’s office, but the judge is free to go completely crazy and give you the maximum and not abide by this and you have to understand that.” Isn’t it very similar to that?

2:54:51 P. Gartlan

It is a lot like that. Essentially we are leaving the decision to go ahead with the appeal with the client. The client has that power in the first instance, but we have to remind the client of that. We are tracking how much it is going to affect the number of appeals that we have, or the number of appeals that are dismissed for this reason. This is a relatively new decision. I don’t have any numbers yet but we are tracking that.

2:55:22 Chair Ellis

It does bother me that a defendant would have an incentive to not take a legitimate appeal. These cases only have relevance if you win on the appeal. So by definition it is not a frivolous appeal. By definition it was a good appeal and it does seem very troublesome that this threat of a higher sentence might intimidate people from taking good appeals.

- 2:55:54 P. Gartlan I agree. There is a fairness factor in here, just basic fairness, and there is also an educational function or benefit to a successful appeal. To the bar and the bench when there is a written opinion there is more information about how a certain issue should be decided and what the relevant principles are. If people are dismissing their appeals, then potentially we would have courts who continue to make rulings using incorrect legal principles. There are a lot of downsides both to the individual and, I think, systemically.
- 2:56:33 C. Lazenby I am looking at Mr. Sermak and Mr. Hazarabedian out in the audience. It is pretty much well understood by everybody that going to trial has sort of an enhanced penalty for the criminal defendants doesn't it? That is just understood.
- 2:56:54 T. Sermak Oh yeah. We are practiced in telling them what the risks are of going to trial and making them understand that. Part of what I am nodding in agreement with is I see myself telling my client that, "I'm sorry you lost your case. I have real good reason to believe that the judge made a mistake. If we can convince other people that the judge made a mistake that same judge is going to be sentencing you, but he is going to be doing it in two years if he still on the bench and I don't know what his mood is going to be like that day. I wasn't sure what his mood was like this day." It just seems to open up the possibility of post conviction relief even if you put it back on the trial lawyer. The guy in prison is going to say that he is doing an extra two years, "Because my lawyer failed to tell me that such and such judge would be likely to punish me more harshly." I don't see an upside to this and I do see a lot more costs in terms of future litigation as a result.
- 2:58:10 Chair Ellis Giant costs to both levels. I would think the trial lawyers and the appellate lawyers would each have that ...
- 2:58:14 T. Sermak That can happen. We see that a lot already where, especially somebody with a long sentence, will bounce it back and forth. First he will PCR the trial lawyer. Then he will PCR the appellate lawyer. Then he will PCR the appellate lawyer on the PCR case. It just seems to me that they have opened up a Pandora's box that is going to prove way more expensive than they realize. I would hope the legislature would correct that.
- 2:58:44 G. Hazarabedian I was just going to say that people who become criminal defense lawyers, whether private or retained, do so to enhance and defend constitutional rights of clients not to have to be in a position where we are trying to chill those rights of clients. This new ruling puts us in that position. I think it is something that we definitely need to urge a change on.
- 2:59:06 J. Potter The two variables to enhance are whether or not at the trial level something is brought forward by the DA that wasn't known during the trial? Is that number one?
- 2:59:18 G. Hazarabedian That is correct.
- 2:59:18 J. Potter Then number two is something that may have taken place in the prison that may have caused an enhancement. Are you also not going to litigate whether or not the DA knew or didn't know at the time of trial? Why wouldn't a DA hold something back knowing that this might come back on appeal and he can use it as an enhancer?
- 2:59:50 I. Swenson It is the judge.
- 2:59:50 S. Wiley Under the decision, the strict words of the decision and the guidance that the Supreme Court has given us, it is simply whether or not the trial court was aware of the information at the time of the original proceeding. That can be new information that developed subsequently, or it could be information that wasn't presented at the original sentencing hearing. As written in *Partain*, it is not a new trial standard where it is known or reasonably could have been known.

3:00:19 C. Lazenby The prosecution gets a second chance at prosecuting.

3:00:19 S. Wiley Exactly.

3:00:25 Chair Ellis Okay. You have got all the free help we can give you.

3:00:35 P. Gartlan Would you like to testify with me, Mr. Chair? The third piece of legislation is a proposed amendment that affects an evidentiary rule. It is called a forfeiture by wrongdoing rule. There is a right to confrontation of witnesses against you. When the U.S. Supreme Court issued *Washington v. Crawford* in 2004, the Oregon legislature enacted what is called forfeiture by wrongdoing, specifically in the evidence code. It says you don't have that right to confront a witness if your conduct created that witness' absence at trial. Let's say there is a witness who does not appear at trial, that witness' statement can come in against a defendant if a defendant caused that witness' absence. That way if the defendant caused the absence the defendant has forfeited the right to confront the witness. We advised the legislature that if they crafted the rule a particular way then it would be constitutional, but the legislature enacted a rule that was a little bit broader than that. The U.S. Supreme Court about a year ago issued an opinion that said that rule is effective, if and only if, the defendant caused that witness' absence so that the witness would not testify against him. So, essentially, we are asking the legislature to limit the statute, the rule that passed a couple of sessions ago. I hope I haven't confused too many people, but we are trying to say, "Limit the statute to be consistent with the U.S. Supreme Court opinion that issued recently and by the by, we told you so a couple of sessions ago but you didn't listen."

3:02:43 Chair Ellis You might reconsider that last part.

3:02:50 C. Lazenby Is that as narrow as it sounds, Pete? The defendant caused it. She is buried in New Jersey and I did it. Is it that narrow? What kind of causes?

3:02:57 P. Gartlan You killed them or you have done something. You have beaten them up. You have threatened them. You have done something so that they are afraid or cannot appear and you did it so that they would not testify against you.

3:03:19 C. Lazenby So that would that extend in child abuse cases where an accused child abuser due to the child abuser's action has traumatized the child such that the child doesn't want to testify and therefore there is no right of confrontation in child abuse and sex abuse cases.

3:03:43 P. Gartlan The judge would have to make a determination was that abuse or terrorization for the purpose of keeping the child unavailable. It has to be intent.

3:03:56 J. Stevens In that specific case or just in general?

3:04:00 P. Gartlan In general. The rule is that the judge would make the preliminary determination of whether or not the defendant did this with the intent of making that witness unavailable.

3:04:13 J. Stevens So a guy, no offense, tells a kid, "If you tell you are going to get me in a lot of trouble and you will be really sorry." That is narrowing it?

3:04:22 P. Gartlan Fascinating. That is, "Don't tell other people." It may not be, "Don't come into court to tell others." That would be a fascinating question.

3:04:36 S. McCrea Yeah but it is not intimidation that is the intent. Intended intimidation is not the same as not testifying. That would be an interesting thing to be litigated.

3:04:57 Chair Ellis Okay. Anything else you want to add here?

3:04:59 P. Gartlan Sure. Another 30 minutes of material.

3:05:06 Chair Ellis I think your light is on.

3:05:06 P. Gartlan We have several cases in the Oregon Supreme Court coming up, including our first in the juvenile/appellate section unit. We are looking forward to that.

3:05:24 Chair Ellis It sounds like they are taking cases?

3:05:23 P. Gartlan Yes. We have five in the criminal section in November being argued. We have a regular diet of Supreme Court cases. The last one is fairly notable, I think. It has to do with the two judge panel. I think I have reported in the past about that. Chief Judge Brewer went to the legislature at the end of the last session and got authority, got statutory authority, to create a two judge panel instead of a three judge panel, which is the norm. The way that statute is written the judge can just create this two judge panel and say that these two judges are going to hear some cases. The judge did that because there is a significant backlog in the Court of Appeals. I think I reported on this a couple of meetings ago. It is taking from six to eight months after the briefing is complete for a case to be on the Court of Appeals docket. This is an attempt to kind of process more cases at the Court of Appeals level.

3:06:40 Chair Ellis So a 30% increase in available judges for this?

3:06:48 P. Gartlan I think there is only authority for one two judge panel. What is happening to us is that we are filing 60 merit briefs per month on average. The court is setting 40 cases per month. So every month there are 20 cases going into a backlog. We were concerned about the two judge panel because we were concerned about cases being processed and maybe not given due attention, perhaps just being rubberstamped and so we were concerned about that. We voiced our concerns to the court. I think the court was receptive to our concerns. The court has set a two judge panel for our cases in December. Chief Brewer and Justice Gillette will be sitting. We are trying to make the best of it. In the best of all possible worlds we get a three judge panel, but we look at the realities and our cases are just getting backlogged and backlogged.

3:08:13 Chair Ellis The chief said something like 60% of Court of Appeals cases are decided without opinion.

3:08:20 P. Gartlan Seventy-five. We are going to try and take advantage of this in our client's interest. I think we have come up with a plan to do that. We will identify for the court 30 cases for the two judge panel. We have identified categories of cases that we think will benefit our clients. It is not all of them. If we think that we have a clear winner under current law then we will put this case before the two judge panel. If we think there are mootness problems with a case. In a lot of misdemeanor cases if there are sentencing issues there are mootness issues. We think those cases would be appropriate for the two judge panel. If we have cases where our assessment of the direct appeal issue is that it is not that strong but the client does not want to waive direct appeal, the client wants to go to PCR and we think that would be a case for a two judge panel and similarly with cases where the client wants to exhaust state remedies before going to federal habeas. Finally, when we think we have a case where the controlling case law is against us at the Court of Appeals level but we think that it might be ripe for Supreme Court review. We are telling all our clients when we have identified cases that we think are appropriate for a two judge panel we are telling our clients, "Here is what is happening and here is why we are doing it."

3:10:07 Chair Ellis Here you know who the two judges are. You are not just sending these cases to the two judge panel, it is these two judges.

3:10:20 P. Gartlan Yep.

3:10:24 Chair Ellis And each of them gets veto power. They have got to agree or they can't decide.

3:10:30 P. Gartlan If they don't agree then a third judge is pulled in to cast the deciding vote. We don't like the idea of two judge panels, but we think we can actually benefit our clients if we are identifying the correct cases to be before the two judge panel. We think we are moving some cases along, at least that is our hope, the cases that would not be addressed for several months later if they remained on the regular docketing schedule.

3:11:05 Chair Ellis Any other questions or comments?

3:11:09 P. Gartlan I have five more items.

3:11:16 C. Lazenby Whatever they are we agree.

3:11:17 Chair Ellis Ingrid, anything else?

3:11:31 I. Swenson You have one more attachment. Last time I described briefly to you the work of this interbranch workgroup. The only reason I introduce it today is because I think Karen is here, Karen Stenard, from the Lane County Juvenile Consortium. She has been active in this group for some time. If we had more time I would give you more information about this. I have provided you the letter that I have given the interbranch workgroup about this proposal from representatives of the three branches of government. There are legislators on our group. Chief Judge Brewer and the Chief Justice and some trial judges are on this group. Then there are defense lawyers, and prosecutors. It is a collection of people interested in the juvenile dependency area. They were trying to agree on a proposal that they can all support before the legislature. They ultimately identified the initial proceeding in a juvenile dependency case as being a critical place where you could make a difference by increasing the resources available to all of the people involved in that part of the process. As you know, we have difficulty getting our lawyers to those first hearings in some counties. They are not there. The parents are unrepresented, the children are unrepresented and this is a critical part of the entire proceeding. The group is willing to support a minor fiscal increase for public defense for the purpose of obtaining more compliance with the requirement that lawyers be there for that initial hearing. So we provided an estimate and I think it was \$1.8 million total for accomplishing that piece financially. We will see where that goes. It has been good to see people try and come to agreement. Karen, anything you want to say?

3:13:41 K. Stenard No. It has been an effective workgroup and it is the proper identification of a really critical issue. The first hearings really dictate the rest of the way these juvenile cases will go. It is astounding to me that providers don't see the benefit of going to that first hearing. It is the culture in some counties and it is persistent. I think this would go a long ways towards addressing it. My thought is once you had compliance if the money was no longer there hopefully at that point people would have changed the culture. That would be my expectation.

3:14:26 Chair Ellis I notice the next meeting is December 9. There is a significant chance I won't be able to make that.

3:14:27 S. McCrea I will be there.

3:14:34 I. Swenson Very good. For those of you who are available we are having dinner at 7:00.

3:15:05 Chair Ellis I would entertain a motion to adjourn.
MOTION: Chip Lazenby moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned.

Attachment 2

Public Defense Services Commission

Strategic Plan for 2009-11

December 9, 2010

Vision

- An integrated state public defense system that is a leader in the delivery of quality, cost-efficient legal services and that is designed to ensure the continuing availability of competent and dedicated public defense counsel.
- A Public Defense Services Commission (PDSC) that serves as an (a) innovative planner for the effective delivery of public defense services and administration of justice, (b) responsive and cooperative policy maker in the state's justice system, (c) responsible steward of taxpayer dollars devoted to public defense, and, (d) through its Appellate Division attorneys and the private providers who represent public defense clients, a vigilant guardian of the legal rights and interests of public defense clients and the public's interest in equal justice and the due process of law.
- An Office of Public Defense Services (OPDS) that is a model for other Oregon state agencies in terms of (a) efficiency in the delivery of quality public services, (b) effectiveness of financial management standards and practices, (c) responsiveness to clients, customers and stakeholders and (d) accountability to itself, PDSC, the Oregon Legislature and the public through innovations in performance measurement and evaluation.

Mission

It is the mission of the Public Defense Services Commission to ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible and with sufficient support to enable competent and dedicated attorneys to provide those services. (See ORS 151.216)

Values

- **Quality** - PDSC is committed to providing quality public defense services consistent with the state and federal constitutions and with Oregon and national standards of justice. PDSC strives to provide direct and contract legal services that meet prevailing standards of professional competence and promote the sound administration of justice in Oregon, while seeking opportunities for its capable and diverse employees and contractors to experience fulfilling careers and engagements in public defense service.

- **Cost-Efficiency** - PDSC is a responsible steward of taxpayer dollars and constantly seeks the most cost-efficient methods of delivering and administering public defense services. PDSC's commitment to providing quality public defense services also promotes cost-efficiency by reducing the chances of legal error and the need for appeals, post-conviction proceedings, retrials, and other costly remedial actions.
- **Leadership** - PDSC is a responsible leader and cooperative partner with other state and local agencies in the development of justice policy and the administration of justice in Oregon. PDSC is a vigorous advocate for adequate public funding to support Oregon's public defense system. PDSC and OPDS are credible sources of information and expertise about public defense and justice policies, practices and their implications, for the benefit of the public, the Oregon Legislature, the media and other justice agencies and professionals.
- **Accountability** - PDSC is a results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. PDSC and OPDS administer public defense services contracts in an open, even-handed and business-like manner ensuring fair and rational treatment of all affected parties and interests.

Organization and Decision Making

PDSC serves as a governing body for the administration of Oregon's public defense system, providing policy direction, guidance and oversight to its operating agency, OPDS. As chief executive officer of OPDS, its Executive Director reports to PDSC and serves at its pleasure.

OPDS is comprised of two divisions:

- (1) the Contracts and Business Services Division (CBS), which administers the state's public defense contracting and payment systems and manages the operations of OPDS; and
- (2) the Appellate Division (AD), which provides (a) appellate legal services to financially eligible criminal defendants, (b) appellate legal services in juvenile dependency and termination appeals, and (c) training and support to public defense attorneys at the trial level in criminal and juvenile matters.

Each division is headed by a chief operating officer—the Contracts and Business Services Director at CBS and the Chief Defender at AD —both of whom report to OPDS's Executive Director.

ORS 151.216 sets forth the policy and decision-making responsibilities of PDSC, including the responsibilities to:

- establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the state and federal constitutions and state and national standards of justice;
- establish OPDS and appoint its Executive Director, who serves at the pleasure of PDSC;
- review and approve the Executive Director's budget proposals, and submit the final budget proposals of PDSC and OPDS to the Legislature, with budget presentations by the Chief Justice and PDSC's Chair;
- review and approve any public defense services contract negotiated by the Executive Director;
- adopt compensation and personnel plans and an employee classification system for OPDS that are commensurate with other state agencies; and
- adopt policies, procedures, standards, and guidelines regarding
 - determination of financial eligibility for public defense services,
 - appointment of legal counsel,
 - fair compensation for appointed counsel,
 - disputes over compensation for appointed counsel,
 - any other costs associated with public defense representation,
 - professional qualifications for appointed counsel,
 - performance of appointed counsel,
 - contracting of public defense services, and
 - any other matters necessary to carry out the duties of PDSC.

PDSC has approved the Executive Director's delegation of authority to negotiate contracts to OPDS's Director of Contract and Business Services. PDSC has delegated to the Executive Director its authority to execute public defense services contracts that it has reviewed and approved.

PDSC will continue to devote most of its time and energy to developing policies that will guide the shape and direction of the state's public defense system and will improve the overall quality and cost-effectiveness of public defense services in Oregon, and to overseeing implementation of the strategies set forth in this Strategic Plan.

ORS 151.216 directs PDSC **not** to:

- make any decision regarding the handling of an individual public defense case;
- have access to any case file; or
- interfere with the Executive Director or staff in carrying out professional duties involving the legal representation of public defense clients.

Accordingly, public defense contractors under contract with PDSC act as independent contractors in the operation of their law offices and practices and in the representation of their public defense clients. However, contractors are subject to the terms and conditions of their contracts with PDSC, which will include overall management, performance and quality assurance requirements and standards designed to ensure the provision of high quality, cost-efficient public defense services.

PDSC has approved the Executive Director's delegation to the Chief Defender of the authority to directly manage AD and directly supervise its attorneys and staff.

Standards of Service

The statute establishing PDSC (ORS 151.216) and the state and federal constitutions require PDSC to serve the interests of public defense clients by ensuring the provision of constitutionally mandated legal services. Besides public defense clients, PDSC serves:

- the community of public defense contractors, attorneys and allied professionals through its professional and contracting services, legislative advocacy and policy making,
- the public and Oregon taxpayers, primarily through their elected representatives in the Oregon Legislature and secondarily by responding to direct inquiries and through the media, and
- criminal justice agencies and other justice stakeholders through interagency collaboration, planning and policy making.

All of OPDS's employees will:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- conduct all legal, contracting and business services in a rational and fair manner;
- address all requests for information and inquiries in a timely, professional, and courteous manner;

- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability.

Legislative Advocacy

PDSC views its role in appearing before the Oregon Legislative Assembly and committees of the Assembly to be limited to:

- providing information in response to requests from legislators or legislative staff;
- advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services in a manner consistent with the state and federal constitutions and state and national standards of justice and (b) the continuing availability of competent and dedicated public defense counsel; and
- informing legislators of (a) the fiscal impact on the public defense system of proposed legislation or existing laws relevant to public defense, and (b) any potential constitutional or other problems that might occur as the result of the enactment, implementation, or amendment of legislation.

As a general matter, PDSC does not view its role before the Legislative Assembly to include advocacy for changes in criminal, juvenile, mental health or other areas of substantive law or procedure. The Commission may decide to take a position before the Legislative Assembly with regard to particular legislation proposing changes in substantive law or procedure only if such legislation is likely to substantially affect the quality of public defense services in the state, the cost-efficient operation of the state's public defense system, the continuing availability of competent and dedicated public defense counsel or the fundamental fairness of Oregon's justice system.

PDSC does not intend this policy to affect the ability of OPDS's Appellate Division (AD) or its attorneys to advocate positions before the Legislative Assembly that are designed to protect or promote the legal rights and interests of AD's clients.

Goals and Strategies for 2009-11

Goal I: Secure A Budget Sufficient to Accomplish PDSC's Mission.

Strategy 1: As instructed in a budget note, PDSC reported to the 2010 Special Session of the Legislature on caseload trends and resentencing costs required by legislation enacted during the 2009 session.

The 2009 Legislative Assembly approved a budget for PDSC that was projected to be \$10.6 million less than would be needed to provide public defense services funded from the Public Defense Services Account for the full 2009-11 biennium, assuming PDSC received the maximum amount of revenue potentially available to it from the Judicial Systems Surcharge Account established by HB 2287. Legislators were aware of this deficit at the time PDSC's budget was approved and directed PDSC to provide current caseload and cost information to the 2010 Special Session.

During the course of the 2009-11 biennium, PDSC reported to every Emergency Board, as well as to the 2010 Special Session about its caseload, anticipated revenue under HB 2287 and management actions taken to address any shortfall in projected HB 2287 revenue.

Because HB 2287 revenue was less than had originally been projected, the 2010 Special Session established a \$3.5 million special purpose appropriation for PDSC to cover the shortfall. In November of 2010 PDSC reported to the Emergency Board that total expenditures from the Public Defense Services Account were less than previously projected and that the agency would need only \$1,482,183 of the special purpose appropriation to provide services through the end of the biennium. Emergency Board action on the request is scheduled for December 16, 2010.

In the final quarter of the 2009-11 biennium, PDSC will be presenting its 2011-13 budget proposal to the 2011 Legislature and seeking sufficient funding to continue providing counsel in all cases in which there is a constitutional or statutory right to appointed counsel.

Strategy 2: Build legislative support for adequate funding of public defense in a time of significant revenue shortfalls.

- A. OPDS's Executive Director will meet with key legislators before and during the 2011 session to keep them informed regarding major drivers of the public defense caseload and the limited ability of PDSC to control the cost of public defense services. She will remind them of the impact that failing to adequately fund public defense had on the whole justice system in 2003.. She will also provide legislators with information about any changes in the projected public defense caseload and about actions legislators could take to lower the cost of public defense by following the

lead of some prosecutors in decriminalizing certain offenses and lowering the crime seriousness level of others.

- B. OPDS staff will continue to work closely with Legislative Fiscal Office staff to keep them apprised of caseload trends and funding needs.

Strategy 3: Develop a budget proposal for 2011-13 that builds on PDSC's long term plan to ensure the stability of the public defense system by addressing the three main challenges faced by the agency: (1) the need to attract and retain a well qualified group of public defense providers; (2) the need to improve the quality of representation, especially in juvenile and post-conviction relief cases; and (3) the need to reduce caseloads. In view of the anticipated revenue shortfall in the 2011-13 biennium and beyond, it will be important to continue to discuss and confront these challenges even though anticipated funding levels may not allow for significant progress in the near future

- A. **Pay Parity** – As directed by PDSC, OPDS staff will develop a strategy and supportive documentation for a presentation to the 2011 Legislative Assembly regarding the need for parity between Appellate Division attorneys and Department of Justice attorneys and between attorneys with not-for-profit public defender offices and their counterparts in the district attorney's offices in their counties and will discuss these needs with legislators prior to and during the 2011 session.
- B. **Other budget priorities** – OPDS staff will discuss with legislators PDSC's continuing support for funding to reduce caseloads and increase compensation for attorneys in juvenile cases, as set forth in the agency's policy option package.

Goal II: Assure Continued Availability of Qualified Public Defense Providers in Every Judicial District

Strategy 1. With funding provided by the 2009 legislature, OPDS applied the priorities PDSC had developed and refined over the course of the previous several biennia to assure the maintenance of qualified providers in each judicial district.

As OPDS informed both the 2007 and 2009 Legislatures, it continues to be the case that the trial level public defense system in Oregon has relied for a long time on highly committed veteran lawyers who were drawn to the work by a desire to perform public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices, especially in view of the sizeable debt many assumed in order to finance their college and law school educations.

PDSC's contractors, particularly some of its non-profit public defender offices, have reported significant difficulty in recruiting and retaining attorneys. Lack of parity with their counterparts in local district attorney offices contributes to the attrition rate among public defenders.

With the funds allocated by the 2009 Legislature, CBS staff was able to successfully negotiate contracts with providers in every county in the state and with specialized providers such as death penalty contractors and mitigation specialists for the two-year period beginning January 1, 2010.¹ OPDS will seek to do the same with respect to contracts for the two-year period beginning January 1, 2012.

Strategy 2. Continue PDSC's service delivery planning process to ensure availability of qualified providers in every judicial district in the state and in all substantive areas of public defense practice.

- A.** Service delivery planning process: Following an investigation by OPDS of the public defense services and service delivery systems in a county or judicial district or a substantive area of law², which includes input from public defense contractors, criminal and juvenile justice stakeholders and public safety officials in the county or district or area of practice, PDSC holds one or more public hearings and then develops a "service delivery plan" for the locale or practice area. A service delivery plan (1) takes into account local conditions, practices and resources unique to the county or district, (2) outlines the structure and mission of the delivery system and the roles and responsibilities of PDSC's contractors, (3) proposes changes to improve the operation of the delivery system and the quality of its public defense services and (4) when appropriate, directs the incorporation of changes it proposes into the Commission's contracts with service providers.
- B.** PDSC's service delivery plans encourage the adoption of "best" practices and procedures in a county, judicial district or practice area including (1) technical assistance and administrative support for contractors, (2) specialized training for public defense attorneys, (3) sharing of information and improvement of communication with the Commission, (4) accountability of public defense managers and boards of directors for the quality of their services and the performance of their

¹ In negotiating these contracts, CBS staff applied the priorities established by PDSC at previous commission meetings including the September 10, 2009 meeting. Prior to the September 10 meeting the commission held an executive session at its annual retreat at which CBS staff outlined its proposed approach to accepting proposals received in response to its RFP. PDSC approved that approach in the public meeting on September 10.

² Further discussion of the Commission's review of public defense practice in particular areas of law is included below under Goal II.

lawyers and staff, and (5) public outreach and involvement in the particular public safety community.

- C. To date, PDSC has visited every region in the state, has reviewed the public defense delivery systems in more than half of the state's judicial districts,³ and, as noted below under Goal II has reviewed service delivery in three substantive law areas of practice. As time and resources permit, PDSC will review systems in the remaining districts, revisit some of those reviewed in the past and will review the delivery of services in additional areas of practice. Although budget restrictions this biennium will impact the ability of both the Commission and OPDS's quality assurance site teams to travel outside the Willamette Valley, it will be important for the Commission to continue monitoring the delivery of services statewide, directing and implementing changes as needed in particular areas, and assessing budgetary needs and priorities for the next biennium.

Strategy 3. OPDS will continue to co-sponsor an annual public defense management conference to promote good business practices by public defense contractors and approaches to defense firm management that will assist contractors to survive and succeed.

The Oregon Criminal Defense Lawyers Association and OPDS have co-sponsored the annual October Management Conference for public defense providers for many years. The conference focuses on different topics each year, but usually includes presentations on effective business management, OPDS policies and procedures, legal ethics, and sharing of information about successful business strategies.

Goal II: Assure the Quality of Public Defense Services Performed by Private Providers

Strategy 1: Continue to develop quality assurance standards and programs to improve public defense services across the state.

- A. Beginning in 2004, OPDS has coordinated a unique and cost-effective quality assurance review of public defense providers that has become a key strategy in improving public defense services across the state. With

³ PDSC has performed service delivery reviews in Baker, Benton, Clackamas, Clatsop, Coos, Curry, Deschutes, Gilliam, Harney, Hood River, Jackson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Polk, Sherman, Umatilla, Union, Wallowa, Wasco, Washington, Wheeler and Yamhill Counties. Columbia, Crook, Douglas, Jefferson and Tillamook remain. It has been more than five years since the Commission conducted its first service delivery review in Lane, Lincoln, Linn and Benton Counties and an updated review in Lane County was initiated in September of 2009..

guidance from the Quality Assurance Task Force, a volunteer task force of Oregon's recognized leaders in public defense that advises the OPDS Executive Director, OPDS assembles peer review teams that conduct on-site quality assurance evaluations of public defense providers over the course of several days that include interviews and surveys of representatives of the court and of public safety agencies in the area. Each team makes findings and recommendations when areas in need of improvement are identified, and also documents local practices and procedures that are working well and can be recommended to other public defense providers. Over the course of the six years it has guided these reviews, the Quality Assurance Task Force has assembled a list of "best practices"⁴ that are recommended to Oregon's public defense providers. The reviews have also identified a number of recurring challenges for public defense providers that are the focus of continuing quality improvement initiatives by OPDS.

Between 2004 and the end of 2010, OPDS coordinated peer reviews of 37 (?) individual public defense providers who handle a majority of the statewide adult and juvenile public defense caseload.

The most recent site visit occurred in May 2010 in Yamhill County. OPDS and the Quality Assurance Task Force hope to complete additional site visits during the final quarter of the 2009 - 2011 biennium. Significant reductions to CBS's essential budget level has diminished the number of visits that can be conducted annually since OPDS must cover the travel costs incurred by the volunteer team members.

Without disclosing the contents of individual site visit reports, PDSC's Executive Director or General Counsel reports to the Commission periodically on the general problems, accomplishments and best practices identified by the site visits.

- B.** Over a period of approximately a year OPDS developed and PDSC approved new standards and processes for determining the eligibility of attorneys for court-appointments, including revisions to the standards for the qualification of attorneys to take court-appointments that were originally developed and adopted by the State Court Administrator's Office and readopted by PDSC. The new standards and procedures were based in part upon OPDS's experience in developing the Commission's court-appointment process in Lane County, the operation of the Appellate Division's appellate panel, and best practices from across the country. PDSC continues to update and revise these standards, most recently in May 2009.

⁴ This document may be viewed on the PDSC website:
<http://www.oregon.gov/OPDS/CBS/BestPractices.page?>

- C. In addition to establishing minimum qualifications for public defense attorneys, PDSC requires attorneys performing services under public defense contracts to observe the performance standards established by the Oregon State Bar for attorneys in criminal, juvenile, civil commitment and post-conviction relief cases. These standards, which may be found on the bar's website,⁵ offer a detailed, comprehensive guide to good practice at all stages of the proceedings.
- D. PDSC has established a formal complaint policy⁶ that outlines the procedure to be followed by OPDS in addressing complaints from clients and other interested parties about the quality and cost effectiveness of public defense representation. OPDS will continue to work with contactors and the Oregon State Bar to ensure that the complaint process operates fairly and effectively, avoids duplication with the Bar's processes, and protects confidential and privileged information from disclosure.
- E. OPDS staff will continue to work with other groups and organizations to plan education and training events for public defense attorneys and staff around the state. The agency's Executive Director and General Counsel participate on many committees and ad hoc workgroups that plan and present educational events. As noted below, making presentations at continuing legal education events and providing direction and advice in cases pending at the trial level is a core function of the Appellate Division.
- F. In 2007 OPDS developed and implemented a process for conducting an annual survey of judges, district attorneys and other juvenile and criminal justice system representatives regarding the quality of representation provided by public defense contractors and hourly rate attorneys. The survey results permit OPDS to monitor general trends in quality in different areas of practice over multiple years and to be alerted to quality concerns that may not otherwise come to the agency's attention. The Chief Justice has assisted OPDS to obtain high response rates from the judges by sending a letter along with the survey and urging them to respond.

⁵ http://www.osbar.org/surveys_research/performancestandard/index.html

⁶ PDSC's complaint policy may be found at <http://www.oregon.gov/OPDS/CBS/ComplaintPolicy.page?>

Strategy 2: Continue PDSC's Service Delivery Planning Process to address significant problems with the quality and cost-efficiency of local public defense services and with the systems to deliver those services and continue to review specific areas of practice and develop quality assurance standards and policies to address deficiencies.

While PDSC's service delivery planning process as outlined above is primarily focused on the structure of the public defense delivery systems in the geographic and substantive law areas it has reviewed, quality of representation issues cannot be divorced from the structural analysis conducted by the Commission. The Commission therefore performs an important quality oversight function as well. This role is more pronounced in PDSC's review of service delivery in substantive law areas.

A. Juvenile law - When PDSC assumed responsibility for providing trial level public defense services statewide in 2003, juvenile representation was an area of law in which significant concerns had been expressed about the quality of representation being provided. Both the Oregon State Bar⁷ and the Oregon Secretary of State's Audits Division⁸ identified juvenile representation as an area in need of improvement.

In April 2006 PDSC conducted a review of service delivery in the juvenile dependency area. Since that time OPDS has taken a number of steps to improve representation. It has conducted evaluations of many of its juvenile contract offices. It has used its complaint procedure to investigate instances of poor representation and has removed chronically under-performing attorneys from appointment lists. OPDS worked with other interest groups to create the Juvenile Law Training Academy, which sponsors an annual two day low cost juvenile law seminar to supplement trainings sponsored by other organizations. PDSC, with dedicated funding from the legislature, established a Juvenile Appellate Section in its Appellate Division in 2008 as a step toward improving both appellate and trial level representation, and in 2009 contracted with the Juvenile Law Resource Center to provide training and litigation support for parents' attorneys. PDSC has regularly sought increased state funding for public defense services and specifically for services in juvenile cases. PDSC's 2009 Policy Option Package No. 100 would have significantly increased funding for juvenile representation statewide but was not approved by the Legislature. A similar package is included in the agency's 2011-13 budget proposal.

⁷ Indigent Defense Task Force Reports II and III were issued by the Oregon State Bar in 1996 and 2000. Both underscored the need for significant improvement in juvenile representation.

⁸ In 2005 the Audits Division of the Secretary of State's Office issued a letter to PDSC identifying juvenile representation as an area of management risk to the agency as a result of ongoing quality concerns.

During contract negotiations with lawyers and law firms seeking contracts to handle juvenile cases in 2010-2011, OPDS advised applicants that attorneys representing clients under contracts would be required to observe the Rules of Professional Conduct, their contractual obligations to PDSC, and the Performance Standards approved by the bar and incorporated into the Qualification Standards for Court Appointed Counsel established by PDSC. Because there appears to be some confusion over the role of counsel for children and youth, PDSC also provided contractors with a copy of a two-page document specifically addressing areas of apparent confusion.

Finally, as part of its contracting process in 2009, PDSC sought to direct a greater proportion of its resources toward representation in juvenile cases in the belief that with specific expectations in place and ready access to adequate training and support services, the major remaining obstacle to improved representation was the excessive caseloads handled by juvenile lawyers and which were unlikely to be reduced without additional resources.

PDSC will continue efforts currently underway and explore other approaches to improving quality in this area of public defense representation and may again propose a policy option package to increase compensation in its 2011-13 budget request.

In juvenile delinquency cases, anecdotal information provided to the Commission indicated that in some counties a large percentage of youth waived counsel and appeared *pro se*. In March 2010 PDSC conducted a hearing to review the frequency and causes of waiver. It also heard testimony from a Washington State attorney regarding the successful effort in that state to achieve full representation for juveniles in delinquency cases. Under the direction of one of its members and OPDS staff several avenues for increasing representation of Oregon youth have been and are being pursued by PDSC. The attention given to the issue by PDSC has resulted in some juvenile departments and some juvenile courts heightening their scrutiny of the circumstances under which youth waive counsel. OPDS's Appellate Division attorneys have developed a draft colloquy which has been reviewed by a number of juvenile court judges and which, when final, will be provided by the Chief Justice to all juvenile court judges to use as a model. An annual training for juvenile lawyers included a segment on what counsel can do to challenge frequent waivers occurring in some jurisdictions. It is anticipated that an appeal currently pending will present the Court of Appeals with an opportunity to review the legal principles involved in the waiver of counsel by juveniles.

B. Post-conviction relief (PCR), which is intended to address, among other issues, inadequate representation by counsel at the trial and appellate levels, is an area of practice in which the quality of representation has been uneven and often inadequate. A state bar task force report recommended intensive study and improvement of this area of practice. In 2008 and 2009 PDSC received testimony from public defense attorneys, prosecutors and judges throughout the state regarding the most effective ways to deliver quality public defense services in PCR cases. A clear consensus favored the establishment of a state office as a separate division of OPDS. Accordingly, OPDS developed a separate Policy Package in PDSC's proposed budgets for 2005-2007, 2007-2009, 2009-2011 to support a four-lawyer division of OPDS that would specialize in PCR cases at the trial and appellate level. The package has not been funded.

A number of other steps have been taken to improve representation, however, including identifying particularly capable lawyers and urging them to devote at least some of their time to representation in post-conviction cases. OCDLA has sponsored CLE sessions on post-conviction relief. At OPDS's request the Oregon State Bar created a task force of highly respected post-conviction experts to establish performance standards for post-conviction relief cases, as it had done previously for criminal, juvenile and civil commitment cases. OPDS's General Counsel served as the reporter for the task force. The standards proposed by this group were adopted by the Board of Governors of the Oregon State Bar in February 2009. Performance Standards for Post-Conviction Relief Practitioners are now in place and serve as a guide to good practice and a measure for OPDS to use in evaluating its providers in this area.

In its 2011-13 budget proposal PDSC did not include a PCR policy option package and resolved instead to review the quality of representation being provided by its current contractors to determine whether this model is satisfactory or not and whether the present providers should be retained.

C. Death penalty representation - The Commission conducted hearings in February and March of 2007 to review the delivery of services in death penalty cases. A consistent message heard from those who appeared before the commission – two circuit court judges, a Senior Assistant Attorney General and three death penalty contractors – was that it is critical that adequate resources be made available to the defense from the outset of these cases in order to ensure that high quality legal representation is provided and to avoid a costly retrial at some indefinite time in the future. Consistent with its obligation under ORS 151.216 to establish and maintain a system that ensures

representation conforming to state and national standards of justice, the Commission approved a legal representation plan conforming to the ABA Guidelines for the Performance of Defense Counsel in Death Penalty Cases (the Guidelines). The Commission also approved a contract for a death penalty resource attorney as a cost-effective means of improving representation in death penalty cases. The resource attorney provides assistance to defense teams in all facets of capital case preparation, client relations, settlement efforts and litigation. The resource attorney is also responsible for: maintaining a library of legal memoranda and trial transcripts; assisting in the identification of expert witnesses and consultants, acting as a liaison to the federal defense bar, attending CLE conferences relevant to death penalty litigation and providing information from those conferences to other defense attorneys, conferring with counsel in individual cases, seeking grants or other funding and administering any grants awarded, and assisting OPDS to meet its obligations under the Guidelines.

C. Appellate Representation - PDSC reviewed the delivery of services in cases handled by OPDS's Appellate Division in April, 2010

D. Other practice areas that the Commission plans to review in 2011 are representation in civil commitment and Psychiatric Security Review Board cases.

Strategy 3: Encourage or require public defense contractors to establish active boards of directors or advisory boards that include outside members in order to (a) broaden the support and understanding of public defense in local communities, (b) strengthen the management of contractors, (c) facilitate communication with PDSC and OPDS and (d) increase the number of advocates for adequate state funding for public defense.

It had been the position of PDSC for a number of years to encourage public defense providers to establish boards of directors. Some contractors did so and others did not. PDSC held hearings in 2010 at which information was received regarding how many contractors made use of boards of directors, the types of public defense entities that were most likely to have boards, and the composition and role of existing boards. In response to the information provided, PDSC adopted a policy in June, 2010 requiring that, "Beginning in January of 2012, every contractor for public defense legal services shall be governed by a board of directors that includes at least two independent members who do not provide services under the entity's contract and are not elected by those who do. In lieu of a board of directors, a contractor shall demonstrate to OPDS staff and the Commission effective and appropriate financial safeguards and quality assurance mechanisms."

Strategy 4: Encourage the adoption of other best practices identified by the Quality Assurance Task Force, including the regular evaluation of attorneys, a plan for recruiting new attorneys, and a system for training and mentoring new attorneys and experienced attorneys found to be in need of such training or mentoring.

In 2010, PDSC reviewed attorney evaluation procedures currently in use in contractor offices and determined that it would require contractors to have appropriate quality assurance mechanisms in place. Rather than develop and promulgate model evaluation procedures, PDSC identified a number of procedures adopted by contractors that could serve as models. In 2011 PDSC will conduct a review of the training and mentoring systems used by providers and consider how to make training and mentoring available to all providers

In its structural reviews PDSC will continue to monitor the ability of contractors to recruit new attorneys as needed and to train and mentor them to ensure that they are prepared to provide quality representation to every client. Not-for-profit public defense offices are generally better situated to train and mentor new attorneys than most consortia. In areas where there are no public defense offices or where the public defender's office does not or cannot perform these functions for all of the local contractors, PDSC will encourage non public defender office contractors to devise their own plans for recruitment and training. The Oregon Criminal Defense Lawyers Association, the Oregon State Bar and other organizations provide substantive law training and some skills training for new lawyers. Some contractors also open trainings developed for their own staff to employees of other contract offices. Judges are a largely untapped source of beneficial feedback to new lawyers who appear in their courtrooms. In 2010 OPDS's general counsel made a presentation to PDSC on the training resources currently available to public defense providers and will provide an update to PDSC in 2011 .

Goal III: Strengthen the CBS's Contracting Process and Business Services

Strategy 1: Continue to improve the effectiveness and cost-efficiency of OPDS's administration of the contracting system.

- A. Since 2005 CBS has had in place a secure and reliable method for sending non-routine expense authorizations and denials by e-mail.
- B. In 2008 PDSC approved a new policy governing OPDS's release of public records, including its costs of production.
- C. In 2006 OPDS established a database to track attorney complaints by provider.

- D. In 2011 OPDS will propose to PDSC revisions in its current Confidentiality Policy to more clearly protect confidential communications involved in the administration of non-routine expenses and complaints concerning attorneys.
- E. OPDS will continue to survey its providers on a biennial basis concerning their satisfaction with OPDS's business practices and delivery of services. Previous surveys indicate high levels of satisfaction.

Strategy 2. Continue and Enhance the Role of PDSC in Oversight of the Contracting Process.

- A. PDSC convenes commission retreats to discuss principles and priorities for the expenditure of public defense funds and, during the course of structural reviews, often identifies specific needs and priorities in local communities that it then incorporates into its final directions to OPDS. PDSC receives information and testimony from representatives of the provider community at all of its meetings but specifically requests such input at its meetings in April and June of even-numbered years before it prepares its budget request for the regularly scheduled legislative session. In June of odd numbered years, at or near the end of the regular legislative session, PDSC again receives input from providers regarding the priorities and principles PDSC will adopt to direct OPDS in the next round of contract negotiations.
- B. As part of PDSC's oversight of the contracting process, after it has established the principles and priorities that will govern the contracting process for the succeeding biennium and before the final terms of contracts are negotiated by OPDS, PDSC will review OPDS's preliminary outline of its statewide plan and be advised how PDSC's principles and priorities were applied. PDSC can accept, amend or reject the proposed plan. Once PDSC has approved a statewide plan, OPDS will negotiate contracts in accordance with the plan. Prior to requesting PDSC's approval of individual contracts, OPDS will provide PDSC with the opportunity to review the terms of any or all of the proposed contracts. PDSC will undertake a detailed, in-depth review of the terms and conditions of an individual public defense contract only if requested to do so (a) by any commissioner; (b) by the Executive Director; or (c) in writing by a contractor or prospective contractor when, in the opinion of a majority of PDSC members in attendance, the request justifies such a review.

Goal IV: Strengthen Working Relationships with Public Defense Contractors.

Strategy 1: Continue to hold PDSC meetings in various counties and regions across the state as funding permits.

Strategy 2: Continue to solicit information and advice from contractors on PDSC policies and procedures.

Strategy 3: Continue to meet and confer regularly with the Contractor Advisory Group.

Goal V: Continue to Provide High Quality Representation in Appellate Cases and Training and Support for the State's Entire Public Defense System through OPDS's Appellate Division.

AD strives to be a premier appellate law office, a leader in the development of legal theories and strategies in the appellate courts and a valued resource to the court, to other public defense providers, to lawmakers and to the public in matters concerning criminal and juvenile law and policy.

Strategy 1: Continue efforts to improve the quality of AD's legal services and reduce the backlog of AD's appellate cases.

- A.** AD has developed a training curriculum for new attorneys that includes initial training in file management, case review, file review and note taking, accessing archives and records, preparing to write an initial brief, editing, oral argument observation, team meetings, moot courts, case discussions with team leaders, and participation in a team.
- B.** AD updated its attorney practice and procedure manual in 2010 and will combine it with a new secretary's manual in 2011.
- C.** AD has implemented attorney caseload standards and a production reporting system that provides each attorney with a report of the attorney's filings and backlog each month. These reports assist management in quantifying some aspects of attorney performance. AD has also established performance criteria for its attorneys. All of these tools assist in the regular evaluation of attorneys. Similar evaluation and measurement tools are being developed for evaluation of the division's secretaries.
- D.** AD attorney caseloads exceed national standards and high caseloads create delays. Currently clients must wait approximately seven months for an opening brief to be filed. With the addition of eight new positions to the criminal section in 2007, the backlog of cases waiting to be

briefed was reduced from 91 cases in June 2007 to 49 cases in June 2008. AD would have received an additional six positions had the 2009 budget's mandated caseload increase been approved by the legislature. The additional positions were not funded, however. PDSC is seeking additional positions in its 2011-13 budget proposal to address any caseload increases and to fill vacancies that have remained open since the 2009 legislative session.

- E. OPDS staff continues to upgrade and improve AD's databases, which now include a brief bank introduced in 2009.
- F. AD's Juvenile Section is fully functioning and making progress on its long term goals of improving representation in juvenile appellate cases and developing a body of case law to clarify the scope of statutory provisions governing jurisdiction in dependency and termination cases. AD will fully staff the Juvenile Section by filling the next available vacancy with an attorney trained in juvenile law. The juvenile section has become a resource center for juvenile dependency lawyers at the trial level and has worked with other public and private entities interested in improving representation in juvenile dependency cases to provide training opportunities for attorneys and to explore other means of improving representation.

Strategy 2: Achieve Parity of Compensation for AD attorneys with their Department of Justice Counterparts

While OPDS has been able to improve compensation for AD attorneys over the last several biennia by conserving other resources wherever possible, it has not yet been able to achieve complete parity with attorneys in the Department of Justice with comparable responsibilities. PDSC's 2011-13 budget proposal again includes a policy option package addressing this issue. OPDS staff will work closely with legislators to inform them about the extent of the disparity and the value of the work done by AD attorneys. Some legislators have already expressed support for achieving parity.

Strategy 3: Expand AD's capacity to support PDSC's contractors and the state's public defense system.

- A. AD will continue to submit articles on substantive legal issues to the OCDLA newsletter on a regular basis and will make its attorneys available for CLE presentations. Presentations by AD attorneys have been well received by conference attendees.
- B. AD now provides advice to contractors on the legal merits and strategies

of potential mandamus actions, and is developing a collection of expert witness transcripts to assist public defense attorneys preparing for trial.

- C. AD has initiated a system that assigns appellate attorneys to work directly with trial lawyers in specific geographic regions of the state. It is hoped that this will help trial and appellate lawyers to develop a closer working relationship

Goal VI: Continue to Strengthen the Management of OPDS.

Strategy 1: Maintain and refine OPDS's performance-based employee evaluation system.

Strategy 2: As an employer that seeks to promote professional achievement and employee satisfaction, OPDS will continue to survey employees annually regarding perceptions about management's efforts to achieve these goals.

Strategy 3: Continue to integrate relevant functions and operations of AD and CBS and exploit the benefits of their combined experience and expertise. This strategy has been almost completely achieved with the August, 2010 move to the office's new location. The operation of both divisions is now well integrated and functioning effectively.

Strategy 4: Develop a Management Manual outlining the decision making process for senior managers at OPDS and providing managers with clear authority, accountability and expectations regarding the performance of their responsibilities.

Strategy 5: Ensure that there is a contingency plan in place to cover critical management functions should one or more managers leave OPDS or be unable to fulfill managerial responsibilities for a period of time. Each member of the management team will develop a list of critical functions and the team will identify a backup resource for each of those functions. As previously approved by PDSC, a deputy director position will be created at CBS as soon as funding permits.

Goal VII: Promote the Diversity and Cultural Competence of Oregon's Public Defense Workforce.

Strategy 1: The recommendations of the Diversity Task Force which were aimed at improving the recruitment of minority attorneys and staff and increasing the cultural competence of the state's public defense workforce have been partially implemented. More remains to be done.

A statewide directory of job openings in public defense offices across the state is now available on the OCDLA website; PDSC supported federal legislation creating a loan repayment program for public defense attorneys and OPDS and its Contractor Advisory Group explored, but ultimately did not recommend, the use of PDSC funds for such a program; OPDS created a recruitment brochure that sets forth PDSC's commitment to equal opportunity and to increased diversity and cultural competence; OPDS designed and distributed a baseline survey of providers to determine the current level of diversity among Oregon providers. The response rate was too low to permit OPDS to use it as intended. OPDS intends to repeat the survey by including it in the agency's 2011 request for proposals. It is hoped that the results of this survey will allow OPDS to identify contractors who have had success in achieving a diverse workforce and to determine whether there are strategies that can be used by other providers to increase diversity in their ranks as well.

Strategy 2: Continue to develop working relationships with criminal law faculty, career counselors, and placement offices at Oregon's three law schools to identify and recruit law students of color who may be interested in internships and attorney positions in the state's public defense system.

Strategy 3: Participate in job fairs and recruitment programs throughout the Pacific Northwest for law students and attorneys of color who are interested in careers in public service. Announce OPDS positions in publications likely to reach members of minority communities in Oregon and elsewhere.

Strategy 4: Design and implement regular diversity training for OPDS employees and any interested members of the larger public defense community. A one-day diversity training for OPDS staff and for other members of the defense community is currently planned for April 2011.

Goal VIII: Ensure that PDSC and OPDS Hold Themselves Accountable to this Plan.

Strategy 1: Integrate this plan into the operations and performance of AD, CBS and their individual employees.

Strategy 2: Use this Plan as a basis for the agendas of meetings of OPDS's Management Team and the personal performance and management plans of its members.

Strategy 3: Ensure that a progress report on the implementation of this Plan is presented to PDSC on a regular basis.

Attachment 3



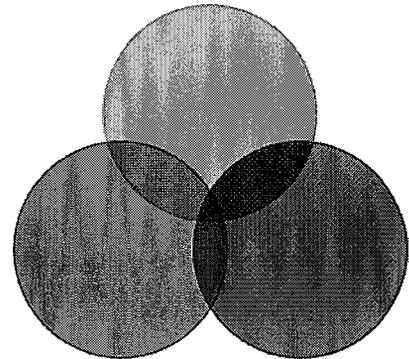
EVIDENCE-BASED PRACTICES AND CRIMINAL DEFENSE:

Opportunities, Challenges, and Practical Considerations

August 2008

Authored by Kimberly A. Weibrecht, Esq.

for the Crime and Justice Institute and
the National Institute of Corrections



This paper is one in a set of papers focused on the role of system stakeholders in reducing offender recidivism through the use of evidence-based practices in corrections.



Dot Faust, Correctional Program Specialist
National Institute of Corrections
Community Corrections Division
(202) 514-3001
dfaust@bop.gov
www.nicic.gov



Elyse Clawson, Executive Director
Crime and Justice Institute
(617) 482-2520
eclawson@crjustice.org
www.cj institute.org

Author's Contact Information:

Kimberly A. Weibrecht, Esq.
Crime and Justice Institute
355 Boylston St.
Boston, MA 02116
kweibrecht@crjustice.org

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The Crime and Justice Institute (CJI) and the National Institute of Corrections (NIC) are proud to present a series of seven whitepapers known as the Box Set. The papers are designed to share information with criminal justice system stakeholders about how the implementation of evidence-based practices (EBP) and a focus on recidivism reduction affect their areas of expertise in pretrial services, judiciary, prosecution, defense, jail, prison, and treatment. This initiative stems from a cooperative agreement established in 2002 between CJI and NIC entitled *Implementing Effective Correctional Management of Offenders in the Community*. The goal of this project is reduced recidivism through systemic integration of EBP in adult community corrections. The project's integrated model of implementation focuses equally on EBP, organizational development, and collaboration. It was previously piloted in Maine and Illinois, and is currently being implemented in Maricopa County, Arizona and Orange County, California. More information about the project, as well as the Box Set papers, are available on the web sites of CJI (www.cjinstitute.org) and NIC (www.nicic.org).

CJI is a nonpartisan nonprofit agency that aims to make criminal justice systems more efficient and cost effective to promote accountability for achieving better outcomes. Located in Boston, Massachusetts, CJI provides consulting, research, and policy analysis services to improve public safety throughout the country. In particular, CJI is a national leader in developing results-oriented strategies and in empowering agencies and communities to implement successful systemic change.

The completion of the Box Set papers is due to the contribution of several individuals. It was the original vision of NIC Correctional Program Specialist Dot Faust and myself to create a set of papers for each of the seven criminal justice stakeholders most affected by the implementation of EBP that got the ball rolling. The hard work and dedication of each of the authors to reach this goal deserves great appreciation and recognition. In addition, a special acknowledgment is extended to the formal reviewers, all of whom contributed a great amount of time and energy to ensure the success of this product. I would also like to express my appreciation to NIC for funding this project and to George Keiser, Director of the Community Corrections Division of NIC, for his support. It is our sincere belief and hope that the Box Set will be an important tool for agencies making a transition to EBP for many years to come.

Sincerely,



Elyse Clawson
Executive Director, CJI

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Elyse Clawson
Executive Director
Crime and Justice Institute

Len Engel
Criminal Justice Policy & Project Coordinator
Crime and Justice Institute

Dorothy Faust
Correctional Program Specialist
National Institute of Corrections, Community
Corrections Division

Dara Glass
Assistant Project Manager
Crime and Justice Institute

Randy Hawkes, Esq.
Managing Attorney
New Hampshire Public Defender

Chris Keating, Esq.
Executive Director
New Hampshire Public Defender

Peter Ozanne
*Deputy Chief Operating Officer for Public
Safety*
Multnomah County, OR

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Staff Attorney
New Hampshire Public Defender

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Criminal Justice Consultant
The Carey Group

Joshua Dohan, Esq.
Director, Youth Advocacy Project
Committee for Public Counsel Services

Jennifer Fahey
Deputy Director
Crime and Justice Institute

Kate Florio
Director of Business Development & Planning
Crime and Justice Institute

Mary Hawkes, Esq.
Investigation Director
New Hampshire Public Defender

Jim Hennings, Esq.
Executive Director
Metropolitan Public Defender Services, Inc.

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Presiding Judge
Rockingham Superior Court

James Reis, Esq.
Staff Attorney
New Hampshire Public Defender

Jo-Ann Wallace, Esq.
President and CEO
NLADA

EXECUTIVE SUMMARY

The fields of corrections and criminal justice have undergone a dramatic transformation in the last several decades. There now exists an extensive body of research on defendant behavior and correctional and criminal justice practices from which we can distill several core elements on what works in reducing recidivism. This body of research is referred to as “evidence-based practices” (EBP).

EBP supports the creation of an objective, information-driven method of assessing the needs of defendants and responding to those needs in proportional and effective ways throughout the criminal justice system. The implementation of these evidence-based practices is a positive development for criminal defense attorneys because of the numerous potential benefits to clients. Defense counsel’s duty to clients requires taking active steps to understand the impact that EBP implementation has on the rights of defendants and on the practice of criminal defense.

The intent of this paper is to provide guidance for criminal defense attorneys on the opportunities and challenges of EBP to criminal defense, to explore the practical considerations of defending in an EBP system, and to discuss some of the ways that EBP impacts defense counsels’ traditional role in the criminal justice system as advocates and as policy-makers.

Correctional practices are evidence-based if they have been demonstrated through rigorous testing to reduce recidivism. From the research, we can conclude that the correctional and criminal justice programs that have the greatest impact on reducing recidivism are those that:

- Assess defendants’ risk and need level with an objective actuarial risk and need instrument;
- Target higher level treatment or supervision interventions (i) to defendants with a higher risk of recidivism and (ii) to their *dynamic* (amenable to change) criminogenic needs such as antisocial attitudes, vocation, education, and substance abuse. Interventions targeted at low-risk defendants do not result in reduced recidivism and may actually increase recidivism;
- Deliver services that (i) employ cognitive behavioral techniques; (ii) actively support and recruit the defendant’s natural community and prosocial supports; (iii) use case management and treatment services that are responsive to the learning styles, motivations, strengths, personalities,

-
- and demographics of the defendants served; (iv) emphasize the defendant's strengths rather than deficits; and (v) prioritize positive reinforcement over negative;
- Prioritize the quality of the curricula, the training level of the staff, and the fidelity of the program's implementation; and
 - Measure relevant outcomes and provide feedback on progress.

The two evidence-based practices that bring the greatest opportunities and challenges for defense counsel as an advocate are targeted interventions and criminal justice treatment. The principle of targeted interventions benefits defendants by focusing correctional responses on defendants based on their risk and need level. It uses correctional resources in the least restrictive manner possible to achieve the desired end of public safety and defendant rehabilitation. It results in correctional interventions that are more effective at changing defendant behavior and improving defendants' lives. Some of the practical considerations for defense counsel in a jurisdiction using risk and need assessments to target interventions include: whether the risk and need assessment is being used by properly trained assessors, whether it is properly normed and validated, whether it is actuarial, and whether the appropriate type of assessment is being used at the appropriate point in the process.

The development of treatment interventions in the criminal justice system also benefits defendants by providing treatment opportunities that may not have otherwise been available and by providing judges and prosecutors with a community-based treatment option for defendants. Some of the challenges that treatment in the justice system bring for counsel include "net-widening" and the consequences of treatment failure when a defendant is under the court's jurisdiction.

In addition to the benefits that evidence-based practices afford defendants and defense counsel as advocates, they also provide opportunities for defense counsel as policy-makers. EBP initiatives cannot be successful without full stakeholder collaboration, which provides defense counsel the opportunity to bring the voice of defendants to the process. As policy-maker, defense counsel can play an important role by furthering the development of policies to ensure the validity of risk and need assessments, encouraging the use of outcome measures and feedback in correctional programs, and by educating stakeholders on the role and "core duties" of defense counsel.

With the development of EBP initiatives nationwide, defense counsel should take advantage of the opportunity to become sophisticated consumers and become involved in influencing the development of policy that governs them. Specific action steps for counsel may include:

-
- Get involved with EBP initiatives in his or her jurisdiction;
 - Become educated about risk and need assessments and the methods required to ensure their validity;
 - Engage peers in discussions about the use of and limits to the exchange of defendant information to inform decision points at various stages of the criminal justice continuum;
 - Be prepared to advocate against “widening the net” in the use of treatment and diversionary programs;
 - Use and encourage the use of techniques that positively reinforce a client’s successes, that enhance their intrinsic motivation to change, and that engage their community support system;
 - Encourage the institutionalization of criminal justice system outcome measurement and outcome measurement feedback; and
 - Maintain and reinforce those core defense duties while considering new ways that problem-solving can be incorporated into criminal defense.

Whether in the role of advocate or policy-maker, defense counsel should not forsake this opportunity to ensure that the potential of EBP initiatives to improve the criminal justice system for defendants is fully realized.

Attachment 4

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

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[Justice](#) » [Racial Justice](#) » [Criminal Justice](#) » [Community Oriented Defender Network](#) » [Indigent Defense Reform](#)

Community Oriented Defense: Stronger Public Defenders PUBLICATIONS

By Melanca Clark & Emily Savner

– 07/21/10

[Full report \(pdf\)](#)

[COD Ten Principles \(pdf\)](#)

[About the Authors](#)

**Community
Oriented Defense:
Stronger Public
Defenders**



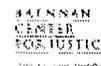
Executive Summary

More people travel through America's criminal justice system than through any other justice system in the industrialized world, and, overwhelmingly, these people are from low-income, African-American and Latino communities. Yet there is but scarce funding available for local indigent defense systems. And legislators face little pressure to provide necessary support to this unpopular constituency.

Public disinvestment in social services has left growing segments of the population ill-equipped to address economic, emotional, physical and mental health problems that can precipitate contact with the criminal justice system when left unaddressed. As a result of these and other deficiencies, many indigent Americans are caught in a cycle of continuous encounters with the criminal and juvenile justice systems.

The Brennan Center founded the Community Oriented Defender (COD) Network to support defenders and their allies who seek more effective ways to carry out the defense function. Our goal is to enable defense counsel to engage community based institutions in order to reduce unnecessary contact between individuals and the criminal justice system.

Through national convenings, newsletters, informational forums and targeted reform projects, the COD Network pulls together innovative defender programs and helps replicate best practices and reform strategies. Begun as a small coalition of defender programs in 2003, the COD Network today includes over 50 defender programs. The COD vision of engagement with community based institutions has a proven track record, and although the



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challenges remain real, the COD model is gaining influence.

The Brennan Center, in partnership with leaders of the COD movement, developed the Ten Principles of Community Oriented Defense. These distill the three overarching advocacy strategies of the movement—whole client representation, community engagement, systemic reform—into ten concrete goals. We have provided a blueprint defender programs can use to reduce unnecessary contact between individuals and the criminal justice system, strengthen defender programs and improve policies that affect client communities.

In this report, we present each of the COD Ten Principles in the context of profiles of defender programs that are putting the various Principles into action. Those cited are but a few of the many defender programs incorporating the COD Ten Principles today and represent just some of the many creative ways we hope defender programs will begin to integrate these Principles into their own work.

Principle 1: Create a Client-Centered Practice

We aspire to employ a diverse group of attorneys, investigators, social workers and other advocates who respect their clients' wishes and goals, and work together to ensure that the dignity of every client is honored.

The *Neighborhood Defender Service of Harlem* (NDS) organized *DefensaNDS*, a team of all-Spanish-speaking advocates, to deliver effective representation to the program's burgeoning Spanish-speaking client population.

Principle 2: Meet Clients' Needs

We seek to promote the life success of every client by: identifying educational gaps, mental health issues, addiction, and other needs, and linking clients with resources, opportunities, and services to meet those needs.

Through its *Defender Community Advocacy Program* (DCAP), the *Rhode Island Office of the Public Defender* helps clients with addiction and mental health problems by sending a social worker to arraignment (along with the attorney) to identify treatment needs and to advocate for care. The result: healthier clients, better case outcomes and more productive relationships with judges and prosecutors.

Principle 3: Partner with the Community

We seek to maintain a local presence in the communities we serve and to form relationships with community members, community based organizations, and community institutions (e.g., courts, schools, government, health care providers and employers) to improve case and life outcomes for clients and to strengthen families and communities.

The *BMAGIC* and *Mo' MAGIC* programs of the *San Francisco Public Defender's* office address the root causes of youth contact with the criminal justice system by partnering with community organizations to deliver enhanced services for at-risk youth. These programs have a permanent, visible presence in the communities they serve, and they have enabled the Public Defender's office to expand its role in the community from courtroom advocate to fully-engaged community partner.

Principle 4: Fix Systemic Problems

We aspire to change policies that harm clients, families and communities (e.g., policing practices that produce racial and ethnic disparities in arrest rates).

The *Racial Disparity Project* of *The Defender Association* in Washington operates the *Law Enforcement Assisted Diversion Program* (LEAD), a pre-booking diversion program, based in the community, that steers individuals accused of low-level drug crimes out of the criminal justice system and into treatment, reducing the number of minority youth caught up in the system.

Principle 5: Educate the Public

We seek to describe the human impact of the criminal justice system to policymakers, journalists, and others so that the public can better appreciate the cost to individuals, communities, and the nation of “tough on crime” policies.

The *Louisiana Justice Coalition* engages in sustained public education campaigns that have contributed to a comprehensive overhaul of Louisiana’s indigent defense system and continuing improvements to the delivery of indigent defense services in the state.

Principle 6: Collaborate

We aim to create partnerships with likely and unlikely allies, including prosecutors, victims, faith-based organizations, and national and state based legal aid organizations to share ideas, promote change, and support mutual efforts.

Los Angeles’ Homeless Alternatives to Living on the Street program, also known as the *HALO program*, is a multi-pronged, collaborative effort between the Los Angeles City Attorney’s Office and the *Los Angeles County Public Defender’s Office* aimed at diverting non-violent homeless or near-homeless individuals with mental illness or addiction from jail and into treatment programs.

Principle 7: Address Civil Legal Needs

We seek to promote access to civil legal services to resolve clients’ legal concerns in such areas as housing, immigration, family court, and public benefits, occasioned by involvement with the criminal justice system.

Cognizant that “collateral consequences” flowing from a criminal conviction can be as severe (if not more severe) than a prison sentence, and aware that they can lead clients into a cycle of involvement with the criminal justice system, *The Bronx Defenders* has established a *Civil Action Practice*, providing legal representation to resolve a broad range of clients’ civil legal problems.

Principle 8: Pursue a Multidisciplinary Approach

We aspire to engage not only lawyers, but also social workers, counselors, medical practitioners, investigators and others to address the needs of clients, their families and communities.

With delinquency attorneys, education attorneys, social service advocates, a psychologist and a community liaison, the *Youth Advocacy Department* (YAD), in Massachusetts, relies on a team approach to get young clients not just “problem-free outcomes,” but positive developmental outcomes and the achievement of real world goals.

Principle 9: Seek Necessary Support

We seek essential funding, professionally approved workload limits, and other resources and structures sufficient to enable the COD model to succeed.

The *North Carolina Office of Indigent Defense Services’ (IDS) Systems Evaluation Project*—a data-driven performance measurement system—will enable IDS to gauge the quality and cost-effectiveness of its services. IDS can rely on the data to make the case for greater support for programs that continue to prove their worth.

Principle 10: Engage with Fellow COD Members

We are dedicated to sharing ideas, research and models to help advance the COD movement locally and nationally in order to maximize its benefits for clients, families and communities.

Being an engaged member of the Community Oriented Defender Network means developing and sharing creative problem-solving strategies for breaking the cycle of arrest and incarceration that have turned courthouse entrances into revolving doors. There are myriad possibilities for engagement.

About the Authors

Melanca Clark was Counsel in the Justice Program and Director of the Community Oriented Defender Network when she conducted her work on this report. Ms. Clark, a former John J. Gibbons Fellow in Public Interest and Constitutional Law and a Skadden Fellow at the NAACP Legal Defense and Education Fund, also was an associate at Paul, Weiss, Rifkind and Garrison and clerked for Judge Joseph A. Greenway, Jr. of the U.S. District Court for the District of New Jersey. She received her J.D. from Harvard Law School, and her B.A. from Brown University.

Emily Savner is a Research Associate in the Brennan Center’s Justice Program. Ms. Savner assists the Access to Justice Project in its efforts to improve the quality and availability of legal services throughout the United States and protect the rights of non-profit organizations working with low-income communities. Ms. Savner received her B.A. from New York University in 2008.

Tags: Justice, Racial Justice, Criminal Justice, Community Oriented Defender Network, Indigent Defense Reform

Washington, D.C. office | 1730 M Street, NW, Suite 413 | Washington, D.C. 20036
202.249.7190 phone | 202.223.2683 fax | brennancenter@nyu.edu

Attachment 5

Policy Analysis

No. 666

September 1, 2010

Reforming Indigent Defense How Free Market Principles Can Help to Fix a Broken System

by Stephen J. Schulhofer and David D. Friedman

Executive Summary

Criminal defense systems are in a state of perpetual crisis, routinely described as “scandalous.” Public defender offices around the country face crushing caseloads that necessarily compromise the quality of the legal representation they provide. The inadequacy of existing methods for serving the indigent is widely acknowledged, and President Obama has recently taken steps to give the problem a higher priority on the national agenda.

Proposals for improvement commonly stress the need for more resources and, somewhat less often, the importance of giving indigent defense providers legal independence from the government that funds them. Yet virtually every suggestion for reform takes for granted the feature of the current American system that is most problematic and least defensible—the fact that the indigent defendant is never permitted to select the attorney who will represent him.

The uniform refusal of American jurisdictions to allow freedom of choice in indigent defense creates the conditions for a double disaster. In violation of free-market principles that are honored almost everywhere else, the person who has the most at stake is allowed no say in choosing the professional who will provide him one of the most important services he will ever need. The situation is comparable to what would occur if senior citi-

zens suffering from serious illness could receive treatment under Medicare only if they accepted a particular doctor designated by a government bureaucrat. In fact, the situation of the indigent defendant is far worse, because the government’s refusal to honor the defendant’s own preferences is compounded by an acute conflict of interest: the official who selects his defense attorney is tied, directly or indirectly, to the same authority that is seeking to convict the defendant.

We see this situation as the source of grave problems. As a corrective, we propose a free market for defense services, one that would, so far as possible, function in the same way that the existing market functions for affluent defendants who are able to retain their own counsel. Though we do not doubt the importance of resource levels, we see budgetary vulnerability and implicit conflicts of interest as inherent in *any* system where the defendant’s attorney is chosen for him by the state. We seek to show that at *any* level of resources, freedom of choice for the indigent defendant can produce gains for both himself and for the public at large. We also discuss in detail how such a system could be implemented and why it can be expected to provide a practical and effective cure for many of the major ills of indigent defense organization.

Stephen J. Schulhofer is the Robert B. McKay professor of law at New York University School of Law. David D. Friedman is a professor of law at Santa Clara University School of Law.

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The great majority of people arrested and prosecuted are indigent.

Introduction

Most citizens would consider it shockingly unethical for an attorney representing one side in a lawsuit to be selected or paid, even indirectly, by the opposing party. Yet this gross impropriety occurs daily in this country on a massive scale. In criminal cases, the great majority of defense attorneys are paid directly or indirectly by the prosecuting party—the state.

The great majority of people arrested and prosecuted are indigent, and the Supreme Court has ruled that the government has a constitutional obligation to provide lawyers for people who cannot afford to hire their own.¹ To meet this constitutional obligation, three basic defender systems have emerged in jurisdictions around the country. First, public defender organizations are staffed by government attorneys who represent virtually all the indigents in the jurisdiction. Second, some cities and counties have made contractual arrangements with individual attorneys or private law firms to handle indigent cases for a fixed fee. Third, still other jurisdictions use “assigned counsel” programs. That is, private attorneys are appointed on a case-by-case basis for indigent defendants.

The danger of a publicly funded defense should be obvious: the decisions of the attorney are bound to be affected by the desires of his employer. That is true for public defenders and assigned counsel in criminal cases just as it is for private attorneys in civil cases. While the lawyers and those who assign them to cases—judges, government officials, or private firms contracting with government—are no doubt interested in preventing conviction of the innocent, they are less strongly committed to that objective than are innocent defendants. And they are likely to have other objectives, such as getting criminals off the streets and reducing court backlog, that conflict with that goal.²

If attorneys for the indigent are to be paid at all, they must be paid by someone other than their clients. The resulting conflict of

interest is clearly undesirable, but how can it be prevented? This paper proposes what we believe is a realistic answer to that question and explores ways in which it might be implemented.

The problem is by no means merely theoretical. Authorities of all stripes routinely conclude that our criminal defense systems are “scandalous.”³ As one expert noted, “year after year, in study after study, observers find remarkably poor defense lawyering.”⁴ In one Tennessee county, for example, the public defender office had six attorneys handle more than 10,000 misdemeanor cases in a single year.⁵ An average of one attorney-hour per case is plainly wrong and unacceptable. To avoid the risk of malpractice charges, public defenders in Missouri started to refuse case assignments after their individual caseload exceeded 395 cases a year.⁶ They note that there is simply insufficient time to prepare an adequate defense, which requires time to investigate the case, to interview the client and witnesses, and to scrutinize the prosecutor’s evidence. Even as we write, New York’s highest court has given a green light to a class-action lawsuit alleging that the state’s provision of indigent defense fails to meet constitutional requirements.⁷ The grave inadequacy of existing systems for serving the indigent is widely acknowledged and widely discussed.⁸ In an effort to give indigent defense reform a higher priority on the national agenda, President Obama recently appointed Laurence Tribe, one of America’s leading constitutional law scholars, to a position in the Justice Department as a senior counselor for access to justice.⁹

Our proposed solution differs in two fundamental respects from other proposals for reform of indigent defense.¹⁰ First, although we are aware of the importance of resource levels, our approach largely takes as a given the resources allocated by prior political decision to indigent defense. We seek to show that at *any* level of resources, reorganization of an indigent defense system can produce gains for both the criminal defendant and society as a whole.

The second difference is the most basic. We do not take as our paradigm a large

defender organization providing the lion's share of indigent defense services for a city or county, and do not focus on efforts (desirable though they may be) to write charters that attempt to guarantee such organizations legal independence from the government that funds them.¹¹ Nor do we see any intrinsic advantage in the principal current alternative—the system in which judges or court administrators assign to the defendant an attorney selected from the private bar. We see budgetary vulnerability and implicit conflicts of interest as inherent in both the large defender model and any other system where the defendant's attorney is chosen for him by the state. Our alternative is a free market for defense services, one that would, so far as possible, function in the same way that the existing market functions for affluent defendants who are able to retain their own counsel.

Indigent defense plays a small role in the budgets of the governments that fund it but a very large role in the lives of indigent defendants. And of all the services that governments provide to the poor, it is arguably the one most defensible on libertarian (as well as other) grounds.¹² Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that government provides to the public as a whole—law enforcement and social protection. It is not proposed to leave that broader service to the private sector; that service is one of government's most basic tasks and indeed is typically seen as the primary *raison d'être* of the state. Within that framework, government support for defense of the indigent becomes essential, since without it the legal system is likely to engage in massive violations of individual rights by convicting defendants who lack the resources to mount an effective defense and punishing them for crimes they did not commit. Such a system is also likely to deliver its social protection services poorly by incapacitating the wrong people. A government that routinely convicts the innocent is failing in one of its most fundamental functions. The state uses the effort of the defense attorney as an input to the production of verdicts, and it is there-

fore both just and efficient for the government to pay its cost.¹³

The first section of this paper analyzes the structure of the attorney-client relationship and identifies the problems that contractual or institutional arrangements must seek to minimize. The second section describes existing methods for the delivery of indigent defense services and assesses their ability to address these problems. The third and final section describes and defends our alternative, a voucher model for indigent criminal defense. We believe that a voucher model would provide a practical and effective cure for many of the major ills of indigent defense organization, to the ultimate benefit of both defendants and the public at large.

Goals and Problems in the Attorney-Client Relationship

People who are accused of crimes are interested in winning acquittal or, if that fails, the lowest possible sentence, and in achieving these goals at the lowest possible cost. Criminal defendants facing substantial prison terms will spend large sums to produce even small increases in the chance of acquittal, but at some point diminishing returns presumably prompt most defendants to economize on the expenditure of their own or their family's resources. Conversely, defendants of moderate means may run out of funds while a potentially productive defense effort remains unfinished; they may regret the inadequacy of their available savings.

Criminal lawyers, whether assigned to indigent defendants or retained by affluent ones, must make hard choices—including decisions about how much work to do (whether to investigate factual leads, research legal issues, and file particular legal motions in court) and about what advice to render in matters of judgment (whether to recommend accepting a proposed settlement, holding out for a better offer, or going to trial in hopes of an acquittal). For all of these decisions, the lawyer's personal

Indigent defense plays a small role in the budgets of governments but a very large role in the lives of indigent defendants.

Attorneys for the indigent may be selected according to how well they serve the court system, not how well they serve defendants.

interest may diverge from that of his client.¹⁴ In the case of retained counsel, as opposed to public defenders, the problem is mitigated by the fact that the lawyer must attract and keep clients, and will do so by creating and maintaining a reputation for serving their interests even when they conflict with his own. The indigent defendant has no such protection. His counsel is chosen not by him but by the court, the public defender's office, or some private organization which contracts with the government to provide attorneys for the indigent. If the attorney wishes future cases, he must indeed maintain his reputation—but with those who provide him with business, not with potential defendants.

The attorney-client relationship thus poses three sorts of problems—those involving incentives for the attorney to act in his client's interest (incentive problems), the need for information about the quality and loyalty of alternative providers of defense services (information problems), and protection against the risk of unanticipated need for criminal defense services (insurance problems).

Incentive Problems

If the lawyer's fee is based on an hourly rate set at a figure that is low, relative to the lawyer's other opportunities, or if the total resources available for the case are too meager, attorneys may forego useful investigations and may avoid trial even when there are good chances for acquittal. If hourly fees are too generous and the available resources are unlimited, attorneys may pursue expensive and unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client's interest.¹⁵ This is a problem for the client if he is paying the bills, and a problem for taxpayers when, as in the case of an indigent defendant, the public is.

As in any situation in which the choices of a buyer and seller are supported by a third-party payer with imperfect monitoring capabilities, expenditure is likely to skyrocket. Health care has been the classic case in point. Where the attorney is chosen and selected by the state, a further incentive problem arises,

since it is the state and not the client that the lawyer must satisfy if he wishes future employment.

Information Problems

In order for anyone—judge, state government, or defendant—to choose the best provider of defense services, he must have information on what will be provided. This is a particularly serious problem for the defendant, since he may have had little previous experience with the criminal justice system. The poor may be especially disadvantaged in this regard, since they generally have less access to lawyers and other sources of information about professional competence. On the other hand, because the poor are disproportionately represented among those accused of serious crime, an indigent defendant is more likely than a middle-class defendant to have faced charges before or to know someone who has.¹⁶

The information problem is less serious if the attorney is chosen by a judge or other court official, by a public defender allocating cases to lawyers under him or by a state agency contracting with an independent provider of defense services. Here the incentive and information problems are in tension. The defendant has the incentive to choose a vigorous, effective advocate but may lack the information to do so. A public official who chooses for the defendant is likely to have better information but a weaker incentive to make the best choice. The official, appraising an attorney's ability from the standpoint of the court system, has incentives to value cooperativeness, a disinclination to work long hours, and other qualities that might not win favor with defendants themselves. Providers may end up being selected according to how well they serve the court system, not how well they serve defendants.

Insurance Problems

Potential criminal defendants—which is to say, all of us—face the risk of having to incur the very high cost of an effective criminal defense. Being accused of crime is not wholly dissimilar to catching a potentially incapacitated

tating or fatal disease. Attempts to combat the problem can be enormously expensive and, in the end, may or may not prove successful. A large share of personal and family resources may be consumed in the effort. Not surprisingly, health insurance to spread the financial risks of catastrophic disease is widely available through the market. Yet insurance against the financial risks of becoming a criminal defendant is not.¹⁷ One function of a public defender system is to provide a substitute for the nonexistent insurance. Public funds are available only to the "indigent." But middle-class or even wealthy individuals can be rendered indigent by the costs of defending against a serious criminal charge. When the affluent defendant runs out of funds, he can qualify for appointed counsel, either to complete his defense at the trial level or to pursue an appeal. The economic effect is comparable to that of an insurance policy with a very high deductible.

In considering how different institutions perform the insurance function, we find it useful to distinguish between two sorts of uncertainty: uncertainty as to whether someone will be arrested (and on what charge); and uncertainty as to how complex the case will be.

The second sort of uncertainty requires further explanation. By a complex case, we mean one in which additional expenditures on defense provide substantial benefits to the defendant up to a high level of expenditure. A simple case is one in which additional expenditures above a fairly low level produce, at most, small benefits for the defendant. Simple cases include both those in which the prosecution's case is so weak that defense expenditures are almost unnecessary and those in which it is so strong that defense expenditures are almost useless.¹⁸

It is useful to further distinguish between two sorts of uncertainty regarding the complexity of the case. They are uncertainty that can be resolved before the attorney is chosen, and uncertainty that can be resolved only after the attorney begins work.

The various kinds of uncertainties affect the relative advantages and incentive problems of different kinds of payouts that an

insurance program might afford. Three basic payout methods may be distinguished: lump-sum payments, variable (fee-for-service) payments, and in-kind payments.

In the lump-sum payment approach, the insurance policy pays a fixed amount or, more commonly, one of several fixed payouts, depending on which of several risks (i.e., what sort of criminal charge) materializes. Lump-sum payments are common in disability insurance. The lump-sum system is also common in indigent defense; as we shall see, many jurisdictions pay appointed counsel a flat fee per case, with different amounts often specified for misdemeanor, felony, and capital cases.

Variable (fee-for-service) payouts are probably the most common form of health insurance coverage, and this system is also used in indigent defense; some jurisdictions compensate appointed counsel on an hourly basis for all reasonable effort both in and out of court. Fee-for-service payouts also exist in some commercial insurance policies for reimbursing counsel fees incurred in defending against civil claims.

In-kind payouts are the predominant form of coverage in health insurance provided by the Veteran's Administration and Health Maintenance Organizations (HMOs), and in pre-paid legal service plans available through unions or employers.¹⁹ In commercial insurance against civil liability, the insurer typically undertakes to defend against any covered claim, using its in-house legal staff or selecting outside counsel at its sole expense. The in-kind payment system is also the dominant form of criminal defense "insurance" in jurisdictions that rely on a public defender.

Variable payouts present large incentive problems. The insured and the service provider have only weak inducements to control costs, and monitoring by the insurer may not be fully effective, as escalating health care costs have made clear. Lump-sum payments avoid the monitoring problem for the insurer (at the cost of possible overpayment on some claims) but leave the beneficiary self-insured for the risk that providers will be unwilling to take on his case because they readily identify it as an

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Nearly all public defenders are philosophically committed to protecting the indigent.

exceptionally complex one that cannot be treated for the lump-sum fee.

The problem is different when a complex case cannot be identified as such before a service provider accepts it. In that instance the lump-sum may be adequate to induce a doctor or lawyer to commit to providing the necessary services. The risk of unforeseen complexity then shifts to the service provider, but because the lump-sum fee affects his incentives, the monitoring problem is transformed. Surveillance, directly or through reputation, is no longer necessary to prevent excessive provider services (as in the fee-for-service model) but is now required to ensure that services are sufficient, and the responsibility for monitoring shifts from the insurer to the insured.

Unlike lump-sum payments, in-kind payouts protect the insured against the risk of complexity that a service provider could detect at the outset. Their disadvantage is the same as that which the insured faces under a lump-sum payment when complexity is initially disguised. The service provider bears the risk of exceptional complexity, but monitoring by the insured is essential to ensure that adequate service is provided.

The different mix of advantages and drawbacks in each payout method helps explain why all three approaches are found in most forms of insurance for legal and medical services. Lump-sum, variable, and in-kind payout packages coexist in the market, and the insured can select the payout system that best suits his situation. In one respect, however, indigent criminal defense is an exception. As we shall see in the next section, lump-sum, variable, and in-kind approaches are all important forms of indigent defense "insurance," but neither before nor after the risk (the criminal charge) materializes is the person in need of services (the indigent accused) permitted to select the package that best meets his own needs.

The Present System

A series of Supreme Court decisions mandate publicly funded defense for indigent

criminal defendants, but not the institutional form of that defense.²⁰ As previously noted, existing methods are of three basic types: public defender programs, contract defense programs, and assigned counsel programs. In this section we consider the extent to which these approaches successfully address the problems of incentives, information, and insurance.

Public Defender Programs

In a public defender program, an organization staffed by full-time or part-time attorneys represents nearly all indigent defendants in the jurisdiction.²¹ In most jurisdictions, the defender organization is an agency of the executive branch of state or county government, and in more than half the others, the public defender is an agency of the judiciary.²² A minority, roughly 10-15 percent of the defender offices, are organized by private nonprofit corporations, which perform the defender function under contract with the city or county.²³

Although all defender systems are funded directly or indirectly by the government, there are significant differences in the government's formal control. Usually county officials appoint the chief defender, but in some places he is appointed by a bar association committee, by judges, or in the case of a community defender, by the board of the nonprofit corporation. Public defenders are elected in Florida and in parts of California, Nebraska, and Tennessee.²⁴ Election of the defender guarantees his independence from county government and the court, but at the cost of accountability to voters who may not regard acquittal or early release of criminal defendants as especially desirable.²⁵

The various selection methods do not preclude appointment of chief defenders who will guard the independence and resource needs of their offices. Nearly all defenders are philosophically committed to protecting the indigent. Some have aggressively challenged defective arrangements by declining to accept new cases or suing the court system for inadequate financial support.²⁶ Defender staffs have sometimes gone on strike to protest excessive

caseloads, which the lawyers felt were forcing them to render inadequate service.²⁷ Still, most chief defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs.²⁸ Thus, for most defenders, most of the time, accommodation to the case management and budgetary priorities of the court and county government is a fact of life.²⁹ And as a result, the great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider essential for a minimally tolerable defense.³⁰

As a solution to the problems of incentives, information, and insurance considered above, the defender approach is plausible but imperfect. The information effects are straightforward. Subject to his budget constraints, the chief defender can hire the best attorneys possible and can know their abilities firsthand before assigning them to cases. He is probably more able than the defendant to select the best attorney for the case, at least if the meaning of "best" is unambiguous. But if the chief defender values attorneys for their ability to resolve cases quickly and to persuade reluctant defendants to plead guilty, the accused might be better off making his own, poorly informed, choice. This problem is not lost on the supposedly unsophisticated defendants whom the public defender ostensibly protects from exploitation in the market. Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing" and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public defender."³¹

The twin incentive problems are to ensure that defenders do not slight the client's interest in adequate service or the taxpayer's interest in controlling costs. The latter concern is met directly by government power to fix the

defender budget and its control or influence over the choice of the chief defender. The chief defender, in turn, may lobby for more resources (just as the district attorney might), but once the appropriation is determined, he will be forced to insist that his staff allocate time and resources carefully to provide the best possible service to the clientele as a whole, within the limits of budget constraints.

The other incentive concern is more problematic. One might ask why the defender or his staff would bother to do *anything* for their clients, beyond the minimal effort required to avoid professional discipline. One answer is personal pride and a commitment to professional values. Many defender offices develop an esprit de corps, in which they view acquittals as victories and severe sentences as defeats in a continuing competition with the prosecutor's office.

To the extent that idealistic motivations are operative, the defender approach provides a distinctive way to reconcile the twin incentive problems. When government controls compensation case-by-case, as in the assigned counsel systems considered below, its need to prevent excessive service is, at every step, in direct tension with the defendant's need to ensure adequate service. In the defender approach, the state exercises its cost control function wholesale, leaving the monitoring function at the "retail" level to the chief defender and other supervisors in his office. Their annual budget leaves them (like the prosecutors) the flexibility to invest enormous resources in a particular case if their sense of justice requires it, free of the chilling effect of case-by-case external review. But even when mediated in this way, the cost-control function constrains the management of nearly all cases nearly all of the time. The annual bottom line may even create a more powerful and pervasive cost-control ethos than would exist for a private attorney who had to justify a single claim for fees in an individual case.

Considerations of narrower self-interest may join with idealism in providing incentives for adequate service. To win the esteem of colleagues, adversaries, and judges, and to pave

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the way for subsequent career moves, the staff attorney needs a reputation for vigor and effectiveness.³² The reputation effect can operate powerfully at trial but is unlikely to constrain an attorney's low-visibility decision to recommend a time-saving plea.³³ The reputation effect may even distort his advice by inducing him to recommend trial in a case that would be a "good vehicle" or to plead out some defendants in order to permit better preparation in high-visibility cases. In any event, self-interested reasons for effective performance, as reinforced by idealism and office esprit de corps, must compete with office attitudes that run in the opposite direction—that of restraining costs and cooperating in the court's desire to move cases. The adversarial attorney thus may *lose* collegial esteem or the chief defender's approval as a result of vigorous efforts. In one highly publicized case, the Atlanta public defender demoted a staff attorney because she had filed a motion asking the local judges to appoint her to no more than six cases per day.³⁴

The insurance problems are a function of the incentive issues just canvassed. Like any insurer that provides an in-kind payout, the defender has in-house control to prevent excessive effort, but it bears the risk of unforeseen complexity, and the insured (the accused) must monitor performance to prevent shortcuts and inadequate service. In one respect the criminal defendant is better placed to control counsel's effort because the decision whether to settle is legally his alone to make; the insured defendant in civil litigation often has no such protection. On the other hand, the criminal defendant has less capacity to assess litigation risks than many civil defendants, usually hospitals or manufacturers, with their own legal staffs.

An alternative possibility for monitoring is the after-the-fact suit for malpractice or constitutionally ineffective assistance, roughly analogous to the civil defendant's suit for an insurer's wrongful refusal to settle.³⁵ But the malpractice suit is virtually a nonexistent remedy for the criminal defendant.³⁶ An ineffective assistance claim is almost equally improbable

as a monitoring device. First, many departures from fully adequate service do not rise to the level of constitutionally ineffective assistance. The constitutional standard is low, and what the defendant wants to ensure is not just a minimally adequate effort, but the effort that an attorney with the right incentives would provide. In addition, the severe penalties that can follow conviction at trial mean that an attorney's recommendation to plead guilty can almost never be proved unreasonable, however much it may be influenced, consciously or subconsciously, by resource constraints.³⁷ Finally, ineffective assistance claims can often be brought only in post-conviction proceedings, and such claims *must* be brought in a post-conviction proceeding when conviction is on a guilty plea; thus the defendant's only tool for monitoring is one he must invoke without a constitutional right to professional help.³⁸

The weakness of available incentives to ensure adequate services and the absence of effective after-the-fact monitoring leave the public defender as a highly flawed solution to the incentive, information, and insurance problems. Although idealism undoubtedly motivates many defenders to seek the best outcome for their clients, the system as a whole is driven by political goals that often conflict with that objective. A court system troubled by full dockets and high crime rates may well decide that lawyers with an idealistic commitment to getting their clients acquitted, a strong aversion to guilty pleas, or a determination to ensure the lowest possible sentences are not the lawyers it wishes to put in charge of indigent defense.

Contract Defense Programs

In a contract defense program, individual attorneys, bar associations, or private law firms agree to handle a specified volume of indigent defense cases for a specified fee.³⁹ Although a contract defender could, in theory, devote all his time to indigent defense work, contract defenders invariably maintain a substantial private practice. Unlike the public defender, a contract defender normally handles only a part of the jurisdiction's indigent

defense caseload, and counties that use this approach may have several independent attorneys or firms under contract. Contract defender programs are becoming more popular, but nationally only about 10 percent of all counties use this type of program as their primary system for delivering indigent defense services.⁴⁰ Many others, however, use the contract method as their back-up system for cases that the public defender cannot accept.

Two types of contracts are common. In the “global fee” approach, the contract defender agrees to accept all cases of a certain type—for example, all felonies or all juvenile cases—for a single annual retainer. Many county officials prefer this approach because it keeps the indigent defense budget predictable and puts a cap on total expenses. That leaves the contract defender with the risk of unforeseen increases in caseload. In effect, he is selling the county not only legal services but insurance. Compared to the county government, the contract defender has much less ability to control the court’s caseload, which is largely a function of the district attorney’s charging discretion. Yet, about a third of all contract programs take this form.⁴¹

Information, incentive, and insurance problems arising in contract-defense programs largely parallel those in the public defender service. As in a public-defender program, the accused bears the burden of monitoring, and effective tools for carrying out this function are largely absent.

The information problem in a contract system arises in two stages: officials must award contracts to attorneys and then assign individual cases to one of the previously designated contract recipients. Often the first decision is made by county government and the second decision is made by a court administrator. At both stages, officials are in a good position to evaluate attorney competence. Indeed, competitive bidding focused on quality of service offers a powerful vehicle for ascertaining what qualifications and support services are available through competing providers.⁴² And compared to some assigned-counsel programs discussed below, there is more prospect that

officials will use their superior knowledge to choose the best available defender, because the county’s defense costs are not affected by the choices made—at least when the contract price is fixed in advance and excluded from negotiation or competitive bidding. There is one qualification, however. Although defense costs are independent of which attorneys are selected, total court costs are not. Thus, officials might hesitate to choose attorneys known for filing many motions, driving hard bargains, or insisting on trials, even if the lawyers are providing these services at no extra charge.

Contract programs, like public-defender programs, address only one side of the incentive problem. Because fees are fixed, either per case or per annum, attorneys have a powerful incentive to avoid *unnecessary* service, but there are few direct incentives for *adequate* service. Indeed, fixed-fee contracts give the attorney a powerful disincentive to invest time and resources in his indigent cases. Public defenders may cut costs on some cases to free up resources for others, but they cannot take home unspent cash at the end of the year. The contract defender, in contrast, is in business for a profit. Money saved on defending one case need not be spent on another; it may simply enlarge the Christmas bonus. Perhaps worse, time saved in handling indigent cases is freed up for more lucrative business, and a busy attorney is unlikely to turn away paying clients when he has the alternative of cutting low-visibility corners in his indigent case commitments. These dangers are intrinsic to all contract-defender programs and have produced seriously deficient service in many.⁴³

As a result, the contract system is seriously flawed. The existence of competing service providers in the contract system should be advantageous, but the potential benefits are lost because court officials, rather than clients, control the flow of cases to the attorneys.

Assigned-Counsel Programs

In an assigned-counsel program, a member of the private bar is appointed on a case-by-case basis for each criminal defendant. About 20 percent of American counties use assigned

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counsel as their sole method of ensuring indigent defense, and most others rely on assigned counsel for cases in which public and contract defenders are disqualified or unavailable.⁴⁴

The judge responsible for the case, or another court official, usually makes the assignment decision. Sometimes the selection system is entirely informal, and appointments are distributed ad hoc to attorneys the judge knows or to those who happen to be present in court. More typically, the assigned attorney is chosen from a list established in advance by the court, the local bar association, or by each judge for his own cases. The choice may be determined by a formal rotation plan, or it may be less systematic. All members of the bar may be eligible for the list, or there may be a few simple prerequisites, such as a certain number of years of experience. Some of the assigned-counsel jurisdictions have more elaborate systems to screen applicants for inclusion on the list and monitor their performance.⁴⁵

Nearly all courts have authority to appoint an unwilling attorney, and such a power is probably an essential backup for cases that involve extensive conflicts of interest or an extraordinarily unpopular defendant. But in many jurisdictions, conscription of unwilling attorneys is a routine feature of the assignment system; *all* eligible attorneys are included on the list, and they are obligated to serve when called.⁴⁶

A variety of compensation systems are used in assigned-counsel programs. In some, attorneys receive a flat fee per case or per appearance, usually with different amounts specified for juvenile cases, misdemeanors, and felonies. Other jurisdictions pay on an hourly basis, often with one rate for time spent in court and a somewhat lower rate for time spent in preparation.

Hourly rates vary from low in some jurisdictions to derisory in others. A June 2007 survey found many jurisdictions still paying only \$40 or \$50 per hour,⁴⁷ rates that are inadequate even to meet the attorney's office overhead.⁴⁸ Low rates are not exclusive to Southern or mainly rural states. Hourly rates

for out-of-court time stand at \$65 for Connecticut, \$50 for Massachusetts and New Jersey, and \$40 for Oregon and Wisconsin.⁴⁹

The low caps imposed in the 1980s⁵⁰ have been raised considerably.⁵¹ But as of June 2007, the maximum fee for a non-capital felony was still only \$650 in New Mexico, \$1,250 in Illinois, \$1,500 in Tennessee and Kentucky, and only \$500 in one county of Oklahoma.⁵² In Virginia, the maximum is \$445 for felonies carrying a sentence of up to 20 years, and for felonies punishable by sentences over 20 years it is a mere \$1,235—enough to fund less than two days' work at the authorized rate of \$90 dollars per hour. Some jurisdictions regard indigent defense as a "pro bono" obligation, and appointed counsel, usually conscripts, receive no compensation at all.⁵³ Although the no-compensation approach is exceptional, flat fees or fee caps are so low in many jurisdictions that hourly compensation in cases that go to trial is virtually nil.

In terms of the information, incentive, and insurance problems we have canvassed, assigned counsel programs pose numerous obvious problems. Judges and court officials who select counsel can obtain good information about attorney effectiveness, but they have little incentive to acquire such information, and even less reason to act upon it. Their own interests are best served by assigning an attorney known to be cooperative rather than aggressively adversarial.⁵⁴

With respect to the attorney himself, the goal for society as a whole is to induce sufficient, but not excessive, effort. Low hourly rates, low fee caps, and mandatory pro bono service nicely solve the latter half of the problem but leave the assigned attorney with powerful reasons to minimize the time and effort devoted to the case. The more generous states—a small minority—face different problems. Hourly rates close to market levels and an absence of fee caps give the right incentives for adequate service, but they risk unnecessary attorney effort and excessive cost. Most of these more generous jurisdictions rely on reputation effects, along with case-by-case review of attorney fee submissions, to provide cost-

control incentives, but monitoring of this sort is expensive and not always successful.⁵⁵

Monitoring may fail for another reason when that responsibility falls to an elected judge, who may benefit less from controlling costs than from encouraging campaign contributions from attorneys who receive well-compensated appointments. In Harris County (Houston) Texas, where all indigent defense is supplied by counsel selected and monitored by an elected judiciary, some attorneys have earned over \$300,000 a year from an indigent defense practice in which they enter guilty pleas for large numbers of assigned clients with whom they have minimal contact.⁵⁶ And even if not abused, a program of compensation at near-market rates puts unpredictable budget demands on the county and tends to cost more than specialized contract defenders or a public defender.⁵⁷

In terms of insurance problems, the compensation structure is crucial. If fees are paid at near-market levels, the county is, in effect, self-insured for both the risk of unusual case complexity and the risk of unforeseen increases in case volume. The defendant escapes most of the need to monitor the adequacy of service, if he can assume that the assigned attorney has no motivation to cur costs. But the county has an intense need to prevent excessive costs. And since the county may meet that need by assigning attorneys predisposed to be cooperative, the defendant still needs—but largely lacks—some vehicle for effectively monitoring the adequacy of service. In fixed-fee and low-cap systems, the county still bears the risk of unexpected increases in case volume, but the assigned attorney now bears the risk of unusual case complexity, and the burden of monitoring now falls entirely on the party least able effectively to protect his interests—the indigent accused.

The Free Market Alternative: Defense Vouchers

Existing systems resolve, with varying degrees of success, the incentive, informa-

tion, and insurance problems presented *for the state*, but in all three areas, the indigent defendant is left largely unprotected. There are few reliable mechanisms to ensure that attorneys for the indigent vigorously protect their clients' interests when those clash with the interests of the attorneys themselves, with those of the court system, or with those of the government that pays their fees. Before describing an institutional alternative, we can help focus the issues by describing three general tools for solving the client loyalty problem, which is the central difficulty each approach must address.

One such tool is to rely on incentives other than individual or institutional self-interest, in particular the attorney's personal pride, professional ethics, and idealistic commitment to helping the accused.⁵⁸ This is the solution implicit in all existing institutions. Its power is not negligible, but for reasons already discussed, we believe it is by itself an inadequate counterweight to strong organizational and financial pressures that push in other directions. A West Virginia court explained the point with irrefutable force:

We have a high opinion of the dedication, generosity, and selflessness of this State's lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.⁵⁹

While one wants to be sure that institutional reforms do not impair the valuable role of personal and professional ideals, there is a need to supplement idealism with concrete inducements and to diminish the power of countervailing pressures.

There is a need to supplement idealism with concrete inducements.

**Consumer
sovereignty is the
mechanism that
most of us use
to control the
quality of the
goods and
services we buy.**

A second solution is to use direct incentives to align the interests of defense counsel more closely with those of the defendants. This could be done, within a system in which the state selects defense counsel, by making reimbursement in part conditional on the outcome of the case, with outcomes more favorable to the defense resulting in more compensation. But there are at least two problems with this solution—the incentives and the knowledge of those running the program.⁶⁰ We want direct incentives because we suspect that the government's interest is in conflict with that of the defendant; setting up a system of discretionary rewards controlled by the state would have a certain air of hiring the fox to guard the chicken coop. Those in charge of administering such a reform could defeat its purpose by writing rules that rewarded the most cooperative lawyers rather than the most effective ones.

Even if the system were run with the intention of serving poor defendants as well as possible, those in charge might not have the information necessary to do so. This is a common problem in institutions that substitute administrative rules for market incentives. How a defendant would wish his counsel to trade off the costs and benefits of different strategies is a complicated issue, especially in deciding whether to accept a particular plea offer. Any administrative rule setting the reward as a function of the outcome will represent only a crude approximation of the correct incentives. What we want, after all, is not to reward attorneys either for persuading their clients to accept plea bargains or for persuading their clients not to accept them, but to reward attorneys for persuading their clients to accept desirable bargains and reject undesirable ones—not an easy thing to measure.

A third solution, and the one we propose, is to transfer the power to select the attorney from the court system to the defendant. So far as his own interests are concerned, the defendant has precisely the correct incentives. If available information is good enough to allow a defendant to appraise alternative providers of defense services, such a system solves the

client's problem. Even if the defendant cannot judge perfectly among alternative counsel, at least the decision will be made by someone with an interest in making it correctly; consumer sovereignty is, despite imperfect information, the mechanism that most of us use most of the time to control the quality of the goods and services we buy. And, insofar as judges or others within the court system have relevant expert knowledge, they can always make it available to defendants—as advice offered to them rather than choices imposed upon them.

One can imagine a range of reforms offering more freedom of choice to indigent defendants. We will designate as a voucher model any system in which lawyers who serve the poor have freedom to organize their practice as individuals or firms, with or without specialization, and to compete for the business of indigent clients. The voucher would be the guarantee of state payment that the accused can take with him to any individual or group provider of criminal defense services.

Because government would not control the organizational form employed by indigent defense providers, a number of different approaches would be likely to materialize—solo lawyers, small groups of practitioners, and larger firms. Providers would vary not only by size but by kind of practice, just as they currently do in most areas of legal work. Some might be generalists who occasionally take a criminal case. Most would probably be specialists—in litigation, in criminal practice, or even in a particular kind of criminal practice, such as drunk-driving cases or major felonies. These variations already exist among those who represent nonindigent defendants; the large client pool created by a voucher system would permit further specialization. We expect that most criminal defense specialists, whether individuals or firms, would serve both poor and affluent clients, though some might specialize in serving the indigent.⁶¹ Finally, we would not exclude the possibility of a government-run staff of salaried public defenders, financed by vouchers collected from clients. A public defender of this sort would not com-

promise the value of a voucher system, provided that defendants remained free to reject the public option and that private service providers accordingly emerged as alternatives.

We hypothesize that this proliferation of possibilities for the indigent defendant would provide a much needed spur for innovation, effectiveness, and loyalty to client interests. The principal risk of such an approach is twofold. Would it successfully protect the state's legitimate interest in avoiding excessive costs, and if so, would it still successfully elicit quality defense services for the poor? To explore these questions, we need to examine in detail the form of reimbursement that the voucher would guarantee. We consider two possibilities: lump-sum payments and variable payments based on services rendered.

Lump-sum Payments

A lump-sum voucher would grant a fixed amount to cover the cost of defense, with the amount presumably depending on the nature of the charge, with different rates for capital cases, other felonies, and misdemeanors. The voucher could be cashed by any provider, chosen by the defendant, who is legally eligible to practice before the relevant court.

When first implemented in a county currently using lump-sum payments for appointed counsel, this approach would cost no more than the prior system of representation; in principle, each voucher would be worth exactly what the county had previously been paying per case for indigent defense services. Over time, plan administrators might find it cost-effective to make the schedule of voucher payments more discriminating—for example, linking lump-sum amounts to the particular offense charged and perhaps to other observable features of the case, such as whether it is resolved by guilty plea or by trial. But initially at least, average payments per case would be no higher than before.

Over time, the voluntary choice features of a voucher system for both attorney and client might exert upward pressure on the indigent defense budget. If the payments offered were insufficient to attract sufficient numbers of

qualified attorneys, a county that had previously relied upon conscription would have to raise the amount of its vouchers. The resulting addition to the county's budget would not represent an increase in real economic cost but only a transfer to the public of costs that had previously been borne by attorneys conscripted at below-market rates.

Just as in the market for ordinary legal services, defense firms will wish to establish a reputation for effectiveness in order to attract clients. A lawyer might be tempted to pocket the lump-sum fee and then stint on the time he devotes to the case, but this danger already exists in the fixed-fee appointment systems that a lump-sum voucher would replace. The difference under a voucher plan is that, as in any market transaction for service at a fixed price, stinting on service risks client dissatisfaction and, through reputation, a loss of future business.⁶² There is no such prospect for preventing meager service when the flow of future clients is controlled by the county or the court.

How well reputation will work depends in part on how well informed potential clients are about attorney performance. While the state's primary role in such a system is providing the voucher, there is no reason why it cannot also provide information. The court or county government could maintain a list of attorneys and firms it considers particularly well qualified to defend the indigent. Such lists might appear to involve unseemly favoritism, but of course nearly all indigent defense systems bestow such favoritism on designated attorneys already. And the favoritism that currently exists is far more pernicious because it carries not just a positive recommendation, but a guarantee of business. In a voucher system, defendants would be free to discount the recommendation if they suspected that the state was more concerned with its own interests than with their own. Such an arrangement allows defendants to have both the informational advantage of state choice of provider and the incentive advantage of defendant choice.

So long as a lump-sum voucher is set at a level sufficient to make it attractive to crimi-

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nal defense practitioners, this approach provides one way to solve the incentive problem. Not only does it use consumer sovereignty to constrain the lawyer to act in his client's interest, it also fixes the payment obligations of the state and thus eliminates any potential for the lawyer to increase his income at taxpayer expense.

The lump-sum voucher has another valuable incentive characteristic. Since the amount provided will normally increase with the seriousness of the charge, the voucher model would tend to deter prosecutors from inflating the charge. A prosecutor who follows such a strategy, to bluff the defendant into pleading guilty to a lesser count, increases the resources available to the defense and thus makes conviction more difficult.

A lump-sum voucher provides the defendant insurance against the risk that his case will turn out to be unexpectedly complex after an attorney has accepted it. Such insurance is implicit in the provider's agreement to accept the case. Defendants choose providers in terms of the total package they offer, including service for both complex and simple cases. As long as the cases cannot be distinguished in advance, a provider has an incentive to offer good service on complex cases as part of a package intended to attract clients because this is the only way to get simple cases.

The most serious disadvantage of the lump-sum voucher is that it provides no protection for the defendant who has an unusually complex case identifiable as such before the lawyer accepts it. Because the provider gets a fixed payment, he will prefer, so far as possible, either to take only simple cases or to take complex cases only on the understanding that he will not try very hard to win them. One cannot solve this problem by merely requiring providers to agree, like common carriers, to accept all comers. All a firm need do to protect itself against complex cases is do an inadequate job of defending them, thus saving money and developing a reputation that will keep away future clients with complex cases.

This might be a serious argument against a voucher if the current system of indigent defense provided substantial insurance against this danger. But it does not. At present, many counties provide only a lump sum for indigent defense, and thus replicate this disadvantage of the lump-sum voucher without its advantages. Other counties provide variable compensation but with a low ceiling, in effect offering either a lump sum or only minimal insurance. For jurisdictions that currently compensate counsel by a lump-sum payment or an hourly rate with a low cap, a voucher structured in the same way would cost taxpayers no more and would leave defendants unequivocally better off.

Nonetheless, the problem of unusual complexity evident from the outset suggests that the lump-sum voucher is far from ideal. It is therefore important to explore possible ways to improve it. The next section analyzes several more fine-tuned forms of voucher payment.

Hourly-rate Vouchers and Other Variations

One alternative would be for the voucher to authorize payment at a predetermined rate per hour, with a firm or presumptive cap and some possibility for a court administrator to review whether the time spent on the case was reasonable. The Canadian province of Ontario has used such a model for some time, apparently with considerable success.⁶³

The hourly-rate voucher improves the system as insurance (because both lawyer and client escape the risk of unusual complexity), but it brings back some of the incentive problems that a lump-sum voucher avoids. If the hourly rate is compensatory, it leaves the attorney with an incentive to work more hours than necessary. Government review of fee claims is therefore essential in an hourly-rate voucher plan, as it is in existing programs that compensate appointed counsel at an hourly rate. Unfortunately, from the taxpayer's perspective, government review is a costly and imperfect monitoring device, while from the defendant's perspective it provides the court system with a tool for punish-

ing attorneys who serve the interests of their clients rather than those of the court.

These drawbacks would count as serious defects in this sort of voucher, except that each of them is equally present in existing hourly-rate plans for appointed counsel. The voucher approach is no worse in these respects and at least has the advantage of using the defendant's power of choice as a reason for the attorney to take his client's interests into consideration. Once a jurisdiction has opted to compensate appointed counsel on an hourly-rate basis, there are unequivocal welfare gains in offering defendants a "portable" voucher with the same compensation structure.⁶⁴

Since an hourly-rate voucher gives the taxpayer less security than a voucher for a lump-sum payment, logic alone cannot dictate the choice between these two methods of compensation. To some extent the relative merits of these alternate approaches will depend on local conditions and on the level at which lump-sum and hourly payments are set. These matters would provide fruitful areas for investigation, perhaps through small demonstration projects, as would the possibility of giving defendants a choice between lump-sum and hourly-rate vouchers. Current experience suggests that hourly rates, combined with after-the-fact monitoring, lead to more responsible and effective representation, without uncalled-for demands on the state budget.⁶⁵

Objections to Voucher-Based Reforms

Will a Voucher Approach Prove Effective in Practice?

Our primary goal in proposing a voucher approach has been to use the engine of free choice and consumer sovereignty to improve the effectiveness of indigent defense services. But several practical concerns raise questions about whether a voucher approach would really work. We examine both economic and noneconomic concerns.

Resource levels. Until now we have put aside the question of how generously indi-

gent defense services will be funded; we have simply argued that, with whatever resources society allocates to indigent defense, freedom of choice will enhance the quality of the services delivered. Among those committed to the improvement of indigent defense, however, there is an understandable preoccupation with funding levels. There are legitimate concerns that without large increases in the resources devoted to indigent defense, other reforms may make little difference. We recognize that funding levels have a major impact on the quality of defense services and will continue to do so under the voucher regimes we propose. But whatever the level of funding, the attorney's independence from his adversary (the government) is the *sine qua non* of zealous representation, and freedom of choice for the client therefore remains a critical element in any plan for achieving effective defense services.

If funding levels remain low, the pool of attorneys who serve the indigent will continue to include both able, altruistic lawyers, as well as minimally competent attorneys with few other opportunities, and highly skilled attorneys who are adept at cutting corners so that they can limit the harm to their clients while maintaining a decent income for themselves. Our proposal to end conscription, if combined with low resource levels, might reduce the number of able attorneys serving the poor. But the attorneys lost would be those who prefer not to serve and, if compelled to, can be expected to minimize the time they devote to indigent defendants. The end of conscription would not preclude able attorneys from serving at below-market rates, and in fact would help ensure that those who do serve are participating out of genuine altruism and concern for client interests.

In the absence of some version of a voucher system, raising resource levels would improve the predicament of the indigent accused in some respects and in some jurisdictions. But paradoxically, it could actually make the indigent defendant's position *worse* in others. With increased funding, public defenders and appointed attorneys may no longer find it impos-

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sible to devote adequate time to their cases, but apart from altruism, such attorneys will still lack an affirmative incentive to do the best job for their clients. In fact, if compensation is raised, fewer of the attorneys involved will be attracted primarily on the basis of altruism, so the indigent defense lawyers in the pool will have, on average, less motivation to put client interests first and even stronger reasons than at present to curry favor with court officials upon whom their positions depend. So client choice will remain essential, even with ample funding, to ensure that attorneys focus on satisfying clients rather than the court.

Noneconomic concerns. A noneconomic element also affects prospects for a voucher system. What risks do we run in making the profit motive more prominent in indigent defense practice? At present, idealism attracts many able lawyers to serve the poor, and these attorneys provide one of the few bright spots in the otherwise dismal picture of American indigent defense systems. In a more profit-oriented atmosphere, would fewer lawyers of this sort be drawn to this work? Would attorneys in profit-oriented firms lose their idealism? Parallel concerns arise with many other proposals to substitute market arrangements for various forms of public service.

These risks should not be taken lightly, especially in an area where, as in indigent defense, idealism has played a vital role. The structure of a voucher model suggests one answer to the problem. Voluntary arrangements and free choice do not mandate a preoccupation with profit. Bar leaders could still form nonprofit corporations and hire idealistic lawyers on salary, just as happens now in Community Defender Associations. Defenders organized as government agencies could likewise emphasize public service in their recruiting and daily operations. Such organizations should have no difficulty attracting clients (and vouchers) if their performance lives up to their ideals. And if altruism permitted such firms to hire attorneys at below-market rates, they would have an advantage that should translate into larger staffs, lower caseload ratios, and more support services

than profit-oriented firms could provide. The market approach we urge in this paper is not inconsistent with preserving what is best in existing systems for indigent defense.

Are Improvements in Indigent Defense Socially Desirable?

In arguing for freedom of choice and a system of vouchers to improve the quality of defense services, we have taken for granted that such improvements would be a good thing. A substantial portion of the general public may disagree. That disagreement, though seldom openly articulated, may play a large behind-the-scenes role in explaining resistance to improving indigent defense. We believe it useful to try to make explicit the reasons for that resistance and our response to them.

One source of skepticism about the value of an effective defense is a widespread view about the way that an effective lawyer can help his client. Do the special skills of the high-priced lawyer typically serve to demonstrate the innocence of someone who was falsely charged, or do they more often enable a guilty person to get off on a technicality? Much of the resistance to providing better indigent defense no doubt reflects the latter view. If that view is correct, then the main effect of improving the quality of defense services will be to make conviction of the guilty more difficult, thus reducing the deterrent effect of criminal punishment and increasing the amount of crime.

We do not know of any way to establish whether effective lawyers help the guilty more often than they help the innocent. But even if that pessimistic view is empirically correct, it represents an obvious normative mistake. Rules of criminal procedure that permit the guilty to escape on technicalities may need to be reconsidered on their merits, but there is no justification for undermining those rules covertly by making them hard for one subset of defendants—the indigent—to invoke. So long as such rules remain on the books, they reflect presumptively legitimate goals, whether related to or distinct from

protection of the innocent, and counsel for all sorts of defendants should be equally able to invoke those rules effectively in order to promote the social values they serve.

A related but even broader claim is that virtually all defendants presently convicted by our criminal justice system are in fact guilty, so that improvement in the quality of indigent defense is unimportant. Judge Richard Posner, for example, has argued that police and prosecutors, faced with tight budgets and high crime rates, have enough to do convicting the guilty and are therefore unlikely to waste scarce resources trying to convict the innocent.⁶⁶

We find arguments of this sort unconvincing on several grounds. Even if prosecutors consistently select only their easiest cases, there is no guarantee that ease of conviction will correlate closely with actual guilt—especially for poorly represented defendants. Indeed, high crime rates, scarce resources, and a weak system of defense may drive prosecutors to seek an easy conviction of the first suspect at hand rather than pursuing a more thorough investigation that might exonerate the initial suspect.⁶⁷

In addition to making it less likely that innocent defendants will be convicted, an improvement in the quality of defense services has other desirable effects. One is to reduce the injury the legal system does to innocent defendants who are eventually acquitted, but would have been released sooner and at lower cost to themselves if they had been adequately represented.⁶⁸ A second effect is to provide more complete information at sentencing and thus to make it more likely that judges will impose appropriate punishments on the guilty.

We recognize that improvements in indigent defense, however desirable, cannot be pursued indefinitely, regardless of cost. But since a voucher system can be instituted with whatever resources a state decides to allocate to defense services, the argument against our proposal is, in effect, an argument that improvements in indigent defense are undesirable even if they entail no additional cost. That argument constitutes an objection to the very nature of our adversary system.⁶⁹ It

implies that lawyers who try hardest to get their clients acquitted are, on net, an obstacle to justice, even when they are doing their job with very limited resources. This perspective strikes at the heart of our system of criminal justice. It is of interest, in part, because it draws attention to the degree to which our present system has become, at least for indigent defendants, inquisitorial in substance, even if adversarial in form.

Conclusion

Common-law jurisdictions outside the United States have long afforded indigent defendants the right to select their own counsel at government expense, and it may be that only inertia prevents us from bringing that option into American law as well.⁷⁰ If so, now is an ideal time to begin moving away from the American status quo. With pressure for reform rising and with unprecedented Justice Department interest in new initiatives, it would be a simple matter to institute a voucher plan on an experimental basis in a few federal districts, or even in cases before selected federal judges who might volunteer to participate. State governments should consider a paradigm shift as well, since most criminal cases are processed at the local level. We do not claim that our voucher proposal will solve every problem—especially if resource constraints generate a wide gulf between the demand for competent defense attorneys and the available supply. What we do claim is that at *any* level of funding, our voucher model can produce gains for both criminal defendants and society generally.

In particular, we maintain that defense vouchers will improve the quality of legal representation for the poor. Better legal representation will, in turn, produce at least three benefits to the community:

- Improving defense services will reduce the likelihood of mistakes. That is, it will be less likely that innocent persons will be wrongfully convicted of crimes.

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By denying freedom of choice to the indigent defendant, the current system represents a breach of our ideals of personal autonomy and freedom from government control.

- Improving defense services will also minimize adverse consequences to the innocent persons who would have been acquitted under current systems of indigent defense. That is, a better defense means it is more likely that those innocents will be released from custody even sooner (pre-trial) and with less disruption to their lives and the lives of their family members.
- Improving defense services will bring more complete information to the sentencing phase of the criminal justice system—making it more likely that just punishments will be imposed on those who are guilty of committing criminal offenses.

We see only two grounds (other than inertia) on which a reasonable person might defend existing institutions for defense of the indigent. One is the belief that defense lawyers are so bound by their professional ethics that they will consistently sacrifice their own interest to the interest of clients to whom they are assigned. Another, and less optimistic, belief is that almost all indigent defendants are guilty, if not of the offense charged then of something else, and that the real business of the court system is the administrative task of allocating punishments while maintaining a polite fiction of concern for defendants' rights.

These arguments are both unconvincing and inconsistent with the underlying premises of our adversary system of justice. Even more, by denying freedom of choice to the indigent defendant in what will often be the most important matter of his lifetime, the current system represents a glaring breach of our ideals of personal autonomy and freedom from unwarranted government control. We conclude that present institutions for criminal defense ought to be replaced with a voucher system, in order to provide indigent defendants with freedom of choice and to provide attorneys with the same incentive to serve their clients that attorneys have always had when they represent clients other than the poor.

Notes

This paper is based in part on an earlier article by the authors, "Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants," *American Criminal Law Review* 31 (1993): 73. Readers can find in that article a more detailed discussion of the issues canvassed here.

1. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).
2. One public defender "was . . . told by a county supervisor that he 'should join the District Attorney in his effort to keep the streets of Essex County safe.'" The Constitution Project, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," pp. 80-81, <http://www.constitutionproject.org/manage/file/139.pdf>.
3. See Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," *Yale Law Journal* 103 (1994): 1843.
4. Ronald F. Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory," *Iowa Law Review* 90 (2004): 221.
5. Remarks by Attorney General Eric Holder, Brennan Center for Justice Awards Dinner, November 16, 2009.
6. *Ibid.*
7. *Hurrell-Harring v. New York*, no. 03798 (May 6, 2010); the appeals court decision permitting the case to proceed is at <http://www.courts.state.ny.us/ctapps/decisions/2010/may10/66opn10.pdf>.
8. For a detailed presentation of the problem and proposals for dealing with it, see "Justice Denied."
9. See Carrie Johnson, "Renowned Harvard Law Professor Joins Justice Department; Laurence H. Tribe to Lead Efforts to Improve Legal Access for the Poor," *Washington Post*, February 26, 2010; Charlie Savage, "For an Obama Mentor, a Nebulous Legal Niche," *New York Times*, April 7, 2010.
10. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court ruled that a person's conviction could be reversed if he could persuade a court that his defense attorney's performance was (a) deficient, and (b) the deficient performance was so bad that it deprived the defendant of a fair trial. This is known as the "ineffective assistance of counsel" doctrine. Many advocates of indigent defense reform argue that the legal threshold for

establishing an ineffective assistance claim has been set too high. Even if that is true, we place little store in reliance on case-by-case litigation of ineffective assistance claims. Though doctrinal change could probably improve the quality of indigent defense services to some extent, claims of ineffective assistance on the record of a particular case can have little influence on the overall operations of an indigent defense system.

11. We thus disagree with Attorney General Eric Holder's view that even in present circumstances—which deny defendants a role in choosing their counsel—"every state should have a public defender system." Remarks by Attorney General Eric Holder, National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010.

12. See Loren E. Lomasky, "Aid without Egalitarianism: Assisting Indigent Defendants," in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*, ed. William C. Heffernan and Jan Kleinig (New York: Oxford University Press, 2000), pp. 84–97.

13. This implies that perhaps the government ought to subsidize defense for the nonindigent as well. We will not consider that question here, beyond noting that the problems of maintaining the independence of defense attorneys paid by the state provide a pragmatic argument for private funding where it is practical.

14. See Stephen J. Schulhofer, "Criminal Justice Discretion as a Regulatory System," *Journal of Legal Studies* 17 (1988): 53–60 (discussing how compensation arrangements for lawyers can lead to conflict with clients); and Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," *Yale Law Journal* 84 (1975): 1179 (asserting that the criminal justice system's reliance on the guilty plea puts defense lawyers in conflict with their clients).

15. Improper action in such situations, whether by prosecutors or defense counsel, need not be the result of conscious misfeasance. Strong financial rewards or penalties may subconsciously color the attorney's judgment on debatable questions of trial tactics or negotiating strategy.

16. Though indigents probably represent no more than 10–20 percent of the population, they account for 80 percent of those charged in felony cases. See Andy Court, "Is There a Crisis?" *American Lawyer* (January/February 1993), p. 46.

17. The principal exception of which we are aware is the availability of limited reimbursement for the cost of defense against certain criminal traffic offenses, as part of the benefits of American Automobile Association membership. See *Chicago*

Motor Club, Members Handbook (n.d.), pp. 11–12.

18. See Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?" *Harvard Law Review* 97 (1984): 1080 (noting that in a sample of felony bench trials, defendants won acquittal in 33 percent of cases in which defense counsel made no effort to cross-examine prosecution witnesses and offered no witnesses in defense).

19. Some prepaid legal services programs use an "open panel" plan, in which members select their own attorneys and obtain reimbursement on a fee-for-service basis, often subject to some cap on hourly rates, hours expended, or both. Far more common, however, is the "closed panel" plan, in which members must use attorneys who have been retained or employed in advance by the plan. See Thomas J. Hall, comment, "Prepaid Legal Services: Obstacles Hampering Its Growth and Development," *Fordham Law Review* 47 (1979): 851–57.

20. See *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring state courts to appoint counsel for poor defendants in capital cases); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing the right of indigent defendants to appointed counsel in all criminal proceedings in federal courts); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending the right to appointed counsel in state courts to all indigent defendants charged with a felony); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to all criminal prosecutions involving a sentence of imprisonment); and *In re Gault*, 387 U.S. 1 (1967) (according juveniles charged with delinquent acts the right to appointed counsel). Courts have declined, however, to recognize any right of the indigent defendant to a role in selecting his attorney, even where the attorney he prefers is willing, available, and qualified. For a discussion of the cases, the arguments for them, and our response, see Stephen J. Schulhofer and David D. Friedman, "Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants," *American Criminal Law Review* 31 (1993): 105–112.

21. Conflicts of interest occasionally preclude appointment of the public defender. The most common conflict situations are those in which the defender already represents a codefendant and those in which one of its staff was a victim of the alleged offense.

22. U.S. Department of Justice, Bureau of Justice Statistics, "Criminal Defense Systems: A National Survey" (August 1984), p. 3.

23. *Ibid.* These offices are sometimes called community defenders rather than public defenders. See 18 U.S.C. § 3006A(g)(2) (West Supp. 1993) (distinguishing between community defenders and public defenders).

guishing between "Federal Public Defender Organization" and "Community Defender Organization").

24. "Criminal Defense Systems," at 17.

25. *Ibid.* at 216-18.

26. See *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980) (public defender won right to withdraw from a case on grounds of excessive caseload, even though Florida statutes imposed duty to represent all indigents); John B. Arango, "Tennessee Indigent Defense Systems in Crisis," *Criminal Justice* (Spring 1992): 42 (Tennessee public defender successfully asked to be relieved from accepting new misdemeanor cases, and thus forced state to assign private counsel).

27. Michael McConville and Chester L. Mirsky, "Criminal Defense of the Poor in New York City," *New York University Review of Law & Social Change* 15 (1986-87): 586-90.

28. See Alison Frankel, "Too Independent," *American Lawyer* (January/February 1993), pp. 67-70, reporting, for example, that the U.S. Court of Appeals for the Fourth Circuit refused to rehire Maryland Federal Defender Fred Bennett. Circuit Judge Paul Niemeyer reportedly argued that Bennett's aggressiveness might make him ineffective. In the words of a Baltimore assistant defender, "[The system] creates an awkward situation for clients. We're representing them, but we're controlled by the court. When the head of our office is essentially terminated by the court [for being too aggressive], it's hard to explain." *Id.* at 70.

29. An internal study commissioned by the Legal Aid Society of New York in the late 1970s provides one telling illustration. It found:

Reacting to increased workload and proportionately diminished staff, the management and staff agreed to place greater emphasis on disposing cases through guilty pleas, clearing court calendars, and reducing backlog. . . . [T]he Society's institutional concerns with meeting its contractual obligations triumphed over the need for systemic reform. The Society . . . subordinated vigorous advocacy—'diligent,' 'vigorous,' and 'individualized' defense—to the need for productivity and efficiency.

McConville and Mirsky, at 687-88 (footnotes omitted).

30. Few knowledgeable observers would question the proposition in text, but several cases have illustrated the depth of the problem. See Mark Hansen,

"P.D. Funding Struck Down," *ABA Journal* (May 1992), at 18 (New Orleans trial judge held the city's entire indigent defense program unconstitutional because it required public defenders to handle upwards of 300 cases at once); American Bar Association, "Indigent Defense Information" (Spring 1990), at 3 (caseloads in some Florida cities stood at 1,200 misdemeanors per attorney per year and felony caseloads ranged from 371 to 539 per attorney per year, even though national standards suggest caseloads of no more than 400 misdemeanors or 150 felonies per attorney per year); Rodger Citron, note, "(Un)lucky v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services," *Yale Law Journal* 101 (1991): 490 (in Fulton County (Atlanta), Georgia, some defenders were handling more than 500 felony cases per year). For a dissenting view, see Roger Hanson, *Indigent Defenders Get the Job Done and Done Well*, National Center for State Courts, May 1992, cited in Andy Court, "Is There a Crisis?" *American Lawyer* (January/February 1993), at 46 (arguing that people represented by privately retained counsel on the whole obtain the same results as those represented by publicly financed defenders).

31. Jonathan D. Casper, "Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender," *Yale Review of Law and Social Action* 1 (1971): 4.

32. See Schulhofer, "Plea Bargaining," at 1099-1100 (discussing the need for assertiveness to achieve success within the public defender's office and to move into private practice).

33. Schulhofer, "Criminal Justice Discretion," at 53-60.

34. "Reports and Proposals," *Criminal Law Reporter (BNA)* 51 (June 24, 1992): 1285. At the time of her motion, the attorney had been assigned to handle 45 cases at a single arraignment session, leaving her only 10 minutes for each felony client.

35. See *Consolidated American Insurance Company v. Mike Soper Marine Services*, 951 F.2d 186 (9th Cir. 1991).

36. See *Shaw v. State of Alaska, Department of Administration*, 816 P.2d 1358 (Alaska 1991) (obtaining postconviction relief is prerequisite for filing action against original defense lawyer for malpractice); see also Paul D. Rheingold, "Legal Malpractice: Plaintiff's Strategies," *ABA Section of Litigation* 15 (1989): 13 ("Criminal cases present two barriers that make victory in a later legal malpractice suit almost impossible.").

37. See Stephen J. Schulhofer, "Effective Assistance on the Assembly Line," *New York University*

- Review of Law & Social Change* 14 (1986): 140–43 (discussing when public defenders recommend guilty pleas for their clients and why); see also Gary Goodpaster, “The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases,” *New York University Review of Law & Social Change* 14 (1986): 80–83 (discussing the difficulty of evaluating whether counsel was effective where the public defender entered a guilty plea on behalf of his or her client).
38. See *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding indigent death row inmate has no constitutional right to appointed counsel to pursue constitutional claim in post-conviction litigation).
39. Almost three-quarters of the contract programs rely on individual practitioners. See Robert L. Spangenberg and Patricia A. Smith, *An Introduction to Indigent Defense Systems* 14 (American Bar Association, 1986).
40. Scott Wallace and David Carroll, “The Implementation and Impact of Indigent Defense Standards,” *Southern University Law Review* 31 (2004): 245; Lawrence D. Spears, “Contract Counsel: A Different Way to Defend the Poor,” *Criminal Justice* (Spring 1991), at 30.
41. Spangenberg and Smith, at 13.
42. On the other hand, it is harder for third parties to compare quality bids than price bids, and thus harder to judge whether the contract is really being awarded to the best bid.
43. See ABA Standards for Criminal Justice § 5-3.1 at 46 (3d ed. 1992) (discussing “uniformly dismal” results in early contract programs).
44. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 4 (U.S. Dept. of Justice 2000).
45. U.S. Department of Justice, Compendium of Standards for Indigent Defense Systems (2000) vol 1-H, <http://www.mynlada.org/defender/DOJ/standardsv1/v1h.htm#Attorney>; Spangenberg and Smith, at 9.
46. See *State v. Rush*, 217 A.2d 441 (N.J. 1966) (upholding the practice in many New Jersey municipalities of conscripting attorneys to serve without compensation), reaffirmed, *Bolyard v. Berman*, 644 A.2d 1129 (1994) (“our [state] Supreme Court has expressly held that a defendant’s right to counsel . . . may be satisfied by the appointment of uncompensated private counsel”). See also *State v. Citizen*, 898 So.2d 331 (La. 2005) (“uncompensated representation . . . is a professional obligation . . . of practicing law” but the court must grant “reasonable” overhead costs); *Office of the Public Defender v. State*, 413 Md. 443 n.6 (Md. 2010) (“a lawyer has no constitutional right to refuse an uncompensated appointment”). See also David Margolick, “Volunteers or Not, Tennessee Lawyers Help Poor,” *New York Times*, January 17, 1992 (conscripted without pay); “Tennessee Lawyers Balk at Defending the Poor for Free,” *Atlanta Journal-Constitution*, January 8, 1992, at 3 (same). Cf. *Nichols v. Jackson*, 55 P.3d 1046–47 (Okla. 2002) (upholding the system of conscripting defense attorneys in capital cases, but mandating “adequate, speedy, and certain compensation”).
47. Rebecca A. Desilets, Robert L. Spangenberg, and Jennifer W. Riggs, *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* (Spangenberg Group, 2007); see also *Mooney v. Trombley*, 2007 U.S. Dist. LEXIS 15298, 30–32 (E.D. Mich. 2007) (flat rate of \$590 per case, which averaged less than \$6.00 an hour, was not prejudicial); *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (appointed attorney in Texas capital case was paid \$11.84 per hour).
48. Even 20 years ago, a court estimated that an attorney needs a fee of \$27–\$35 per hour just to cover overhead expenses for rent, library, and secretarial services. *State ex rel. Stephan v. Smith*, 747 P.2d 816, 837 (Kan. 1987). See also *Baker v. Corcoran*, 220 F.3d 276, 285–86 (4th Cir. 2000) (overhead for attorney in post-conviction proceedings was \$53 an hour); *Sheppard v. Jacksonville*, 827 So.2d 925, 931 (Fl. 2002) (\$40 an hour compensation renders counsel unable to cover overhead); *New York County Lawyers’ Association v. State*, 763 N.Y.S.2d 397, 416–17 (N.Y. Sup. Ct. 2003) (average overhead in N.Y. was \$42.88 an hour, with a range of \$26.80 to \$62.50 per hour); *State v. Young*, 172 P.3d 138, 140 (N.M. 2007) (overhead costs for a capital case was \$73.96 an hour).
49. Spangenberg Group, at 6–10.
50. See “Criminal Defense Systems,” at 5 (noting that compensation ceilings of \$500–\$1,000 were common for non-capital felonies, and in some counties ceilings were as low as \$200).
51. Maximums are now set at \$3,600 for the District of Columbia, \$3,000 for West Virginia and Hawaii, and \$2,500 in Florida and Nevada. See Spangenberg Group, at 2, 3, 6, and 9.
52. *Ibid.* at 1–10.
53. See Margolick (discussing conscription without compensation).
54. An article describing the Detroit Recorder’s Court reports:

Since court-appointed counsel depend upon the 29 Recorder's Court judges for their assignments, the system may discourage the lawyers from doing anything that might alienate the judge by impeding his or her efforts to move the docket.

In testimony given two years ago before a special master appointed by the Michigan Supreme Court in the dispute over the flat fees paid to indigent defenders, Recorder's Court judge David Kerwin spoke of "lawyers who just don't seem to really be interested in recognizing that it's an adversary process . . . that are more interested in presenting to you a situation that accommodates the moving of the docket, as though that's going to endear them to you and cause you, when you are on assignment [duty], to give them more cases."

Andy Court, "Rush to Justice," *American Lawyer* (January/February 1993), p. 58.

55. See Mark Hansen, "Indigent Defense Fee Abuses Found," *ABA Journal* (August 1992), p. 29 (describing abuses resulting from inadequate monitoring of attorney fee submissions).

56. See Judge Charlie Baird and William S. Sessions, "Public Defender Proposal Lacks Checks and Balances," *Houston Chronicle*, June 8, 2010; Texas Fair Defense Project, "Benefits of a Public Defender Office," White Paper, September 2009, pp. 3-4.

57. *Ibid.*

58. In the course of an opinion upholding conscription without pay, the New Jersey Supreme Court stated, "[A] lawyer needs no motivation beyond his sense of duty and his pride." *State v. Rush*, 217 A.2d 441, 444 (N.J. 1966).

59. *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989).

60. For a discussion of the same problems in the context of regulating a natural monopoly, see David D. Friedman, *Price Theory: An Intermediate Text*, 2d ed. (Cincinnati: South-Western Publishing Co., 1990), pp. 466-77.

61. The prospect of the legal equivalent of health care's "Medicaid mills" comes to mind as a cautionary note here, though we doubt that firms freely chosen could be any worse in this regard than many existing public-defender systems.

62. An article on Ontario's voucher system reports: "10-15 percent of the criminal certificate bar are 'constant pleader' types who rarely go to trial—and . . . clients know it. Layton Elijah, who has been rep-

resented on certificates several times since 1971, agrees that defendants know which lawyers will merely try to plead them out. 'You hear about it in jail about guys who just take the deal, lawyers who lead you astray,' he says." William W. Horne, "Canada's Cadillac," *American Lawyer* (January/February 1993), at 62-66 (discussing 1967 plan that allows qualified applicants to choose from 5,500 lawyers serving on legal aid panels). As of 2009, there were 4,382 private attorneys certified to serve on the legal aid panels. Legal Aid Ontario, "Fact Sheet: Panel Management," 1 (2009), http://www.legalaid.on.ca/en/about/downloads/factsheet_panelmanagement.pdf.

63. The Ontario Legal Aid Plan differs from a simple hourly-rate voucher in several ways. It combines payment by time with lump-sum payments for certain activities. A higher payment is provided to more experienced lawyers. Defendants who are not sufficiently indigent to qualify are in some cases able to get a partial subsidy for their legal expenses. OLAP seems to be widely regarded as a success in terms of the quality of service, but it is hard to tell whether that reflects the organizational structure, the level of funding, or features of the legal environment in which it works. Compared to New York City's legal aid plan, the OLAP is less expensive per taxpayer but substantially more expensive per matter handled. Horne, at 62-66. A recent evaluation shows a high level of satisfaction with the Ontario program among both lawyers and clients. See Legal Aid Ontario, "Fact Sheet: Legal Aid at a Glance" (2009); Legal Aid Ontario, "LAO Common Measurements Tool" (2008), http://www.legalaid.on.ca/en/about/downloads/2008_cmt-overview.pdf.

64. This remains so even though monitoring of attorney fee requests seems likely to be more effective when the state can restrict the pool of attorneys eligible to serve.

65. The comparison between the effectiveness of attorneys compensated on a lump-sum or hourly basis in current, non-choice regimes is clouded, however, by the fact that the level of authorized payments in existing lump-sum systems is typically quite low and the attorneys who serve in such regimes tend to be conscripts with powerful incentives to minimize the time they devote to the case.

66. See Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1993), p. 216.

67. See, for example, Michael Mello, "Second-guess Death," *National Law Journal* (May 21, 2001).

68. See Anthony Lewis, "The Soul of Justice," *New*

York Times, January 4, 1993, p. A15 (Indianapolis defendant spent 19 months in jail awaiting trial, including four months confined after the charge was dismissed; the public defender never told his client or prison authorities about the dismissal).

69. The argument against improving criminal defense, if correct, has some interesting implications. If improvements in indigent defense are a bad thing, if their main effect is to make it harder to convict the guilty, then so are improvements in defense for nonindigents.

Nonindigents improve their defense by spending more money on it. If even costless improvements in indigent defense, such as those that might result from moving to a voucher system, are undesirable, then costly improvements in defense are undesirable a fortiori. If improvements in indigent defense are undesirable even at the present low level of expenditure, it seems to follow that expen-

ditures on nonindigent defense above that same low level are also undesirable. So the argument holding that our reforms are undesirable precisely because they would provide improved defense for indigents also seems to imply that there should be a cap on defense expenditures by ordinary defendants, set at or below the present level of expenditure for indigents.

70. See Earl Johnson, Jr., "Equality Before the Law and the Social Contract," *Fordham Urban Law Journal* 37 (2010): 189-96 (discussing England, Ontario, and Quebec); Norman Lefstein, "In Search of Gideon's Promise: Lessons from England and the Need for Federal Help," *Hastings Law Journal* 55 (2004): 915-21; Tamara Goriely, "Evaluating Scottish Public Defense Solicitors Office," *British Journal of Law and Society* (Cardiff Law School, Cardiff Wales) 30 (2003): 84. With respect to Ontario, see also Horne.

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Attachment 6



Oregon Government Ethics Law: Overview and Developments

Presented to the Public Defense Services Commission

By Paul Levy, General Counsel

December 9, 2010

I. Introduction. The Oregon Government Ethics Law, which applies to all public officials in Oregon, including members of the Public Defense Services Commission (PDSC) and the staff of the Office of Public Defense Services (OPDS), has undergone several significant changes since it was first enacted by initiative in 1974. A major legislative overhaul of the law in 2007 included new definitions and limitations on gifts to public officials and enhanced reporting requirements for many public officials. The PDSC received training on these changes at a retreat on March 21, 2008. In 2009 the Legislative Assembly, responding to widespread dissatisfaction with some provisions of its 2007 enactment, made further changes to the law's gift and reporting requirements, among other changes.

II. Scope of the Law. The Oregon Government Ethics Law is codified in Chapter 244 of the Oregon Revised Statutes.¹ It applies to any Oregon "public official," defined as any person serving the State of Oregon or any of its political subdivisions or any other public body as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services. ORS 244.020(14).

A defining feature of the law is the imposition of personal responsibility for complying with its provisions and personal liability for any sanction imposed for violations of the law. ORS 244.260; 244.350

III. Operation of the Law. The Oregon Government Ethics Commission (OGEC) and its staff are responsible for enforcement of the law. The OGEC has issued administrative rules in Chapter 199 of the Oregon Administrative Rules.² In addition to investigating complaints concerning violation of the law, the OGEC staff will provide prompt informal and written advisory opinions to public officials. Reliance on those opinions may mitigate a sanction for violation of the law. ORS 244.282-244.284. The OGEC will also issue formal advisory opinions. The OGEC cannot impose a penalty on a public official who relies upon one of its formal opinions, although a person who does so may still be found in violation of the law. ORS 244.280. In other words, as the OGEC explains in

¹ <http://www.leg.state.or.us/ors/244.html>.

² http://arcweb.sos.state.or.us/rules/OARS_100/OAR_199/199_tofc.html.

their newly updated *Guide for Public Officials*³, there is no “safe harbor” for violations of the law.

The OGEC maintains a website with a variety of resources for understanding the law, including the *Guide for Public Officials*.

IV. Major Provisions of the Law. The following are provisions that members of the PDSC and its staff will encounter most frequently. This outline does not discuss other significant provisions, such as those addressing nepotism and restrictions upon former public officials. The *Guide for Public Officials*, referenced above, is an excellent overview of the entire law.

1. Use of position or office for financial gain. A cornerstone of the Government Ethics law prohibits every public official from using or attempting to use the position held as a public official to obtain a financial benefit, if the opportunity for the benefit would not otherwise be available but for the position held by the public official. ORS 244.040(1). A “financial benefit” can be either an opportunity for gain or avoidance of an expense. Government employees violate this provision if they conduct personal business on an agency’s time or with government equipment. Similarly, a public official could not make personal purchases from a vendor offering discounted prices for services or supplies to a government agency unless those discounted prices were also available to a significant portion of the general public.

A corollary of this rule is the prohibition on the use or attempted use of confidential information gained because of the public position to further the public official’s personal gain. ORS 244.040(4).

Public officials are permitted to accept certain statutorily identified financial benefits that would not otherwise be available but for holding a public position. ORS 244.040(2). These include official compensation, publicly paid reimbursement of expenses, certain honoraria and awards for professional achievement, and gifts that do not exceed the limitations set forth elsewhere in the Government Ethics Law.

2. Conflicts of Interest. Public officials must respond as directed by the Government Ethics Law to conflicts of interest when participating in official action that “would or could” result in a financial benefit or detriment to the public official, a relative of the public official or a business with which either the public official or a relative is associated. ORS 244.120. Different responses are required depending upon the position held by the public official and whether the conflict of interest is “potential” (“could” result in a personal benefit) or “actual” (“would” result in a personal benefit). Public employees must provide written notice of actual or potential conflicts of interest to the person who appointed or employed them, and request that the appointing or employing authority dispose of the matter giving rise to the conflict. Members of commissions must publicly announce the nature of the conflict before participating in any official action on the issue giving rise to the conflict, and then:

³ <http://www.oregon.gov/OGEC/index.shtml>.

- For potential conflicts of interest, following the public announcement, the commissioner may participate in official action on the issue that gave rise to the conflict.
- For actual conflicts of interest, following the public announcement, the public official must refrain from further participation in official action on the issue that gave rise to the conflict, unless the official's vote is necessary to meet a number of votes required for the official action, in which case the public official may vote but must otherwise refrain from any discussion of the matter. This exception does not apply when there are insufficient votes because of a member's absence when the governing body is convened.

There are a number of important exemptions from the law's conflict of interest provisions, including when a conflict arises from a membership or interest held in a business, occupation, industry or other class that is a prerequisite for holding the public office or position; when the financial impact would affect a public official to the same degree as all other inhabitants of the state or a smaller class or identifiable group; and when the conflict arises from an unpaid position as officer or member in a nonprofit corporation that is tax-exempt under Sec. 501(c) of the Internal Revenue Code. ORS 244.020(12).

3. **Gifts.** The gift sections of the Government Ethics Law are among its most vexing provisions, and also among those provisions that were significantly modified by the 2009 legislation. Generally, public officials may receive gifts. Indeed, the acceptance of lawful gifts is an exception to the general prohibition, discussed above, on the use of an official position to gain personal financial benefits. In most instances, the questions for public officials concern whether a gift may be accepted with or without limitations and the nature of any applicable limitations.

Generally, the law prohibits a public official from receiving gifts that exceed \$50 in a calendar year from a source that has a "legislative or administrative interest" in the decisions or votes of the public official. ORS 244.025. If the source does not have such an interest, the public official can receive unlimited gifts from that source. ORS 244.040(2)(f). Thus, the analytical framework for the law's gift provisions require an understanding of what it means to have a "legislative or administrative" interest, and how the law defines "gifts."

- A. **Definition of "legislative or administrative interest."** **CHANGED!** This concept was significantly modified by the 2009 legislation in a way that narrows the application of the gifts provisions. Prior to the 2009 amendments, the focus was on whether the source of a gift had an economic interest, distinct from that of the general public, in any official action of the public official's governmental agency. Now the focus is on an interest in the decisions or votes of the particular public official to whom a gift is offered. ORS 244.020(9); ORS 244.040(2)(f). Thus, now it's possible that one public official may be able to accept a gift without limitations while another, working in the same setting, may not because the authority of the public officials may differ. For instance, the OGEC, by administrative rule, has said that making a recommendation or giving advice in an advisory capacity does not constitute a "decision." OAR 199-005-0003. If a

person does not have authority to make a decision or to vote on a matter of interest from a source, or the particular interest is not subject to a vote or decision by a person, that person may be permitted to accept a gift from the source without limitation.

B. **Definition of “gifts.”** A “gift” means something of economic value that is offered to a public official, or to relatives or members of the household of the public official, without cost or at a discount or as forgiven debt, and the same offer is not made or available to the general public. ORS 244.020(6)(a). This is a fairly unremarkable meaning. The crux of the “gift” definition, however, is the many things of economic value that are statutorily exempted from the definition. Some of these include:

- a. “An unsolicited token or award of appreciation in the form of a plaque, trophy, desk item, wall memento or similar item, with a resale value reasonably expected to be less than \$25.” ORS 244.020(6)(b)(C).
- b. **CHANGED!** The cost of admission to or the cost of food or beverage consumed by a public official at a reception, meal or meeting held by an organization when the public official appears as a representative of a public body. ORS 244.020(6)(b)(E). Prior to the 2009 legislation, this provision only applied if the public official was a scheduled speaker at the event.
- c. **CHANGED!** The reasonable expenses for attendance by a public official at a convention or other meeting at which the person is scheduled to deliver a speech or make a presentation or appeal on a panel if the expenses are paid by any unit of federal, state or local government, a recognized Native American tribe, a membership organization to which the public body pays membership dues or a not-for-profit corporation that is tax exempt under Sec. 501(c)(3) of the Internal Revenue Code.
 - i. Prior to the 2009 legislation, the “not-for-profit” corporation, in order to qualify, had to receive “less than five percent of its funding from for-profit organizations or entities. This language, which effectively excluded the Oregon Criminal Defense Lawyers Association (OCDLA), was deleted from the law. Thus, for instance, with the change, assuming that OCDLA had a legislative interest in a public official’s vote or decision, that public official may receive travel expenses in excess of \$50 from OCDLA in connection with the appearance of that official as a presenter at an OCDLA program.
 - ii. However, even before this amendment, the OPDS had received a staff advisory opinion from the OGEC that *any* public official could receive such payment from OCDLA because OPDS paid for staff membership in the organization, making it a “membership organization to which a public body pays membership dues.”

- d. Contributions to a legal expense trust fund established for the benefit of the public official for purposes of defending against actions brought in connection with performance of the person's public duties. ORS 244.020(6)(b)(G).
- e. Waiver or discount of registration expenses or material at a continuing education event that bears a relationship to the public official's office and at which the person participates in an official capacity. 244.020(6)(b)(J).
- f. Food or beverage consumed by the public official where no cost is placed on it, and entertainment that is incidental to the main purpose of an event attended by the public official. ORS 244.020(6)(b)(L)&(K).
- g. **NEW!** Anything of economic value that is received as "part of the usual and customary practice" of the person's private business or employment or volunteer activities, and the thing bears no relationship to the person's public office or position. 244.020(6)(b)(O).

C. **Entertainment expenses. REPEALED!** Prior to the 2009 legislation, public officials were prohibited from soliciting or accepting any gifts of entertainment by ORS 244.025(4). This provision was repealed. Now such "gifts" cannot exceed \$50 in a calendar year from a single source with a legislative or administrative interest.

4. **Statements of Economic Interest. CHANGED!** The 2007 legislation required quarterly and annual "verified statements" from many public officials that were widely condemned as overly intrusive and unnecessarily burdensome. In response to these concerns, the 2009 legislation eliminated entirely the requirement of quarterly filings and narrowed and simplified the matters to be reported on the annual filing. The 2009 legislation did add the Executive Director of OPDS to the list of public officials required to file annual statements. ORS 244.050(1)(g)(MM). Members of the PDSC are not among those required to file reports.