

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 10, 2009

1:00 pm to 4:30 p.m.

Senator Hearing Room, Courthouse Square
555 Court St., NE, 1st Floor
Salem, Oregon

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's October 23, 2009 Meeting (*Attachment 1*) Barnes Ellis
2. **Action Item:** Approval of the Minutes of PDSC's September 9, 2009 retreat (*Attachment 2*) Barnes Ellis
Commissioners
3. **1:15 p.m. to 2:15 p.m. Executive Session1** PDSC Subcommittee
Report from PDSC Subcommittee regarding Ross Shepard
Contract Proposals for Lane County Invited Witnesses
(*Handouts*)
4. **Action Item:** Approval of Service Delivery Plan for Lane County Barnes Ellis
(*Attachment 3*)
5. **Action Item:** Contract Approvals Barnes Ellis
(*Handouts*) Kathryn Aylward
6. **Action Item:** Commission Approval of Service Delivery Plan for Polk County Barnes Ellis
(*Attachment 4*)
7. **Action Item:** Review and Possible Approval of Drug Court Guidelines Barnes Ellis
(*Attachment 5*) Ingrid Swenson

1 This portion of the commission meeting will be an executive session that will include a review of contract proposals to provide public defense legal services beginning on January 1, 2010. The executive session is being held pursuant to ORS 192.660(2)(f).

8. **Action Item:** Review and Possible Approval of Strategic Plan, Biennial Report (*Attachments 6 and 7*)

Barnes Ellis
Ingrid Swenson

9. OPDS Monthly Report

OPDS Management
Team

Please note: Lunch will be provided for Commission members at 12:30 p.m. in the meeting room.

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

Next meeting: The next meeting of the commission is scheduled for January 28, 2010 from 10am to 3pm at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Friday, October 23, 2009
12:45. – 4:45 p.m.
Mt Bachelor Village Resort
19717 Mount Bachelor Drive,
Bend, Oregon 97702

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Becky Duncan
Paul Levy
Caroline Meyer
Billy Strehlow
Amy Jackson

(Meeting was called to order at 12:40 p.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's September 10, 2009 Meeting

Chair Ellis noted two corrections to the unofficial transcript of the September 10 meeting.

MOTION: Chip Lazenby moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 4 Contract Approval

Kathryn Aylward described the contract proposals being recommended to the Commission for approval. She said that workload would remain the same for most contractors. She noted that two attorneys had been added to the post conviction relief consortium contract. The expanded group of four attorneys will handle 180 cases per year out of a total of approximately four or five hundred. The consortium's cases are principally from Marion and Umatilla Counties. She reported that a new contract was being proposed for Polk County. At Commissioner Lazenby's request discussion of that proposal was postponed until the discussion of Item No. 3 on the agenda – the Polk County Service Delivery Plan. Commission Lazenby also asked

that the Multnomah Defender, Inc. proposal be handled separately since he had an actual conflict of interest regarding that proposal. Kathryn Aylward said that OPDS was recommending approval of a new contract in Tillamook County with the Rose City Defense Consortium. In Marion County she said both criminal contractors had sought an increase in their caseload quotas and that the recommended agreements included an increase for both that matched the number of cases they were actually being assigned. OPDS was not recommending discontinuation of any existing non-death penalty contract. The only controversy regarding the process involves contractors who perceive an advantage on the part of a competing contractor. For death penalty cases, there are two new contracts being proposed, with Dan Koenig and Deb Burdzik, both of whose applications were reviewed by the Death Penalty Peer Panel. The hourly rate paid to death penalty contractors is not the same for every provider since the rate covers overhead costs, which can vary. With respect to death penalty mitigation specialists the peer panel planned to review proposals at its meeting immediately following the PDSC meeting. She reported that there were several other applicants whose proposals were not yet ready for PDSC approval. Contracts consume approximately 75% of the funds allocated to the Public Defense Services Account. Most of the balance goes to non-routine expenses.

Chair Ellis inquired about the impact of a repeal of the tax measures passed by the 2009 legislature. Kathryn Aylward explained that regardless of the outcome of the election on the tax measures, the account was already \$14.1 million short with the possibility that \$3.5 million could be forthcoming from the proceeds from HB 2287, the court fee bill, which would leave a deficit of \$10.6 million. There may be a decrease in caseload or additional funds allocated by the legislature to reduce or eliminate that deficit.

After inviting comments from those attending the meeting, the Chair accepted a motion to approve contract proposals number one to 68 on the non-capital list and number one to 26 on the capital list, except items numbers 3 and 42 for Marion County, number 51 (Multnomah Defenders) and number 57 (Polk County consortium proposal.)

MOTION: Shaun McCrea moved to approve the contracts; Chip Lazenby seconded the motion; **VOTE 5-0 with one abstention (Hon. Elizabeth Welch)**

Commissioner Welch said that she did not understand the function well enough to vote on the contract proposals.

MOTION: Shaun McCrea then moved to approve contract No. 51 (Multnomah Defenders, Inc.); Peter Ozanne seconded the motion; hearing no objection, the motion carried: **VOTE 4-0 with two abstentions (Chip Lazenby and Hon. Elizabeth Welch)**

With regard to proposed contracts for criminal cases in Marion County, Kathryn Aylward reported that under the current contract 76 percent of the cases were assigned to MCAD and 24% to PDMC. She said that the increase to PDMC would allow them to add at least one more attorney if that was how they chose to use the additional funds. Commissioners recalled that there had been an expectation that a larger proportion would go to the public defender's office over time and they asked that additional information be provided at the Marion County review in March of 2010.

MOTION: Chip Lazenby moved to approve the Marion County contracts; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0 with one abstention (Hon. Elizabeth Welch)**

Action on proposal number 57 was postponed until later in the meeting.

Chair Ellis said he was impressed that the process seemed to have worked reasonably well, which was a tribute to Kathryn Aylward and her staff and good relations with the contractors.

Agenda Item No. 3

Commission Approval of Service Delivery Plan for Polk County

Ingrid Swenson said that the Lillegard firm had been providing public defense services in Polk County since 1984. The firm is reported to provide quality representation, particularly in criminal cases. Conflict cases are generally assigned to attorneys from Marion County. In the course of preparing for the Commission review, it was learned that parties to juvenile dependency proceedings were not represented between court hearings because it had been the practice of the juvenile court to terminate attorneys' representation at the conclusion of each hearing. She reported that the court had changed its practice and was now continuing attorney appointments.

Kathryn Aylward said that conflicts represent approximately 25% of the caseload in Polk County.

Commissioner Ozanne inquired about the impact of the court's high caseload per judicial officer and its effect on providers. Mr. Lillegard said that the attorneys in Polk County are very experienced and don't believe they are overworked. He said that the current district attorney had taken office in January of 2008 and that they were now seeing 30 and 40-count indictments which they had not seen under the previous district attorney. As a result the firm has been exceeding its contract quota. Commission Lazenby inquired whether the change in charging practices actually cost PDSC more. Kathryn Aylward said that OPDS uses the alleged incident date to identify counts on which it will award multiple credits. Alternate theories alleging the same offense do not receive multiple credits. Regardless of the number of counts the maximum number of credits that will be awarded in most cases is five. Commissioner Ozanne suggested that the Commission might want to send a letter to the district attorney. Mr. Lillegard said that the new district attorney was doing what he told the voters he would do if he were elected as district attorney. Mr. Lillegard said he would be willing to meet with the district attorney and let him know how his charging practices were affecting public defense. Chair Ellis said that at this stage that would be more appropriate than sending a communication from the Commission. Peter Gartlan said that prosecutors are required to charge offenses that arise in the same criminal episode in a single charging instrument. In addition, the legislature has authorized permissive joinder of crimes having a connection with the first crime or set of crimes. Counts are often joined in cases alleging multiple sex crimes that occur on different days. The prosecutor could file separate cases or join them. There can be as many cases as there are criminal episodes.

Kathryn Aylward described the proposed new consortium of attorneys which she was recommending be approved by the Commission. Three attorneys, Martin Haberkost, Steve Walls and Scott Howell would each work halftime under the contract. Since OPDS cannot determine what the caseload under a unit-based system would be compared to the caseload assigned on an hourly basis there may still be a need for a private bar list for criminal cases. Mr. Lillegard said all three attorneys were well respected by the judges in Polk County.

Commissioner Welch said she was pleased that representation would now continue in juvenile dependency cases but she encouraged Mr. Lillegard to look into increasing representation for children since Polk County seems to be out of step with other counties in this respect. Mr. Lillegard said that steps were being taken to bring practices up to standard.

Chair Ellis said that by approving the proposed contracts, the Commission would be approving a revised service delivery plan for the county and asked that a final report be prepared for the December 10, 2009 PDSC meeting. The Commission then approved contract proposal number 57 from the Polk County Conflict Consortium, having previously approved the proposal from the Lillegard firm.

MOTION: Shaun McCrea moved to approve the contract; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 5-0 with one abstention (Hon. Elizabeth Welch)**

(Recess)

Agenda Item No. 2 Commission Approval of Service Delivery Plan for Lane County Criminal Cases

Ingrid Swenson said that OPDS staff was recommending a change in the service delivery plan for the criminal conflict caseload in Lane County. She said that the panel approach did not appear to be well suited to the circumstances in Lane County, including the unusual caseload mix that includes twice as many felonies as misdemeanors and the limits on funding for law enforcement. The caseload is inappropriate for training significant numbers of new attorneys, which was one of the principal goals of the panel approach. The major quality concern expressed by justice system representatives in Lane County was the lack of oversight and the failure to mentor and monitor new lawyers. There were reported to be far too few lawyers qualified to handle serious cases and too many lawyers eligible to handle the lower level cases. OPDS received a proposal from a very experienced group of lawyers to form a consortium to handle a portion of the more serious cases. Ingrid Swenson said that were the commission to allow OPDS to explore a contract with this group, the balance of the caseload could be handled by expanding the group's proposal or seeking a proposal from another group or continuing a smaller panel or list.

Commissioners discussed what role the Commission should play in developing and approving an alternate proposal. Chair Ellis said that he had concluded that the panel arrangement wasn't working and asked whether other Commissioners were in agreement. He noted that lawyers in Lane County had strongly supported an open panel but that an open panel conflicts with quality. Commissioner Potter agreed and said he could support a consortium of 12 to 15 people that set aside a small portion of cases for new lawyers to help them get training and get into the courtroom since the public defender's office is not able to perform that function because of the lack of turnover on their staff. Commissioner Ozanne said that there would probably be a lack of turnover in a consortium as well and inquired how a portion of the caseload could be reserved for new attorneys and whether new Lane County lawyers shouldn't be encouraged to go elsewhere. Ingrid Swenson said that, while not a perfect model, the Clackamas County consortium had established a mentoring program that provides training to a number of new lawyers who are then assessed by the consortium board for possible membership when a vacancy occurs. Most of those mentored are not hired. Commissioner Potter said that some consortium attorneys might decide after a period of time to reduce the proportion of public defense cases in their workload, eventually making room for a new member or members to be added.

Chair Ellis inquired how the transition would be handled between what is currently in place or available, and a large consortium. He suggested that PDSC could let it be known that a change was going to be made, probably to a system with one or two consortia and a list that would be phased out. Commissioner Potter said he did not favor starting a small consortium with the panel still in its existing form and that once it became clear that the panel was being phased out, Lane County attorneys might come up with other proposals. Commissioner Ozanne said that he would like for the Commission to review any proposals that were forthcoming and have an opportunity to examine the structure and the personnel involved, probably in an executive session. Chair Ellis asked whether Ross Shepard could assist in the process as a mediator or facilitator. Commissioners Ozanne and McCrea supported his involvement. Kathryn Aylward said it was important to have an early resolution and suggested that a sub-committee of commission members assist with the screening of proposals and provide input to staff. Commissioner Potter said the subcommittee could meet and start open discussions the following week and could plan for the full Commission to review proposals at the December meeting. He recommended that the direction to Lane

County lawyers should be that the Commission is interested in a unit based contract or contracts with a reduced number of lawyers with a certain type of caseload. Then the question would be is there a group that wants to bid for all of the cases and if so, who would be the administrator? If there is not one group there could be two with different administrators.

Commissioner Ozanne apologized to any Lane County applicants who had been kept waiting on their contract proposals. Chair Ellis invited Elizabeth Baker to comment.

Elizabeth Baker said that she and three other attorneys had submitted a contract proposal. Their interest was in protecting the interests of their clients. They did not believe the panel model was working for their community anymore. The panel was a big project. They wanted to create a smaller group with increased oversight. While she values mentorship and has served as a mentor to others, criminal defense is not a hobby or a way to figure out what you really want to do. She and two other members of the proposed consortium, Mike Buseman and Brad Cascagnette, described their professional backgrounds and the training they had received. They said that they were considering having two administrators and were talking to potential board members. Ms. Baker said that their longer term goal would be to have a larger, more well established group handling all of the conflict caseload. They could probably bring in four more attorneys in this proposal once the community was convinced there would be a change. One limitation is the lack of knowledge about how many "cases" as defined by OPDS, are available. A very large consortium would not work the way the Commission would like it to.

Commission Ozanne asked whether consideration had been given to using a non-lawyer administrator. Ms. Baker said they the four attorneys all preferred practicing law to administering a consortium so that they were open to the idea. She said that their bid had assumed that they would start their contract work on January 1, 2010 but that they would need four to six weeks to expand the proposal. She would prefer to start with the group of four and have time to get it up and running and then bring on two or four more within the first six months. Brad Cascagnette said that all four of the attorneys in the proposed consortium concentrate almost 100% of their practice on criminal defense and they would like other members who also specialize in criminal law. Mike Buseman said that as part of their practice they would need to do some retained work for financial reasons, probably about 20 to 25%. He said that if a contract were awarded to the four attorneys the balance of the cases could go to attorneys on a court appointment list or continue to go to the panel. The group indicated a willingness to work with Ross Shepard to discuss possible options with other attorneys. Kathryn Aylward explained the process for adding other names to an existing proposal. She also said there had been more than 1893 conflict cases in FYE 2009. Elizabeth Baker said they had submitted a proposal for 793 cases.

Greg Hazarabedian suggested that the Commission issue a statement that could be distributed to the Lane County legal community setting forth the preliminary decisions it had made so that people would have information they could act on.

Commissioner Ozanne said that the legal clinic at the Lane County Public Defender's Office was started at the University of Oregon Law School with a federal grant. He said that the Commission might want to look at the use of this asset in meeting the training needs of criminal defense attorneys.

Chair Ellis summarized the Commission's position on a change in the service delivery plan for Lane County by saying that through no one's fault the current panel structure was not working. Between October and December a subcommittee consisting of Commissioners Ozanne, McCrea and Potter would work with staff and the community to create a proposal or proposals for review at the December 10 meeting. Any such proposal or proposals would be likely to build on the proposal that has already been submitted. The subcommittee would

probably enlist the services of Ross Shepard to facilitate a meeting with interested parties. Proposals would not need to involve a January start date. The Commission would be willing to work with any emerging proposal to find a realistic start date.

Marc Friedman was invited to comment. He said that after the September meeting he had met with most of the judges and with Alex Gardner to get their input on panel members since he realized that the group was too large. He also let panel members know that the hourly system would probably be going away. He prepared a draft proposal that would have included the four attorneys who submitted the consortium bid but there has been no resolution. He believed that clear direction from the Commission would be helpful. One of the fundamental values of the panel was its openness. He felt that the court appointment structure worked well and that a proposal could be designed that would meet all of the Commission's expectations. Mr. Friedman agreed that it would be helpful to have Ross Shepard involved in the process.

Commissioner Ozanne said that he was not interested in an open panel and that the rate issue was secondary to the structural one.

Agenda Item No. 5

OPDS Monthly Report

Peter Gartlan reported that the United States Supreme Court had denied *certiorari* in *State v. Bowen*, relating to non-unanimous verdicts. He also noted an Oregon Supreme Court decision that set out criteria for trial judges to apply in determining whether a mandatory sentence would be disproportionate as applied to a particular individual. He hoped that the case would give trial level attorneys more bargaining power. He said that 3,000 out of an estimated 5,000 prisoners potentially eligible for increased earned time under House Bill 3508 had received notice of their eligibility and that the court had approved the additional credits for 900 inmates, or about 90% of those whose cases had been processed. Currently there are 10 appeals pending. The state will be challenging whether the denials are appealable judgments. Ingrid Swenson said that the measure was designed to minimize public defense costs and that the right to counsel doesn't arise until there is an objection by another party to the reduced sentence. OPDS is tracking the number of appointments in order to report to the legislature on the cost of the measure. The practice in some counties is for the district attorney to object to all reductions.

Kathryn Aylward said that House Bill 2287 continued surcharges on court fees that otherwise would have sun-setted and added new fees and increased existing fees. Up to 35% of revenues under the measure could go to OPDS. She said that she is serving on a workgroup that will recommend distribution of the fees.

Ingrid Swenson suggested moving the December meeting to the afternoon. She said that in response to budget limitations the Commission would be meeting less often but for longer time periods. Time will be set aside in several of the 2010 meetings for retreat-like discussions among Commissioners. In addition to the topics listed in the proposed agenda for 2010, she said that the Commission would discuss boards of directors for contract offices and a model attorney evaluation procedure.

MOTION: John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting was adjourned 3:40 p.m.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Friday, October 23, 2009
12:45. – 4:45 p.m.
Mt Bachelor Village Resort
19717 Mount Bachelor Drive,
Bend, Oregon 97702

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Becky Duncan
Paul Levy
Caroline Meyer
Billy Strehlow
Amy Jackson

(Meeting was called to order at 12:40 p.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's September 10, 2009 Meeting

0:01 Chair Ellis The first item is the minutes of the September 10, 2009, meeting. Are there any additions or corrections to the summary minutes? Are there any additions or corrections to the transcript? I had a couple there. On page 12, at 57:22, it should be Judge Panner (sp) not Judge Tanner. Most of us who know both of those gentlemen realize how significant that change is. Then on page 31, the last line of the passage that begins at 2:25:50, there should be the word "not" inserted between the words "I have" and the word "seen." Any other additions or corrections?

MOTION: Chip Lazenby moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

1:20 Chair Ellis We are going to rearrange the order of agenda items. We will start with the Contract Approval item. Kathryn, if you want to present.

Agenda Item No. 4 Contract Approval

1:37 K. Aylward I have given you a handout on the contracts on which we have reached agreement, our office and the contractor. I'm sorry I couldn't get this to you sooner. As you can imagine things were happening at the last minute, people were showing up at the conference and continuing discussions even up through yesterday. We talked about a way to present the information to you. Historically what we had done was something that said that this is their old contract compared to their new contract. We who work with the numbers all the time know that it is really difficult to isolate changes in a contract. If you used to have 10 misdemeanors and now you have 10 felonies, you still have 10 cases and it is twice as much money. Is that an increase in your contract? Well, no, not really. What we thought we would do is just present the contracts that we are asking you to approve starting January 1. These are the number of cases, the amount, who the contractor is, the county, and roughly the case types that they do. In most cases it is basically, "What you did the last two years you are going to do again for the next two years."

I have a couple on the list that I want to comment on. Number 45, it is "PCRELIEF LLC." As you know we have been trying for a long time to get a group together that would be basically PCR central. We had a contract with Noel Grefenson to do PCR and Dick Cowan. The two of them got together and put in a proposal that also included Tom Bostwick and Jon Weiner in Marion County. The four of them will be taking PCR cases from all around the state. As some of you have heard, unfortunately Charles Simmons, who was doing a lot of the PCRs for us in eastern Oregon, was killed in a car accident. A lot of those PCRs that might have gone to the group that he was with will now be taken by this PCR Central.

4:00 Chair Ellis Pause a minute. Do you have a sense whether that is the bulk of the PCR work or what percentage of it?

4:04 K. Aylward No, in fact, it is not. The contract is for – they had wanted 180 a year. There are probably between four and five hundred PCR cases a year. They wanted enough to sustain the four of them. We were a bit conservative with the caseload. We said, "Look, we are not going to give you all of the ones you asked for." It is probably a third of the PCR caseload.

4:34 Chair Ellis And the ones they are taking are inmates at the state penitentiary in Marion County?

4:42 K. Aylward And also in Umatilla.

4:45 Chair Ellis Oh, they are doing Umatilla.

4:45 K. Aylward They have been already doing those. Each of them has been supplementing their current contracts with cases from eastern Oregon as needed. They have been doing the work. They are familiar with the counties and now will just be available to take a larger caseload because they have more members.

5:05 Chair Ellis This may be a hard question. What percent of the PCR caseload are capital cases?

5:13 K. Aylward Less than one percent.

5:17 Chair Ellis Of the PCR caseload?

5:17 K. Aylward Yeah. The PCR caseload is probably five hundred a year and the death sentence PCR cases, although they last a long time, new ones are only coming in at the rate of a handful a year.

5:32 Chair Ellis But they consume a great deal more time.

5:33 K. Aylward Absolutely, and we are always looking for attorneys who will take death sentence PCR cases.

5:43 Chair Ellis At the present time do those go to the capital contractors?

5:47 K. Aylward Most of them do, yes. The PCR relief group doesn't do aggravated murder and they also don't do murder. It is just anything under that.

No. 57 on this list is a new group. We actually had two proposals. In Polk County right now we have Chris Lillegard who has been providing services for a long time. The rest went to a private bar list mostly of attorneys who also work in Marion County. This time we received two proposals, each for all of the remaining caseload that Chris Lillegard's office was not taking. They were very similar bids and we consulted with the court and have offered a contract to Polk County Conflict Consortium which is Martin Haberkost, Scott Howell, and Steve Walls.

6:47 Chair Ellis Are they in Dallas? Are they the Marion County group that comes over?

6:52 K. Aylward I think they have offices in Salem. I am not 100 percent sure. Steve Walls is currently doing the drug court in Polk County and doing it hourly. We folded that drug court work into this consortium contract.

7:07 Chair Ellis My memory, refreshed by the materials we got, is that that was the significant missing piece of Polk County. You feel good about this I take it?

7:18 K. Aylward I do. When the court strongly urges me to do something I feel pretty good about it. I feel like I am not making a horrible mistake.

7:31 I. Swenson It is premature. The Commission is going to be reviewing the Polk County structure today. It is really part of your general agenda today to decide if that is the direction you wish to go.

7:45 J. Potter Will we hear about the consortium members themselves and the bid they put in and what it entails?

7:46 K. Aylward It is confidential until contracts are awarded.

7:52 J. Potter Are we going to be asked to vote on this without knowing anything about it until after we vote?

8:01 Chair Ellis You sound like Congress.

8:03 K. Aylward I am happy to share anything with you that you need to know in order to make a decision. I have things with me.

8:20 C. Lazenby If your concern, Commissioners, is about maybe wanting to separate this out until after we have had the discussion about Polk County, I am going to ask that Item 51 be separated because I have an actual conflict of interest on that.

8:35 Chair Ellis Why don't we hold this one out from the omnibus motion and then be sure we cover it when we do Polk County.

8:47 K. Aylward That is fine. I would also like to talk about No. 59. Rose City Defense Consortium is a Multnomah provider that has been doing the Gresham court and some conflict felonies that Portland Defense Consortium couldn't take. They have also been taking cases in Tillamook hourly. The court in Tillamook approached them and encouraged them to put in a proposal to take all of the felony caseload in Tillamook County and a portion of the dependency caseload, effectively the same type of cases they have been taking now on an hourly basis, but with more attorneys. We did get a bid for Rose City to take cases in Tillamook. They had bid on

that before and we had said no in the past. Now they actually have an office in Tillamook and one of the attorneys has a house there. We won't have the commuting issue with them.

- 9:45 Chair Ellis Up until now I think that Tillamook has been the only remaining area that was all single appointments.
- 9:49 K. Aylward Up until the last two cycles. We have Dawn McIntosh who is also listed here. She was the first to have a contract in Tillamook. She had been doing both misdemeanors and felonies and some juvenile work. We spoke to her and said that we were thinking about taking all of her felony work away and she was fine with that. They are both happy.
- 10:30 Chair Ellis On Marion, how did you resolve the allocation issue between Marion PD and MCAD?
- 10:50 K. Aylward The proposal from MCAD and the proposal from the public defender's office in Marion had both requested an increase of 600 cases in their quota. In fact, each group was already taking more cases than that under their quota. I think they had the notion that there was only a spare 600 out there and that they each were fighting over the same 600. What we have ended up doing is continuing their contracts. Basically, whatever caseload they had been getting under the current contract is now what their quotas are. We are putting their quotas at the number that they have actually been getting. In the public defender's case that was because they were taking cases beyond their quota. Now if we set their quota at what they were doing that gives them sufficient funding to add somewhere between one and two FTE attorneys. They will be doing the same work as before but have more attorneys to do it.
- 11:50 Chair Ellis What we are looking at is agreement with each on the application they each made?
- 12:00 K. Aylward That is correct. Basically they each wanted 600 and they each got 582 or something. It wasn't quite 600 for either.
- 12:06 Chair Ellis There wasn't a collision this week as I was lead to believe there might be?
- 12:11 K. Aylward No. I remember you, Mr. Chair, once saying, "They all signed so it must be acceptable to them." Certainly the distribution of cases will stay the same. The number of pickup of days or however they are distributing cases is unchanged. In terms of, "How big is my piece of the pie?" it should not be affected by these new contracts; it stays the same as it was.
- 12:44 J. Potter I am unclear on that. They have both gone up by 500 but the percentage of their total caseload is the same? They had different numbers of cases right?
- 12:54 K. Aylward Yes.
- 13:00 J. Potter How can 500 not change the percentage?
- 13:05 K. Aylward What I should have said was they each got what they asked for. Because what is happening now is that the cases are falling in this mix or this mix and it is here. If you don't change the pickup schedule, whatever the ratios are it is going to stay the same. It probably wasn't exactly 500 cases. I can check.
- 13:35 J. Potter In the past you told us what their percentage has been. That is the PD was picking up 20 or 25 percent of the cases. MCAD was picking up – whatever those numbers were. Under this new contract is that percentage different?
- 13:50 K. Aylward The PD's quota increased 520 cases per year and MCAD's increased 626.
- 14:13 J. Potter Does that change the percentages?

14:14 K. Aylward I don't know. It would take me like a minute and a half to do it.

14:28 I. Swenson Is their case mix relatively the same, Kathryn, or are we comparing apples and oranges?

14:30 K. Aylward You mean as to each other? Yes.

14:40 J. Potter The only reason I am asking the question is when we started the Marion County PD's office, there was some notion that possibly they would increase, over time, the percentage of cases that were available in Marion County.

15:00 K. Aylward They wanted more caseload. They wanted the full 600. That was really the discussion - the appropriateness of that. I said, "We can look at it but what I am hearing from the court is that you are currently maybe a little overworked and you are still a new organization. This gives you enough funding to add another attorney, gives you time to hire and train, and see how that affects your workload and your mix and then we can look at it again." I worry when I do stuff on the fly that I am going to mess up. If you want to set that aside as well, then if we are moving on later to talk about the others I can calculate that and let you know.

16:07 J. Potter I would like to know.

16:11 K. Aylward With the capital contractors they are actually in alphabetical order by first name, except the two at the bottom are new contracts, Dan Koenig and Deb Burdzik. These are people that the peer panel reviewed - "recommended" is not the right word, but we did discuss the possibility of having contracts with these two people and the peer panel supported that. On these, some of the hourly rates are slightly different. If someone does death sentence PCR the rate is a little bit higher. I worry sometimes that people will just take the number of hours and total value and divide them and think that is somebody's hourly rate. It isn't necessarily the case. Some of these contracts have an additional amount of funding if someone has a case that has a huge amount of banker boxes of files and they need \$100 bucks a month to rent a storage shed somewhere. Some of these contracts may have something like that in them but generally a lot of the death penalty contractors said that they didn't need any change in their contract.

17:34 P. Ozanne These are hours of others besides the principles when you see 3600 hours?

17:36 K. Aylward That is in two years. Maybe another question is, "Who is not on this list?" We decided fairly early on that we were going to wait and deal with the requests for proposals that we received for mitigation. We are having a death penalty peer panel meeting tonight after this meeting. I want to talk to that group a little bit about when you enter into contracts how do we know that these people are going to be used by you? What should our involvement be in connecting the death penalty attorney with the mitigator. We want to talk about some of those things so we have 13 mitigator proposals that we have read but haven't really looked at yet, a couple of death penalty investigator bids. We have a few more of the death penalty people that we didn't get to because they were out of town or in trial. In Grant County we did not receive a proposal. In some of the neighboring counties the bids said, "I am willing to take Grant County cases." I hope and suspect that it was an oversight that the existing contractor missed the deadline and is in trial with a murder case. So Grant is not done. We have plenty of time between now and the end of the year to come up with a caseload coverer.

19:16 Chair Ellis On the regular contracts, the non-capital ones, are there names missing from the list of people we had contracted with before that we are not contracting with now?

19:36 K. Aylward I would have remembered a phone call like that, I think. No. There isn't anybody.

19:45 Chair Ellis Are there any on that list that are controversial within the region?

19:55 K. Aylward Well, what they tell me is maybe different during contractor negotiations. It seems that there is controversy everywhere and a lot of it has to do with a perceived advantage that someone else has. In Washington County, with what we call ODAC, Oregon Defense Attorney Consortium, there is always some discussion about the complications that have arisen because of the early case resolution program, how all of the changes in that county are impacting the, the repercussions, so there is a lot of discussion about that. Where else did we have trouble with?

20:50 Chair Ellis What percentage of the fund gets consumed by these contracts?

20:52 K. Aylward Seventy-five percent.

20:58 Chair Ellis Is that consistent with prior experience?

21:00 K. Aylward Yes.

21:00 Chair Ellis And the balance I take it occurs with appointments and overages and other things happening?

21:10 K. Aylward No. Most of the balance goes to non-routine expenses. A portion of it does go to hourly paid attorneys. A portion of it goes to transcripts. It is about one million a year we spend on transcripts for appeals. That is the breakdown.

21:37 Chair Ellis If the voters repeal the tax increase and we get cut, will we be able to deal with that?

21:47 K. Aylward Well, no. I don't know. Right now we are looking at – our budget is \$14.1 million in the hole. We have the possibility of the \$3.5 million other funds from the House Bill 2287 fee bill, which would then leave us \$10.6 in the hole. That is not making any assumptions about the tax measures, or the revenue forecast, or anything else that might impact the state as a whole. We are proceeding in the hope and assumption and expectation that either caseload will drop off, expenses will drop off and we will have less of a problem, or that the legislature will find a way to fill that \$10.6 million hole, possibly through the fee bill as well.

22:47 P. Ozanne That is assuming then that the ballot measures, the taxes that have been passed by legislature, will stay in effect?

22:57 I. Swenson The \$10 million assumption has nothing to do with what happens to those tax measures. Those would create an additional deficit that the legislature would have to fill from somewhere.

23:11 K. Aylward Whether they would choose us or choose someone else.

23:13 I. Swenson And we have been asked, like other agencies, to submit five and 10 percent reduction options. It is the same process we used during the last session, which was to say, “Well, if you cut us five percent that means we can offer public defense services for a lesser period of the biennium.”

23:35 Chair Ellis I note on Lane we are approving the public defender and the juvenile. There is, I know, another application that we are going to consider from a regional planning point of view later. Are there any other pending ones besides the Lane Consortium? In other words, is this going to be the whole deal or are there other contracts you are negotiating but haven't presented here?

24:15 K. Aylward Other than a possible addition of a contract in Lane County and Grant County, as I said, where we still haven't resolved it, everything is done for the counties. We did receive a sort of follow up from the panel regarding possibilities there.

24:34 Chair Ellis But the panel wouldn't be a contract.

24:39 K. Aylward Well, I don't know.

24:39 Chair Ellis In the past it hasn't been.

24:43 K. Aylward That is correct. After the last meeting we have had supplemental material provided to us from the panel that looks like it could be a contract if that is what the Commission wanted. I consider it a proposal. I will put it that way.

25:01 Chair Ellis Other questions? If we are ready, I would entertain a motion to approve all of these, that would be Nos. one to 68 of the regular contracts and one to 26 of the capital contracts, except this motion would exclude No. 51, which is Multnomah Defenders. It would exclude No. 42, which would be MCAD, and No. 3, which is the public defender in Marion County, and No. 57, the Polk County Conflict Consortium group. So is there a motion to approve all but the ones I just enumerated?

MOTION: Shaun McCrea moved to approve the contracts; Chip Lazenby seconded the motion;

25: 07 Chair Ellis Is there further discussion?

26:10 Hon. Elizabeth Welch I am curious. Are people being offered the opportunity at this meeting to object or complain?

26:30 K. Aylward Fine by me.

26:36 Chair Ellis We have always been pretty liberal. If you have strong interest raise your hand. Alright, the motion has been made and seconded. All those in favor?

VOTE 5-0 with one abstention (Hon. Elizabeth Welch)

26:54 Hon. Elizabeth Welch I am abstaining, Mr. Chair.

27:00 Chair Ellis Okay. Did you want to make a statement on that?

27:02 Hon. Elizabeth Welch Well, it is the same issue as last time. I don't understand the function.

27:09 Chair Ellis Okay. Still there is a quorum. There is a majority. Thank you, Kathryn. Bring back to us, as the day unfolds, the other ones. We could do MDI. Kathryn, wait just a second. Do you want to announce your...

27:30 C. Lazenby I have an actual conflict of interest on Item No. 51, Multnomah Defenders. My wife works for Multnomah Defender so I cannot participate in the discussion around that contract. I should be shown in the record as not participating.

27:51 Chair Ellis Anything about MDI that you think we should know?

27:55 K. Aylward I think Keith is here. Is there anything they should know?

28:07 K. Rogers No, unless I can ask for more.

28:13 S. McCrea Do you want us to approve the contract?

28:13 K. Rogers Please.

28:20 Chair Ellis I would entertain a motion to approve No. 51.

MOTION: Shaun McCrea moved to approve contract No. 51; Peter Ozanne seconded the motion; hearing no objection, the motion carried: **VOTE 4-0 with two abstentions (Chip Lazenby and Hon. Elizabeth Welch)**

29:00 Chair Ellis Any abstention? Alright, show the abstention. On the other three we are going to have discussion later in the day. I am very impressed that the process seems to have worked reasonably well. That is a tribute to you, your staff, and the good relations with the contractors.

Agenda Item No. 3 Commission Approval of Service Delivery Plan for Polk County

29:09 Chair Ellis Why don't we go next to Polk County if we can get Chip back.

29:36 I. Swenson I am sure he will come back as soon as he is able. I should point out that Chris Lillegard is here somewhere. He is the principle contractor for that county if you have any questions.

30:04 Chair Ellis Welcome, Chris.

30:04 C. Lillegard Thanks.

30:04 Chair Ellis Tab three of our materials is the revised draft of the service delivery plan for Polk County. Did you have anything you wanted to comment on?

30:24 I. Swenson Nothing additional. I will just remind you that Mr. Lillegard's firm has been the principle public defense provider for Polk County for many years. I understand from this morning, since 1974.

30:43 C. Lillegard 1984.

30:40 I. Swenson Excuse me, 1984, providing defense services there. Over that period of time there has been a frequent need for conflict providers, obviously, since this is a law firm. Most of those providers have come from, in recent years, anyway, from Marion County. I think you used to get some from Yamhill. The evaluation that people gave us of the work of this firm was excellent, particularly in criminal matters. We realized when we were there that there had been a long term practice on the part of the juvenile court to discontinue appointments of attorneys in juvenile dependency matters upon the completion of a hearing, so Mr. Lillegard's firm was literally terminated from representation. At first we were puzzled why there was no on going representation being provided to those clients. Then we were informed that that was because they had removed them from the case. I understand that that practice has now changed. The court has agreed to continue those appointments so that parties will be represented between hearings. One of Mr. Lillegard's associates attended the Juvenile Law Training Academy, which was held last week, which emphasized some of the things that should be happening between these kinds of hearings. I know he will share that with other members of the firm. I am planning to introduce Mr. Lillegard to Angela Sherbo with the Juvenile Rights Project. She is going around the state providing trainings to attorneys on parent representation issues. I want her to be acquainted with Mr. Lillegard and to see if there is some work she can do to help bring those lawyers up to speed on what the expectations would be between hearings. Any other changes since we have been there that you are aware of?

32:50 C. Lillegard No, I think that was the main thing, talking to the judges and staff person that did the disposition orders and who used to just put in there that we were terminated, so we got the order and put the file away. Since your meeting at the courthouse we have changed that with

our presiding judge, Judge Horner, and the staff in the juvenile office. We are just changing the way that things have always been done.

- 33:16 Chair Ellis In the report the one obvious issue with Polk County was the overage cases. What is your estimate of the caseload percent that you are conflicted with?
- 33:33 C. Lillegard I think - at one time I thought - nine to 10 percent or something like that. It has been a while since I thought about that. I know the two consortia - "two groups" is a better way to put it - did some research into that. I don't know what the numbers are now. I think it is two different groups of three lawyers each that put in this bid for the conflicts.
- 33:58 Chair Ellis That is how I understood it from Kathryn.
- 33:58 K. Aylward That is correct and I am trying to calculate the number even as we speak. I will tell you. It is actually higher because in juvenile cases where Chris Lillegard's office can only take one party, what he is thinking of is probably accurate for that. As far as total caseload it is probably 25 percent of what is out there.
- 34:30 Chair Ellis That is actually a number closer to what we are hearing in other communities.
- 34:32 C. Lillegard That would make more sense because we sometimes have two parents and different children.
- 34:40 Chair Ellis On the criminal cases you have been there a long time and you are a firm so you have the attribution rule. I would guess that you get a fair amount of conflict built up over time.
- 34:57 C. Lillegard We run into that. Not as much as you might think, but we do run into it where somebody will be a victim. We have some of that.
- 35:09 Chair Ellis Kathryn, do you want to talk about the consortium bid on the overage?
- 35:20 P. Ozanne Chris, the caseload in the court, as we see in footnote four is substantially above the average of the state. I would assume that makes practicing more complicated and difficult. Do you have any sense of that from talking to other lawyers who are practicing in other counties?
- 35:32 C. Lillegard No, not really. We are busy but we are well organized. We are a block from the courthouse. The jail is right there. Everybody has been at it a long time. We are not overrun or overworked, I don't think. I don't have a sense how it is in Marion County. I don't have a clue how many cases these guys take or anything like that. I just know that we are able to do what we are required to do.
- 36:04 P. Ozanne I wasn't thinking of it as a criticism of you. I was thinking, actually, given the process that we go through that we sometimes get feedback from other people. I was even going to think about recommending that we send a letter to the Chief, or someone, I think the Chief, just to say that we are concerned about the level of caseload in this county because it impacts public defense, but you are saying that it doesn't.
- 36:27 C. Lillegard Well, we have a new DA as of January 1. I think we have been up significantly over our ...
- 36:38 Chair Ellis This coming January?
- 36:39 C. Lillegard No, this last January, and somebody maybe ought to say something because we are getting the 30-count indictment, or Measure 11s, or the 40-count indictment - I have one now that is 40 counts. It will still boil down to one or two or something.
- 37:03 P. Ozanne The numbers we have are 2008. You are saying that 2009 could even be worse?

- 37:06 C. Lillegard In our contract work here it is crazy. We are way up. I think Shelley and my staff finished July and we were \$21,000 over our monthly contract amount. It is partly because of the charging practice that we are now seeing coming out of the DA's office. I have one gal charged with a bunch of theft cases where there are 16 different files, 16 different case numbers. I know he is talking about kind of your normal resolution. She admits to 12 of them but it skews our numbers. It is taking more of our time - I am shooting myself in the foot here - but it is taking more time for us to deal with this. When Tami reports to Shelley and we have these numbers, it is crazy. New DA, fairly inexperienced, this is apparently his practice. I don't know if he will learn and figure out another way to boil it down so that it is more realistic. It is what is happening and if you look at our '09 numbers here you will see what I am talking about. It is crazy. We just work harder.
- 38:46 Chair Ellis Do you want to talk about the consortium?
- 38:53 K. Aylward Sure. As I said it is Martin Haberkost, Steve Walls, and Scott Howell. They are each putting in that they would be about half time under the contract. I think that they will probably end up working more than that. It is difficult to know. What we were aiming for is having the entire caseload that is not handled by Chris Lillegard's office covered under this. But one of the things that I may have mentioned before to the Commission is that it is a little bit difficult when we are comparing our data from hourly billing attorneys. If they get an A felony and a misdemeanor and they work 10 hours on the A felony and three hours on the misdemeanor, they are just going to submit one bill that says A felony, 13 hours. We don't necessarily know that there was another misdemeanor case in there. We just don't track them that way. When we look at our data for the number of cases that are not going to Chris Lillegard's office, there might actually be more caseload than we see. As far as I am concerned there are also good people on a private bar list that have been doing the work. It is possible that we would keep this new group to their quota and if there are extra cases it is available for the people that are currently private bar people. There is a possibility that this group might say, "Wow, we better add some members, or one member, because the caseload is more than we anticipated. These are attorneys who are all well known to the court.
- 40:25 C. Lillegard I don't see any of them here but these are three guys that we see a lot over there. We don't have any bar in Polk County itself that wants to take the conflict cases. We have one or two lawyers in Monmouth that don't want to do it. There just isn't anybody else around. The conflicts have always gone to some guys from out of Marion County. These three gentlemen are well respected by the judges and we see them a lot. They will do a good job.
- 41:04 Chair Ellis Any other comments or questions?
- 41:07 Hon. Elizabeth Welch I do, about your representation of children in dependency cases. I am not going to make a speech but I am so pleased that something happened about that other issue and I would just want to encourage you to maybe look into or talk with people who think that children do need to be represented. Maybe get a sense about where that is coming from because from the discussion last time it was just pretty clear to me that everybody in the legal community of Polk County has the same perspective on it. It is very much out of step with what is going on.
- 41:53 C. Lillegard I think that we learned that what we were doing was out of step. I think we have taken steps, and are taking steps to get up to speed, if you will, as to what is appropriate and what the standard is. I don't think we have met that standard but we will take steps to do that. I think we heard loud and clear what changes needed to be done. We are sensitive to that.
- 42:22 Chair Ellis So, Ingrid, the way things stand you will add a section to the report. It feels to me like it has all resolved itself. The one issue that we had seems to be pretty well dealt with. If we approve that contract today then we can approve a revised plan that will have a paragraph that

will include that description at our December meeting. Is there a motion to approve contract No. 57, the Polk County Conflict Consortium?

MOTION: Shaun McCrea moved to approve the contract; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 5-0 with one abstention (Hon. Elizabeth Welch)**

- 43:31 Chair Ellis Thank you.
- 43:33 C. Lazenby Can I get a little clarity on one of these pieces you were just talked about. You were saying that you have a new DA and they are charging big. You end up with a client who has 16 counts but when you look at it it is really four thefts. I guess I need to understand how that really impacts us in terms of our budget and the way we pay for cases. You followed that up by saying, "We are going to resolve them in the same way. We are all going to end up with the same sort of plea arrangements. It is a function of the DA now charging 20 charges when before they might have added eight." Does that actually cause us more cost? Does it matter to us?
- 44:13 K. Aylward It depends. What we have as our bright line is the alleged incident date of the offense. There is history behind everything. We used to say that a case is a case and you get credit for taking a case. Then as soon as DAs thought, "Um, I will just file one case and put all my charges under one case number. Then that attorney only gets paid once instead of for each case." Then the attorneys said to us, "This isn't fair. Now I am getting less money because the DA has changed." So then we said, "Okay, how about this? We will say 'incident date of alleged activity.' That will be the bright line, but you also have to have a separate count. You can't have a single count that says, you know, 'On or about you did this stuff and it covered two days.' That is not going to count. You at least have to have a count in the charging instrument and it has to be a separate incident date." We limit that again because of the baseball bat in the back of pickup truck along Hwy 97 hitting the heads of mailboxes. That was a hundred different victims, a hundred different locations, a hundred different counts, and someone said, "I want a hundred credits." We limit it generally to five as a max. It will have some impact depending on whether it is actually a separate criminal episode that is in the same charging instrument.
- 45:53 C. Lillegard We have this one fellow with two different victims pm sex abuse and such charges. They both report that it happened many times. He has 20 counts but different incident dates, one for each victim. I am dealing with a 40 count indictment. It doesn't make any sense to me. In terms of our reporting to the staff what we are dealing with, that is what we have. We just finished a 30 count deal. We just haven't had that before. The DAs before boiled it down to, "We will charge three of these or something." You are going to get the same net result, if the person is guilty, in terms of jail and what have you. It does have an impact, I think, because what we are reporting in our numbers this calendar year are over what we had contracted for because of that.
- 46:54 Chair Ellis Sounds like the old consecutive versus concurrent. How discreet is the episode?
- 47:00 P. Ozanne Sounds to me like we have a DA who is driving our budget.
- 47:06 I. Swenson Only to a certain extent.
- 47:03 P. Ozanne To a certain extent but is it enough for us - again I am interested in letter writing today, apparently - but the most direct way would be a letter from the Commission with a cc to the chairman of the Public Safety Subcommittees.

47:28 I. Swenson As I recall, when he ran for office, one of the issues on which he ran was that he intended to prosecute more frequently and allege more counts. I think this was all part of a discussion that the community had when he ran for that office.

47:48 P. Ozanne Maybe the community doesn't know what that means. I am certainly not suggesting that a more vigorous prosecutor who is charging more crime is the problem, but monkeying with the charging instruments in a way that generates additional cost – that is what is happening.

48:05 C. Lillegard I think he is trying to show that he is aggressive as a new prosecutor and doing what he said he would do. I don't think he has any clue how it impacts us. He is not thinking about that at all. He is a fairly new lawyer. He practiced criminal defense for a couple of years and all of a sudden he is the prosecutor. I think he is doing what he promised the people he would do. I certainly don't want to go tell him how to charge things, but I am reporting to you that it is impacting what is going on.

48:39 P. Ozanne We are not meaning to implicate you, Chris. Maybe our letter is more diplomatic if we are going to send one. It seems to me this is partly why we visit these counties and find things out.

48:54 Hon. Elizabeth Welch Are there also alternative theories of criminality in that situation?

49:03 K. Aylward It used to be allowed and now our contract specifically says you cannot claim for additional theories or whatever. No, that wouldn't trigger it.

49:17 C. Lillegard That is what he is doing but we are talking about the incident date. The victim with 20 different dates of abuse.

49:23 I. Swenson He is probably seeking consecutive sentences.

49:25 C. Lillegard He is doing that too. Can we talk to him about that?

49:33 Chair Ellis My sense is you are communicating back and forth reasonably. So far we have been able to deal with it in terms of unit credit fairly.

49:47 C. Lillegard Yeah, and I think what we could do and I know this fellow pretty well would be to get done with this calendar year. We get all squared away and I would be happy to go over and sit down with Stan and talk about how he is impacting us. Maybe he would see that and make some changes. He could do things differently and still be an aggressive prosecutor. It wouldn't skew this budget for our little county.

50:15 Chair Ellis I would rather we took a little bit of a wait and see approach. I think a discussion with you would be exactly right. I am shy of a Commission communication to a DA. I think we would get a pretty negative reaction. We could send Peter down to talk to him.

50:44 C. Lillegard And I was never here.

50:50 Chair Ellis We have approved the contract.

50:52 K. Aylward I have the answer to Commissioner Potter's arithmetic question.

51:03 Chair Ellis Is this on Marion or Polk?

51:08 K. Aylward This is Marion.

51:15 Chair Ellis I think we are done with Polk. Thanks. Now, let's revisit Marion.

- 51:22 K. Aylward Under the current contract the ratio is 76 percent of the cases is going to MCAD and 24 percent to the public defender's office. In the contracts that I am asking you to approve that split would now be 73 percent to MCAD and 27 percent to PDMC. I caution you in a couple of regards. One is that the number of cases alone does not reflect the whole picture of workload. 10 more PVs it is not the same thing as 10 more Measure 11s. The second one is that in the PD's case if they are already overworked and I give them 10 more cases at \$300 each that is not sufficient to add an attorney. It goes in chunks. There is no point giving them more unless it is enough more work that they can hire another attorney. It is difficult to get exactly what you want because you have to do it in chunks or not at all.
- 52:28 Chair Ellis I thought I understood that their caseload now should be sufficient to add one more attorney?
- 52:35 K. Aylward That is correct, at least one more. There were other things that they wanted to have addressed in their bid. When we looked at all the proposals we weren't saying, "Okay, we are going to fund this and this." We basically said, "We can't fund everything that you are asking for. If we gave you this amount you can pick and choose which things can be postponed. Maybe you can't give the salary increases you were hoping for." We leave it up to them to decide how to use their funds.
- 53:16 Chair Ellis Any other questions? Any other discussion on Marion?
- 53:21 P. Ozanne Well, I wanted to follow up on Commissioner Potter's – my recollection, and I would have to go back and look at the service delivery plan, but I have a sense that we had an expectation that some day over time we would have a larger proportion than currently exists in the public defender office. I don't know if the board and Mr. Sermak have developed a business plan that tells us the trajectory they are on. I would like to hear about that at some point.
- 53:51 Chair Ellis We do have on our agenda a Marion County review in March. I would entertain a motion to approve contracts No. 42 and 43.
- MOTION:** Chip Lazenby moved to approve the contracts; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0 with one abstention (Hon. Elizabeth Welch)**
- 54: 24 Chair Ellis One abstention. Is Elizabeth here yet?
- 54:29 I. Swenson I don't believe so. If we could take a brief recess...
- 54:37 Chair Ellis Okay. We will do that, then do the management report and then Lane County.
- (Recess)
- Agenda Item No. 2 Commission Approval of Service Delivery Plan for Lane County Criminal Cases**
- 54:54 Chair Ellis We had a meeting in Eugene a month or two ago. We had quite a bit of input there. Ingrid, do you want to summarize where we are on Lane County?
- 55:06 I. Swenson Yes, Mr. Chair. You all received three documents as part of the Lane County material. Actually two, I beg your pardon. Unfortunately, the second of those documents, which is from February of 2004 doesn't help you a great deal today. It was only one of a number of reports that Peter Ozanne prepared in connection with the earlier review of service delivery there. It got included by mistake. What you really have is just an update that includes information that OPDS staff gathered prior to your September meeting. Then it includes the summary of the information that was provided to you at that September meeting. What it didn't include was a recommendation from OPDS staff. I have distributed to you today, and

made some copies available for audience members, a recommendation that we are submitting to you. Essentially what that document does is recite the information that was provided prior to your September visit and tries to draw some conclusions about what all of that meant. I think the impression that staff received was that for a number of reasons, the panel approach to handling the criminal conflict caseload in Lane County was not well suited to the circumstances in Lane County. That had to do with a number of factors which are listed in this document, one of which is the unusual caseload mix in that county which includes approximately twice as many felonies as misdemeanors, just the opposite of what you find in most counties. That is because of limited law enforcement resources. It is not an easy place to be bringing in new lawyers on a regular basis. One of the principle values of that panel was that it did permit the entry, on a regular basis, of new attorneys into public defense work. I think the largest concern you heard about the operation of the panel was difficulty in overseeing, monitoring quality, and also in mentoring new lawyers even though a principle value was to bring in new lawyers. There was no formal structure that we were made aware of for training, mentoring, supervising those lawyers. The judges and the district attorney testified that they had concerns about that aspect of the work of the panel. I want to let you know that I did talk to Mr. Gardner, the district attorney, prior to this meeting. I had sent him a copy of the transcript and asked if he had any further comments for you. He said, "Well, you know, when I read that over it sounded more negative than it should have because, actually, we have some great lawyers here. I want you to know that. I must have just been thinking more negatively than I usually do because I come off sounding more critical than I would like to." I certainly wanted to pass that on to you. As the Commission is aware, we have had a proposal during the RFP process from a group of Lane County attorneys who are willing to pull together a consortium of attorneys and take a piece, at least, of that conflict caseload. One of the things that Judge Bearden and the other judges told you was that they have far too few lawyers to handle the more serious cases, and too many lawyers eligible to handle the lower level cases. They said they cringe whenever one of these senior attorneys decides not to take cases anymore. This would be a consortium of very experienced attorneys who would be prepared to handle very serious cases and take a good portion of those. If you approved of OPDS going forward to discuss a contract with someone other than the panel administrator in Lane County, we would want to talk about this proposal and then, ultimately, what to do with the balance of it and whether this Commission wants to continue with a smaller panel, or take a different approach, returning to a list and such a list could be administered either locally or through OPDS as is the case in other counties with a court appointment list. Or you could consider coming back in the near future and hearing further from potential providers. It may be that the folks that have submitted this proposal would be interested in expanding that proposal to include more of the caseload, or there might be an alternate proposal from another group willing to look into taking some part of that. There are lots of options. I suppose the action that we would recommend that you take today, and you can certainly hear from the many people who are here from Lane County, but our recommendation would be that you authorize us to explore contracts other than the contract with the panel administrator for Lane County. It would be a change in the structure of the system that you had previously approved.

1:01:12 Chair Ellis

Any comments or questions?

1:01:25 J. Potter

Ingrid's plan is to authorize them to look at something. Would we authorize something other than the panel without determining exactly what that is? We would have until when, do you think?

1:01:42 I. Swenson

Well, I certainly would want Kathryn to comment. The proposal that we received would be for a contract beginning January 1. The Commission can extend its deadlines if it wishes to and we could seek a brief continuance of the current contract if that were acceptable to the contractor. I don't think that you have to make a decision.

1:02:14 Chair Ellis I would think the contractor would need a lot more warning than our December meeting if this is to start on January 1.

1:02:30 K. Aylward If you decided at the December meeting to proceed and approve a contract, it doesn't have to begin January 1, it could begin February 1. I personally am not tied to the calendar year for whatever you end up doing.

1:02:47 J. Potter And I suppose, Mr. Chair, if we agreed that we will pursue something other than the panel, we authorize negotiations to take place for that at this meeting. That puts them now on notice that something will take place very soon, whether it is January 1 or February 1, but everybody will be aware of it and start making plans.

1:03:10 P. Ozanne John was your assumption that staff would proceed negotiating with respect to the consortium now?

1:03:24 J. Potter It would be something other than the panel, right? If I understand what Ingrid is suggesting that we authorize, then that would be the case - something other than the panel, a consortium, or hybrid, or whatever it might be, but they would be authorized to work on that. The second part for me would be the role the Commission plays, echoing a little bit of the concern Judge Welch had about not wanting to be in a position where we are presented with something that we haven't had an opportunity to participate in developing. Whether or not that means some sort of executive session review, I would be willing to participate in it. I am uneasy about having the Commission not involved at all and then presented with a plan that we have to vote up or down on.

1:04:20 P. Ozanne That is why I asked my question. I will be a little more frank about it. People who know me well - and I have great respect for Kathryn and Ingrid - I just don't want to delegate this. We are right in the middle of looking at a structural change. The shape and quality of the new structure is embedded in that, so I don't want to delegate that. We are saying the same thing, I think.

1:04:45 C. Lazenby Lane County is small enough that, realistically, aren't we in the situation where there is the usual list of suspects out there? We have a pretty good idea of who is going to fall into these slots and we would authorize it one way or another.

1:05:02 P. Ozanne I want to know the structure of the consortium, who is running it, board of directors, all of the things that we wanted in a consortium, I want to know that that is going on. I want a role in the qualitative assessment. I am just speaking for myself.

1:05:19 C. Lazenby Following along those lines, Commissioner Ozanne, I think we probably would also be better served to maybe have a range of options, configurations that we could consider with faces to them.

1:05:33 I. Swenson Assuming you have a range of proposals to choose from.

1:05:41 Chair Ellis Sounds to me like the decision making process has several kinds of decision points. One I think I am hearing, but I really want to put it out on the table and make sure this is where we are, for the reasons that Ingrid has outlined in the handout and without criticizing anybody, I personally have concluded that the panel arrangement just isn't going to work. The reasons that drive me are I have never felt comfortable that an open panel can be done consistent with the quality and particularly the supervision and training of young lawyers that the client service requires. The larger the panel the more diluted the caseload. Even though there is a very impressive young lawyer who appeared before us, and he seems to have kind of made the transition without a whole lot of supervision, I think that is just too big a gamble to take with the due process rights of the people that we serve. I am personally at a point, and I was four years ago, but I am very much now. I don't think a list or panel as a source of providing

25 to 30 percent; it is actually higher than that, 30 to 40 percent of the caseload in one of our largest counties is a good practice for us. I think that is the first question that I would like to get input from the Commissioners on. Are others where I am on that? If not, let's talk about it. If we are in an agreement on that, then I think we know what we are going to do is a change. It is going to be a significant structural change and then let's address how we get from here to there on this significant structural change. The first question I would like input on is do others share the comments that I just made?

1:08:14 Hon. Elizabeth Welch

I do, like 98 percent. The only thing that I am just curious about is there was some reference, I think from Kathryn earlier today, to the possibility of a new proposal. I am not sure that is the right word, from the panel administrator. In other words, given what was said last time, and maybe what has been in the air in the meantime maybe there might be some residual use of the panel concept. Did I follow what was being said?

1:08:50 K. Aylward

We did receive additional information from the panel administrator and he described it as a redacted proposal which could be fleshed out if the Commission wanted that, so it is not enough information to really move forward on, but it is an indication that there is interest in doing that.

1:09:22 Hon. Elizabeth Welch

All I mean by that is I do agree with what you said, Mr. Chair. I would just be curious to hear whether there is maybe some more information – a somewhat smaller version, perhaps.

1:09:43 Chair Ellis

The sad thing is I do recognize a lot of feeling by a lot of lawyers in Lane County. They cherish the notion of an open panel. They cherish the notion that young lawyers can get some cases to develop on. I just have reached the point that an open panel conflicts with quality and I just have a hard time with that. I think the four years we have been working with this has, in my mind, kind of confirmed that it is not easy in that context to maintain the quality that we want. When Judge Bearden spoke to us, I thought her comments were pretty telling.

1:10:44 P. Ozanne

I share your view. I think what Judge Welch's comments go to how do we proceed. Certainly if there is a majority who feel that a change is necessary then I wouldn't want to put Marc or the panel to a lot of work into trying to do more if we are of the mind that we want to move forward with a different structure.

1:11:13 J. Potter

I understood Ingrid's proposal was we would authorize staff to move forward on something other than a panel and that is what we would be voting on. Then the supplemental comments that I made and Peter made were about having the Commission involved in the process of developing an alternative proposal. If that were the vote, we would be saying we won't have a panel starting sometime in early 2010. We will be looking at an alternative proposal that could be brought to the Commission at the December meeting.

1:11:53 Chair Ellis

What would you envision, John, as the optimum if it were presented to you? Describe what it is you would really like to see.

1:12:06 J. Potter

With the caveat that I understand the hesitation with an open system, but the optimum would be, for me, a consortium of a dozen to 15 people that would do 30 to 40 percent of the work, with some provision and this is the difficult part for me, with some provision for a small number of cases with a small pot of money that allows lawyers that aren't members of the 15 to get a toehold into doing criminal work. The retort to that is it is the public defender's office that should do that. They have the training base and knowledge to do that. I say the public defender's office doesn't have enough turnover. They will have a group that will leave soon. I would think that in four to five years there is going to be a little turnover. They will fill those with younger lawyers and they will probably stay for a long time. You then won't have any way for lawyers that are coming out a law school that is in town, with people who

want to stay in town, to get a toehold into criminal defense work. The optimum for me is a major consortium doing the bulk of that work with something over to the side. The consortium would understand that there is this group of cases. There is a training component, a mentoring component built in, and knowing that maybe it is only two lawyers, three a year that may come in. They are not going to make a living off doing that work. The living is going to be made by the base group of consortium lawyers. But they are going to get some case experience beyond the public defender law school clinic.

- 1:14:06 Chair Ellis Let me ask a few other questions on that. Do I assume when you refer to a consortium you are talking about a structure with a board including outside members?
- 1:14:16 J. Potter Absolutely.
- 1:14:17 Chair Ellis And you are talking about a structure with a manager empowered to do the kinds of things the strong consortiums around the state do?
- 1:14:32 J. Potter Absolutely.
- 1:14:30 Chair Ellis And you are talking about a consortia with a staff that would handle the administrative piece of it.
- 1:14:39 J. Potter Yes.
- 1:14:40 P. Ozanne John, just to follow up. I understand what you said, I guess, but won't the same issues apply about lack of turnover with the consortium? Let me just follow where I am headed. Isn't it like any firm, public defender, and consortium? When somebody does indeed retire or decide to become a patent lawyer or whatever, that will be the time that the young lawyer will be lucky enough to be hired, brought in and trained. I am having trouble seeing how many clients we put at risk by this little panel. I am sure you have something in mind for their training, but why couldn't those two organizations just do that. It is a sorry situation when there isn't enough turnover for younger lawyers, but that is probably the reality. What is this panel going to do? Are these young lawyers going to stay on the panel for years? I am not quite sure.
- 1:15:42 J. Potter I am not quite sure either, Peter. It would seem to me that if you are a new lawyer and are trying to get a practice, and you want to stay in Eugene, and a lot of people do and that is a reality of Eugene, that having some mentorship, having some training opportunity, having some way to get into the courtroom is something that we could provide and these lawyers are going, at least in my mind, to be setting up a private shop and trying to do law work other than criminal law, probably, to make a living. If they want to go into criminal law the training component is done by this consortium, panel, training unit, something.
- 1:16:34 P. Ozanne Having lived in Lane County and been very happy with it, why as a matter of policy do we want to encourage or support lawyers to stay in Eugene if there is no work? Don't we actually want them to go somewhere else?
- 1:16:44 J. Potter Well, sure, you can say that. The flip side of that is while there will be turnover, there will be people when there is time to hire. It would be nice to have people that you knew something about that and maybe had some training and you were part of the training of those people. You still want a pool out there.
- 1:17:04 I. Swenson Could I remind you of Clackamas County? It is not a perfect model but it is a pretty good model. As we know there isn't quite as much turnover as there should be of the senior people in that consortium. But they have had a mentoring program for a long time that is very established. Most of the people who go through it don't necessarily end up in the consortium, but they go through the training, they are assessed by the members, they are mentored, they

are pretty carefully supervised and then if it turns out that this person is somebody the group wants to add then they wait for the next opening and that person gets that position. We could provide you some more information about that. I think when we reviewed Clackamas County we didn't really talk, in any depth, about their mentoring program. It is there, and it may be a model of how to handle that function.

- 1:18:05 J. Potter I am absolutely open to that. It is along the same lines and addresses the same issue. My guess would be, and I don't know this for sure and some of the proponents of the consortium are here and they might know, but folks in the consortium are going to be contracting with us with some sort of understanding that lawyer A is probably going to do 50 percent consortium work. Somebody else may be 40 percent. Somebody else may be 60 percent. My guess is they are going to be slightly different percentages that these consortium lawyers are agreeing to. Is that fair, that you would join a consortium knowing that I am doing it with this in mind?
- 1:18:47 I. Swenson It is not fixed but they do give us an indication of what percentage of their time they expect to devote to consortium cases.
- 1:18:53 J. Potter If that is the case, it could be that over time those consortium lawyers may say, "Well, you know, two years ago I was interested in doing this consortium work about 50 percent of my time, but right now where I am in my career, or whatever I am doing my law practice, I would rather make it 40 percent." The consortium can say they can accommodate that because they have done some training and have other lawyers out there who might be willing to step in and do the 10 percent. You may not have folks leaving the consortium. You may have folks changing the amount of work they wish to do within the consortium. It seems like we have to have a pool of people that the consortium could then draw on to fill those spots. The model in Clackamas County, if I understand what you just said, would be a good way of doing that.
- 1:19:47 Chair Ellis Next question I have is something along the lines you outlined as to where we would like to end up. It is a big undertaking to try to have a consortium of that size put together in the time frame that we are talking about. There is great risk, it seems to me, that if you push to have an instantly large group that you may not find the administrator that really works. That could leave us a year or two from now with a very unhappy situation. I am interested in your comments about transition, getting there from here, and I can see two or three ways to think about it. One is to send a signal that we are obviously sending that there is going to be change and there is very likely going to be one consortium, maybe two, in the Lane County market to fill that overflow of cases. I can see some suggestion of a smaller than optimum consortium to start with and phasing down the use of the list. How do you see the transition from here to there?
- 1:21:21 J. Potter That would depend on the negotiations in the next six weeks before the December meeting. We would have a much better sense of what Lane County lawyers are amenable to doing, knowing that the panel wasn't there anymore. That might change the dynamics dramatically. You might come back with a proposal that is currently in front of you and a separate one for a partial panel that is going to get phased out. You may come back with one that says, "Here are 12 to 15 lawyers and we can be up and running and take over on February 1." What I don't want to see, Mr. Chair, is a situation in which we start out with a small consortium and you still have the panel in its existing form. I don't think that is a good scenario.
- 1:22:26 Chair Ellis Commissioner Ozanne, you made a very interesting comment that you didn't want to just delegate this, you wanted the Commission to be involved. What are your thoughts as to how that would play out?
- 1:22:39 P. Ozanne I would like to see the proposal, which we don't usually see to my recollection, see the proposal or bid. I would like to see it. I would like to question our staff about the proposal, the personnel involved, and the structure, in other words be more deeply involved in the

substantive decision because we are reviewing the structure and we are launching another design which I think justifies that additional energy, probably in executive session.

- 1:23:16 Chair Ellis We currently aren't planning a meeting in November, but I am very reluctant to let this go to December. I think that just takes an awful lot of the momentum out of it.
- 1:23:41 P. Ozanne The problem is, as John says, six weeks isn't much time either, before the December meeting, to see how the market responds. I guess after all these years a month or two one way or the other – sounds cavalier. We don't need to start in January. We could start in February with a contract.
- 1:24:00 Chair Ellis Your thought would be to leave our meeting schedule where it is, but try to have by the December meeting as much development of the alternatives as we can?
- 1:24:16 P. Ozanne Right.
- 1:24:21 Chair Ellis One suggestion that has been made to me informally and I want to put it out on the table, it to try to use the services of our good friend Ross Shepard in some fashion. The word "mediator" has been mentioned or it could be "facilitator." Someone from the community who is clearly well-regarded in the community and knows the players. Is there a feeling that that is a good approach, or should we leave that out there and see how players work it out among themselves?
- 1:25:02 P. Ozanne I like the idea if Ross is available. People know him and respect him and I think he would follow our direction.
- 1:25:18 Chair Ellis Any thoughts out there? The Commissioner to my right who knows a lot about Lane County. Do you want to share with us your thinking?
- 1:25:26 S. McCrea I agree with everything that Commissioner Potter has said. I also agree with what Commissioner Ozanne has said. I like the idea of utilizing Ross in a mediation fashion because it seems to me that if we can come up, for lack of a better term, with "buy in" from the attorneys in Lane County we are going to be a lot farther into having a new workable system than we are if things are at odds, so I think it is a good idea. I am prepared to accept authorizing staff to explore something other than the panel. I also believe it is important for us to be involved and not delegate it as Peter said. John has expressed my sentiments so I don't need to go through it again.
- 1:26:31 Chair Ellis Any thoughts or reactions?
- 1:26:44 K. Aylward I have some sympathy for knowing what it feels like when you prepared a proposal and you have submitted it - and these were submitted in July and it is already October. I think if there is anyway that we can shorten the amount of time that deliberations go on it would be good. Knowing an answer, even if it is bad news, it is still better to know it than leave people with doubt. Would it be possible to have a little task force group, Commissioners Potter, Ozanne, McCrea, whoever, some little group that can assist staff with some of those basic first questions that we need to address before we can move forward. For example, let's say the existing consortium bid that has four attorneys wanted to add more attorneys. You can't go out and say, "Please join our consortium," until you know what your rate structure is going to be. Will you include murders or not include murders? I think on a lot of those decisions I would certainly welcome the input of that group in even those preliminary discussions. If there is any way that we could do something in November with input from the Commission at least to sort of start in the right direction, it may work out that either the modified panel proposal or the consortium bid that we have when we start talking to them they will say, "You know what? We can get these three attorneys or this group of six onboard as soon as you tell us what the rates are. We are all up and running and ready to go." Then at the December

meeting you could actually approve a contract or something. I am just worrying about waiting until December to have an executive session.

- 1:28:43 Chair Ellis I share that view. Would you three guys be willing to...
- 1:28:47 J. Potter Absolutely. That was not contrary to anything I was thinking. I wouldn't want to wait until December to have an executive session the day before we had a meeting. So participating starting next week and meeting with you, scheduling a meeting to talk about the preliminary things that we need to know and then going to Lane County to gather all the folks and have an open discussion, getting everybody's cards on the table, trying to allay fears and then seeing if folks want to cobble together a proposal. Maybe it is two proposals or maybe there is no agreement at all. If there is no agreement at all we have a proposal in hand. There is a starting place and we can work with that. Let's start next week. Let's go.
- 1:29:43 Chair Ellis Are you okay to do that?
- 1:29:41 P. Ozanne Well, I wanted to ask Kathryn to elaborate a little more on this rate structure issue. The current proposal knew what the rate structure ...
- 1:29:54 K. Aylward With our proposals if people say, "I will do this mix of cases and this is the amount of money I want." We look at it and say, "That would be nice, wouldn't it, but we don't pay anything like that." The proposal we have is close. Obviously clever people go and look at existing contracts. If they can see what you are paying now, it is not unreasonable to ask for 10, 15, and 20 percent more. Then we get the bid and we say, "No, sorry. We can't meet your rates."
- 1:30:28 P. Ozanne This kind of goes back to the old thing about administrative model versus negotiating. We could give ballpark or historical information that would allow people to put it together without this working group. I am willing to do it. I just don't know how much help we will be.
- 1:30:58 J. Potter I would think you could short-circuit a lot of the process by saying, "This is the rate we have to work with to make this work."
- 1:31:04 K. Aylward "If I were to give you a contract this is what it would look like."
- 1:31:08 J. Potter "This kind of case is a \$1,000. This kind of case is \$1800. This is the number of cases that we think are going to be there." You have these various categories and various prices.
- 1:31:15 P. Ozanne I don't want to cut off openness. I have kind of my mind's eye some of these Town Hall meetings again where we debate billing hours versus units and are just all over the place. Process is nice but I'm not sure what it gets us. I am willing to sit down with Kathryn, if I can help, and think through how we can send something out.
- 1:31:44 J. Potter We are going to provide direction for those folks in Lane County that want to participate. The direction is you going to a unit system that is not going to be an hourly system. It is going to be a reduced number of lawyers involved in the consortium. It is going to involve this mix of cases in this price range. These are the knowns. So, knowing the knowns, what can we do? Are there folks who want to do it all together? Then there are big issues about who is going to administer that? Can we agree on who might administer that? No, you have two separate consortia, two different administrators, and a Ross Shepard type person as a moderator, mediator, negotiator that helps direct that process.
- 1:32:36 P. Ozanne Barnes you said, and certainly you will make known your concern, but you share Kathryn's concern about prolonging this. But I am worried again about giving the market enough time to respond.

- 1:32:48 Chair Ellis I agree. I know there are some folks from Lane County. Yesterday I made some comments about whether decisions like this should be top down or bottom up and my answer was “yes.” You have been hearing a lot of the top down. If there is some bottom up that anybody wants to share? Elizabeth, any thoughts?
- 1:33:27 P. Ozanne To the extent we have kept people waiting, - Kathryn, was that July when Elizabeth’s proposal was put in - we apologize.
- 1:33:49 E. Baker I am Elizabeth Baker. I have not met a lot of you in person. Hello. I practiced in Lane County when we had a system where the court, well, what is now pretrial release, appointed attorneys to represent people, and also with the panel. Four of us did put in a bid. I wish Becky was here. Becky is preparing for a case of humongous proportions. What we can tell you is that the intent in the preparation of this bid and the thought that went into it was not exclusionary. It may have felt like that to the community. That was not close to what our intent was. We felt that the trend was that the panel model had had its opportunity and that it was not going to work for our community anymore. Primarily it is about protection of our clients. It is about quality representation, which the four of us are very, very focused on. We are dedicated practitioners and we are doing the bulk of the panel work, quite frankly. That is something we are very proud of and we continue to be proud of it to the degree that we wanted to get this bid done in a timely manner and present it. We believe that continued dedicated representation should be the focus, with increased oversight, and part of that oversight is clearly having a much smaller group. The panel was really a monumental undertaking. No one can point a finger. That was a big project really, maybe, too big a project. Obviously we would like an answer. We have been very focused on trying to get specific mechanisms in place. We absolutely appreciate the board’s desire that there are continued opportunities for new attorneys and we believe we can provide those. I have personally been called upon to mentor people in the panel. I want to tell this board that at the time I was called upon to mentor people on the panel it was potentially too late for me to do so. It became more of, “Just do it for me or let me borrow some forms.” Unfortunately, the mentoring process starts a little bit earlier. The primary process starts with a person who is overwhelmingly dedicated to doing this work. Our concern has been, and will continue to be, that doing criminal defense is not a hobby or a way to figure out what you really want to do with your life. This is what we are doing with our lives. We would like to continue to provide that in the plan we have included in the bid to OPDS. If you have specific questions I can try to address those. I don’t know if you do.
- 1:37:15 Chair Ellis I kind of want to know a little about each of you. You told me you have been in practice since ...
- 1:37:18 E. Baker Since 1991.
- 1:37:23 Chair Ellis What percent of your practice has been defense?
- 1:37:26 E. Baker The percentage of my practice that is criminal defense is probably about 90 percent. I do about 10 percent domestic relations. Not only do I work in Lane County as a panel attorney, but I am appointed routinely by OPDS generally in the southern half of Oregon to do conflict cases. I am all over the state. I have been here three times this month.
- 1:37:48 Chair Ellis You are a solo practitioner?
- 1:37:53 E. Baker I am and I have always been a solo practitioner.
- 1:37:56 Chair Ellis Mike, how about you?
- 1:37:55 M. Buseman I graduated from law school in 1996. I clerked for Judge Foote in the Lane County Circuit Court for a year. I worked at the Lane County Public Defender’s Office for two years. Then I

worked for another attorney for nine years. Then I went out and started my own practice just over a year ago. I only do criminal defense. I have never done anything else.

- 1:38:26 Chair Ellis You are Brad?
- 1:38:25 B. Cascagnette I graduated from the U of O Law School in 2002. I am one those people who got on the court appointed list. I have been doing criminal defense ever since. The first few years that I started I was doing criminal defense and domestic relations and other things. At this point in time, 99 percent of my practice is criminal defense.
- 1:38:49 P. Ozanne You are a sole practitioner too?
- 1:38:50 B. Cascagnette No I am in a firm. There are seven of us who are partners in the firm. When I say partnership, not a traditional partnership, an office share would be a better description. I am the only one who does criminal defense in that firm.
- 1:39:09 Chair Ellis Elizabeth, I understand that you would be the manager?
- 1:39:17 M. Buseman We are looking at having two administrators.
- 1:39:21 Chair Ellis Describe that to me.
- 1:39:21 M. Buseman Who they would be? We are not exactly sure. We are in the process of talking to people to have a board put together. We have already spoken to Doug Dennett who is a very well respected criminal defense attorney in Eugene. We want to add perhaps two other people to that board, maybe from the financial sector and maybe someone from the University of Oregon or maybe another lawyer who practices in a different area. We would then discuss with that board who the two administrators should be. I think Elizabeth would clearly be one of the administrators because she has put a lot of time and effort into this. She has a good relationship with the court which is important.
- 1:40:12 P. Ozanne Why two instead of one? Coverage?
- 1:40:12 E. Baker Exactly. Balance.
- 1:40:17 M. Buseman Because of the travel that is involved in going to management seminars like this and the time it takes to talk to the court and figure out the distribution process and what the issues are, we figure it would be easier to have two people to cover all those areas adequately.
- 1:40:33 Chair Ellis What is your own vision of where you would like to be in January five years from now. How do you envision things then?
- 1:40:47 E. Baker Good god! I will be 51.
- 1:40:50 Chair Ellis That is nothing.
- 1:40:55 E. Baker Where we would like to be five years ahead is a more well established, larger group which is handling the overflow work in Lane County. I think that that number may be around 12ish. Our goal was to provide a bid that was for eight attorneys. This is a very big change for people in Lane County. People are not in a mode to believe that any change will occur. It is just very new. We believe we are not going to have much difficulty in obtaining four more attorneys if the trend is set. Then, yes, we believe it is going to be critical to add newer attorneys and to grow as the caseload grows.
- 1:41:58 B. Cascagnette One of the difficulties in Lane County is that we don't know how many cases are out there. As Kathryn was describing to you there are case units and there are cases. In Lane County for

the previous how ever many years, those cases just came as one case, but OPDS might look at that and say that that is actually five cases. We have no way of knowing how many cases are actually there. We have no way to know exactly how many lawyers this system will support and how many people are required to do this. If people are going to get together and say, "This system is going to support 15 lawyers, let's get together and submit a consortium bid for those 15," there might not be enough cases. For that reason I personally think the better model is to start small, have your board of directors, get everything established and nailed down, have applications submitted to that board, and those board members determine who the most qualified people to come on are. I think if you try and put together a consortium with 15 lawyers right now it is not going to work the way you guys want this consortium to work.

1:43:10 Chair Ellis

I share that concern.

1:43:13 P. Ozanne

I think you all know that law firms now are getting kind of smart and having administrative partners who are not even JDs but have some business training. You may not know but we have a couple of consortia, although I understand you have done your research, where we have an administrator who doesn't handle a caseload and just spends their time on administration. Are you open to thinking about the administrative structure? You obviously feel that administration would conflict with your case duties. How would you feel about a different administrative structure?

1:43:45 E. Baker

Well, we are open to that and obviously it is a project that is developing. We like being trial lawyers, the four of us, and as we were putting together this bid what we all realized is that we are all on the same page about how cases should be handled and the numbers that we can handle and how we can provide things. It didn't look like an unmanageable number to us to start out with. An administrator for four people is sort of someone who is making sure everyone is on track and really not doing directorial administration. We may have flipped a coin to see who actually signed the application.

1:44:32 Chair Ellis

And you got the short stick.

1:44:34 E. Baker

I did. With more lawyers there is going to be more direction and the administrator or administrators are not going to be able to participate in trial work as much. I have been tapping Brad for this because he is so good at being political mostly and a lot of other things that I think a group that needs to be managed needs because I like being a trial lawyer. We are open to what the job is going to call for. With four people it is one ball of wax. With eight or 12 it is a completely different thing. You can't have an administrator out there trying major felonies twice a month with eight or 12 people taking cases. You know 1600 cases or 2500, whatever the real number is.

1:45:21 Chair Ellis

Assume it starts at four but your hope it is grows and our expectation is it would grow. How much lead time would you need between us saying, "Okay, let's do it," and you getting started? You can see we are running out of time.

1:45:51 E. Baker

Are you talking about starting with the four of us?

1:45:54 Chair Ellis

That was my question?

1:45:54 E. Baker

Our bid was focused on being up and running by January 1. If the goal is to immediately bring someone on to expand then I think we need a minimum of four to six weeks to make sure that people understand that there is going to be a consortium. Quite frankly, there were three people that we talked about it very seriously with and one said, "I just don't want to do it I am 72. I don't want to do this anymore." Two of them were young lawyers and one of them is trying to develop a federal practice and was only interested in a very limited piece and just didn't want to commit the time but is on the panel and is very interested in continuing the

work. One was a senior lawyer, which I am sure all of you would be familiar with, who just wasn't sure the tide was changing. There is another new lawyer who has come on relatively recently. He is now Measure 11 qualified. I have worked with him out of county and in county. Those are the four people that we talked to, if the decision was that the consortium bid should expand immediately. My preference currently as the administrator would be that we start with the four of us and give us an opportunity to develop this and get it up and running, then bring on the two to four within the first six months. I understood from Kathryn Aylward that the process is that it is sort of a negotiating process. As more cases become available more people become amenable to the consortium model. I think that we are going to be able to bring that in, but I don't think we are going to be able to bring in four more practitioners in four weeks.

1:47:47 B. Cascagnette I am will also say that there was some discussion at the last meeting, I wasn't there but I read the transcript. People came in and talked about their caseload and what percentage of their practices is criminal defense. I think what I gleaned from reading that transcript is you guys were informed that 50 percent of the panel, or all of the panel does 50 percent criminal defense work and 50 percent something else. We told you that that is not the case for us. It is not the case for the other attorney, Becky Davis, who is participating in this consortium also. What we would want in a perfect world is for all attorneys in the consortium to be practicing 100 percent criminal defense. I personally don't think you should do 50 percent civil and 50 percent criminal. It is too difficult to stay on top of all that case law and be a good criminal attorney. We also understand that that model might not exactly be possible, but if you form this consortium and set up the board to get applications from people who are doing a majority of criminal defense you are going to have a better applicant and a better consortium representing the clients in Lane County and that is what we want to do.

1:49:11 Chair Ellis Other questions?

1:49:11 J. Potter Brad, you had mentioned that if you were to get the contract there would be a transition over some time, four to six months, bringing in other people. What do we do in the meantime with the existing panel?

1:49:32 B. Cascagnette I don't know the answer to that. I think it would probably go back to a court appointed list like it was previously. I don't know what else you would do. Obviously the four of us can't take all of those cases and, again, we don't know what they are. We don't know how many would be left over for those individuals either. When I originally started taking cases pretrial release would contact me and inform me that I had a client. Now it has changed to the panel contacting me and informing that I have a client. I don't see why it can't continue with the panel or go back to pretrial release for those overflow cases of those individuals. It is going to be the same members on there and then some of those members will eventually, hopefully, become members of this consortium.

1:50:21 E. Baker I think Brad is one of the practitioners, as well, who frequently gets called by the court regardless of the fact that the panel is in place and that there was a pretrial office. Every once in a while you get a call and you are told that you are going to take a case and you are going to try it within a certain period of time. This is a way of going around the panel or around the pretrial release office. I know the court isn't necessarily jumping for joy about the thought of going back, even a little bit, to that role. In creating this bid I did talk to the pretrial release office. The pretrial release office is extremely amendable to administering the assignment of cases similar to what they used to do. They were very positive about a consortium and they were positive about their potential role in going back to handing out or administering – administering is not the right word, given that they are just assigning cases.

1:51:24 P. Ozanne Just for your information - and this is not at all critical of your suggestions - but some of us are a little queasy about getting the court involved in administering. The better practice is to really have that separation. I don't know what we are going to do but we might administer the

list through OPDS or something. I take your point but it may not happen in the court, although it does still in some parts of the state.

- 1:51:53 C. Lazenby What kind of comment do you have on the training pieces that Commissioner Potter was talking about earlier when we were wrestling with this and bringing newer lawyers on. I guess maybe part of that answer is how did you all get trained as competent counsel?
- 1:52:05 E. Baker Well, I think his training was apparent.
- 1:52:10 M. Buseman Well, clerking for a judge was helpful.
- 1:52:16 Chair Ellis And you were at Lane PD?
- 1:52:16 M. Buseman Two years with a lot of oversight. They had a very structured educational system within that office.
- 1:52:33 B. Cascagnette I wasn't trained. I came out of law school and got on the court appointed list. All I had to do was watch four misdemeanor trials start to finish. I started taking misdemeanor cases. I don't know why that is a qualification that allows you to take those cases without any supervision, but I was allowed to. I trained myself and I didn't know a lot of things. I called everyone in Lane County. Lane County is a great place to practice criminal defense. I have called Commissioner McCrea on an occasion or two and asked her questions. Anytime I don't know something I contact someone else. I just slowly learned and specialized in criminal defense.
- 1:53:14 E. Baker That is sort of what I did. I came out and I think I sent 800 letters out to solo practitioners. I ended up primarily working with and working for Doug Dennett and Bill Honsowetz and exactly what Brad has described to you. I talked to Mark Spence. I talked to Dan Koenig. I was mentored by guys who are great at practice. I have never picked up the phone and asked for advice or assistance from a senior lawyer in our community and been turned down. I can't believe that would ever happen in Lane County. I don't think people say that they are too busy. That is how I learned.
- 1:54:00 J. Potter Can we go back to the amount of time you are spending on the consortium. I heard 100 percent criminal law. Does that 100 percent criminal law apply just to consortium work, or do you do retained cases as well so the consortium work would be a lesser percentage and retained cases would be a percent?
- 1:54:17 M. Buseman I think there would be a sacrifice made, frankly, to focus on the court appointed work. I think there would have to be. I think we would all also have to take some retained work because there are expenses involved that we are responsible for. I know that that is factored into our bid to a certain degree, but I think we still have to have some other money to make it work and that would come through the retained clients.
- 1:54:47 J. Potter You got a lot of experience and training, I would think, through Doug Dennett in DUII cases?
- 1:54:55 M. Buseman Yeah.
- 1:54:53 J. Potter I think that that would still be a market that you could service.
- 1:55:01 M. Buseman I do.
- 1:55:02 J. Potter I guess my question is how much of the time do you think would be contract and how much would be private work in order for it to work for you as a business person?
- 1:55:14 M. Buseman I would imagine probably 75 to 80 percent is going to be contract work. That is sort of my guess, my feeling.

1:55:27 E. Baker I guess based upon my experience I would say that is about the right number. I think everyone talks about hearing that 98 percent of all the clients that we have are indigent, so only two percent of the work out there at all is people who are retained. If people are lucky enough to have an hourly rate that is a really wonderful hourly rate for every case that they have that would be great and you wouldn't get them standing here. I don't think there are very many practitioners in our county who can say they do 100 percent retained work, just given the number of people and the cases. I think the numbers are 80 percentish.

1:56:17 M. Buseman Again, I think it is hard to predict what percentage will be court appointed and retained because we don't know what those numbers are in terms of the court appointed work. I can tell you that the amount of money I made from the state last year is about parallel with my overhead, so, yes, I am going to continue to do retained work.

1:56:45 Chair Ellis My assumption is that you have been paid on an hourly basis. If you do it in the consortium, and I am not here to set rates, but I think you could look forward to doing better.

1:56:59 M. Buseman I hope so.

1:57:11 Chair Ellis Any other questions?

1:57:11 J. Potter So you heard the discussion about what would you do and it was directed at me. You heard the discussion saying six weeks or so to work with Lane County and see if there was some arrangement that could be made or plan that had buy off from the majority of the folks. Is this a waste of time?

1:57:40 E. Baker The six weeks?

1:57:39 J. Potter To work to see if there is either an addition to yours or a separate consortium group that would get together?

1:57:46 M. Buseman I think time will tell, but it is putting a lot on to us to take responsibility for collecting those people and then the administrator being responsible for them, if they, in fact, are not inclined to do it.

1:58:05 S. McCrea I agree. I don't think that is what John is saying. I think what he is saying is "Are you willing to be part of the process that has been expressed? It doesn't mean that you have to change your bid. That is totally up to you guys." Is that what you were saying?

1:58:25 J. Potter Exactly.

1:58:25 S. McCrea Are you willing to talk?

1:58:30 M. Buseman Of course, but you picked the right moderator. Ross is probably the best. Maybe that will work.

1:58:39 S. McCrea There is the answer that you said you had.

1:58:55 M. Buseman Everybody will listen to what Ross says. Hopefully it would create something better. It will be a bit of challenge and it may not work. Then we are back in this spot again.

1:58:57 S. McCrea We may be.

1:59:02 Chair Ellis I don't think anyone here has a desire to impose on you things that would make your likelihood of success not so good.

1:59:13 M. Buseman I don't get that feeling. If I gave you that impression, I didn't mean to. What we are trying to do is represent the indigent clients in Lane County in the best way possible. I think we all have that as the goal. To the extent that that talking would go to that goal, yeah, we should do that. It has been a challenge and I don't want you to assume that we haven't tried to talk to a lot of people repeatedly. It has been exhaustive.

1:59:45 Chair Ellis It may be a little different when word gets out. We have talked today and we have said that it is going to change. Sticking with the list structure is no longer an option. I think you may find that some of your compatriots, now that they know that, may react differently.

2:00:05 M. Buseman If more people want to join are you looking for them to submit the type of information that we submitted in our proposal? There is a lot of financial information that has to be included in there. I am assuming that you are going to need all that, correct?

2:00:26 K. Aylward Typically we do not require that. What we request in proposals is to get an idea about how you propose to run the consortium in a contract if you were awarded a contract. Adding additional members to a structure that we like and have approved, is just a question of are we comfortable with a bid changing and adding this person, and this person, and this person, and adding X number of cases. They don't need to submit anything other than their qualification form. The administrator of any proposed contract would indicate how much workload you anticipated them having.

2:01:06 M. Buseman So you are basically just adding FTE to an existing contract.

2:01:07 J. Potter And I assume, Kathryn - we heard Brad say we don't know how many cases are out there really; they don't know for sure - but you have some sense so that you would never allow more people to be added at the front end of the consortium than you reasonably thought there were cases for?

2:01:24 K. Aylward Well, 1893 in fiscal year '09. It is some number greater than that because that is what we see when we just (inaudible). There might be a misdemeanor hiding there, some PVs hiding in there, so it is at least that.

2:01:49 J. Potter So roughly 2000 cases. Can we say, is this still secret, what this bid is for? Is this for a 100 cases, 600 cases?

2:02:11 E. Baker 793.

2:02:14 K. Aylward We don't call them units in the office.

2:02:16 E. Baker 793. That was based primarily on us looking at what we had personally done in 2008. We took that as cases and we made an estimate on what we thought an FTE should be and then that number was created. That number does include two murder cases which is certainly not a line drawn in the sand. That is how we put it together but it wasn't based upon data outside the four of us looking at what we actually already did.

2:02:56 M. Buseman Because we didn't have it.

2:02:56 Chair Ellis Thank you. Greg?

2:03:16 G. Hazarabedian I wasn't going to speak to the substance of what is going on here. I was just going to suggest that the Commission might want to uncharacteristically put out some sort of communication as to what happened today and what is going to happen in the future. Marc can let his lawyers know, but there are a lot of other interested people in Lane County, prosecutors, judges, what have you. Lane County being what it is I think if actual information were put out on a page

from this Commission it might well be useful as opposed to the rumor mill getting out of hand as it tends to.

2:03:48 Chair Ellis I think that is a good idea.

2:03:51 G. Hazarabedian That is all I wanted to suggest.

2:03:51 P. Ozanne While you are up here can I ask something that relates. It came up, and it is not something that we can take up today, but sometime in the next months or years is to revisit the clinic. Many of you know that John and I first met 30 years ago when we got federal money to start this clinic. Both of us have a little ownership interest in it. It was in the law school, which as is typical of law schools, was happy when they got grant money. Then it fell upon your office, Greg, for years and you are still doing it.

2:04:27 G. Hazarabedian We are doing the clinical component. There are lawyers in town who are doing the law school academic component.

2:04:40 P. Ozanne It is no longer a law school program in substance but they do send some money to it. Why I mention it is that maybe we would want to look as a Commission at this issue of training. That is an asset and how is it being used to meet this need? Is there a way to use it by screening the students, by judging their commitment to the practice? I don't know but I think we ought to look at that. It is kind of floating around and the community is really running it not the law school anymore.

2:05:13 G. Hazarabedian More or less that is right. Along the lines of what you are saying, Commissioner Ozanne, is that the American College of Trial Lawyers has a program that Jim Hennings participated in in Portland where civil lawyers, young lawyers in civil firms who don't have any trial experience work some hours at a public defender's office and get into court and try some cases. We participated in that in 2008 in Eugene and had two lawyers from a civil firm in town come and intern in our office and try some cases and get some good practical experience. We, of course, got the benefit of two smart young people helping us with our caseload. It worked out very well and what we did was to plug them right into the clinic program - just an example of how do you get somebody up to speed in a fairly quick way so they can run into court and try a DUII case. We plugged them into our clinical model and it worked pretty well for all concerned. We may be doing that again. That is not a bad thought.

2:06:27 Chair Ellis Great. Thanks. Let me see if I can summarize where I think we are because you are going to send out a communication. I think I hear consensus among the Commissions that the current structure, no fault of anybody, is just not working and it is not going to be where we end up. That is a judgment that has been reached. Secondly, between now and December a subcommittee of this board consisting of Commissioners Ozanne, McCrea and Potter will work with staff and the community, working toward the best proposal we can have available by the December 10 meeting. That is very likely to build on the proposal that is on the table right now. Thirdly, that subcommittee is very likely to enlist the services of Ross Shepard to talk with interested parties and be a facilitator to help us get to where we are trying to go. The last piece of this is in December, hopefully some clarity will have emerged from the fog and we will be in a position to go forward. That may or may not involve a January 1 start date. We are obviously going to work with whatever proposal emerges from this process to make it a realistic start date. Have I summarized where we are?

2:08:26 J. Potter My only quibble, and it is a small one, might be using the word "proposal" in the singular. You might have proposals.

2:08:39 Chair Ellis Fine. Amend what I said accordingly. This is not something that requires a formal motion and vote. If the word "consensus" is getting nods, I think that is where we are. I think it was very constructive.

2:08:59 S. McCrea Before we leave I think we should solicit any comments that Marc wants to make since he has been part of this too.

2:09:10 M. Friedman I do appreciate this opportunity to talk to you again. I want to let you know that after the meeting in Eugene, I took everything that you said quite to heart. I felt it was my obligation to leave that meeting and start working on some pretty significant changes. The fact is that if there was nothing else that you folks made clear to me it was that the notion of an hourly system was gone. What I set about doing - and I certainly took to heart the comments from the peer review - I left there and started meeting with all of the judges. I made of point of getting together with just about every judge on the bench to get their input with regard to the panel members. I went ahead and met with Alex Gardner and got his input with regard to the panel members. The reason I did that was you, Mr. Ellis, had pointed out that we had too large of a group. Realizing that that was one of the things that I was going to have to address, I wanted to at least have a notion of who, if there was going to be a change, would be part of that change and perhaps who was not. The second thing that I did was I let the attorneys on the panel know that the hourly system was probably going away. I didn't have anything hard and fast at that point with regard to what those new numbers or that new approach would be, but I met with small groups of the panel. Then I finally met with the rest of the panel. I felt there were certain people that had been longer term practitioners and kind of formed the core of Lane County public defense. With that, I put together a draft proposal. Also during that time I had some meetings with some of the folks in the consortium group. What I wanted to do was kind of draw together what was the panel as well as the folks in the consortium. I do know that I did not achieve a resolution but felt that we were moving in that direction and hoped that based upon what the Commission had said that there would be some support out there from both within Lane County and staff within OPDS. I don't know that we have gotten quite there yet. I think that is probably why we are at this point right now, where, if for nothing else, I guess what I am asking for from the Commission is kind of that clear direction. I don't know whether or not there are going to be multiple proposals or whether there can be one proposal. I have some ideas I actually pulled together based upon the discussions I had with a number of members of the panel. I only use the term panel because that is what we have been. It is clearly my notion at this point that there would be some new entity. Before we started this meeting today I knew that was a fact. I think most of the people in Lane County realize that is a fact. It was going to be something that was responsive to everything you said. I have got to tell you that the biggest struggle, the biggest struggle I have had with this is when the panel formed the notion that it was going to be an open panel was fundamental to the operation. While I struggled with ideas how to maintain that openness, I honestly don't have that answer. I don't know if there really is a practical answer. There are sort of piecemeal approaches that can be taken. We are not quite there, but I also know and perhaps now based upon what you have said today it is necessary to sit down with the attorneys at large and the folks in the consortium and see if we can still try to mesh this all together. The proposal that I was preparing to submit did include the four attorneys. It was going to be one approach. I tell you, I agree that there is perhaps a preference to going from small to large, but the fact is that there really already is a structure in place. There is a good working structure with regard to court appointments. The piece that is missing from a consortium is making that transition in terms of the internal bookkeeping that is necessary. I think that can be accomplished. It might not be something that could be prepared by January 1, but certainly within short order. I understand that there is hesitation about going towards a larger group from the get go as far as a consortium. I don't think that that is an impossibility. As I say, that structure is already there and I think from the comments you have had it works, it does work. Again, the proposal that we potentially have, and hopefully will still have, is for a group that would take everything that the Lane County Public Defense Panel is doing right now. It would be a fundamentally different organization, but I think it would achieve what you folks are hoping for. I am truly hoping that it is possible to draw together what Elizabeth and her group are thinking of and what I am thinking of and the people I have been talking to are thinking of.

- 2:15:14 Chair Ellis Stay in touch.
- 2:15:15 J. Potter Are you amenable to the idea of having Ross Shepard involved in the process?
- 2:15:18 M. Friedman Absolutely. Yes. I think it would be beneficial. Again, when something gets formalized I would think that it doesn't necessarily need to require that everyone be brought in, but I think maybe some other people would be helpful. Some other people that I foresee participating in this group would be helpful to be brought in, so it is not just me versus those folks. I think there are a lot of things that could be on the table in terms of how it is run and who runs it. I just want to see something work for Lane County. I think there are some things about the way we have done things in Lane County that really do work. I understand that we have been far from perfect but I think there is hope for us.
- 2:16:08 P. Ozanne Are you thinking of a consortium?
- 2:16:14 M. Friedman Yes. It would be a consortium. With regard to how we do the mentoring there are some ideas that are perhaps different than are what is done in other places. Again, I have got a few ideas that I have laid out to some folks with regard to dealing with the openness issue. That is really where I am right now. I don't know if there is a perfect answer particularly if you look at it as a pie and we are splitting it and you can only split it so many ways. That is the difference when we go from an hourly base to a unit base in terms of maintaining some degree of parity there.
- 2:16:57 P. Ozanne Okay. I can only speak for myself but I am not really interested in an open panel. To me the rate issue is secondary to the structure issue, to the size, to the number of people trying to do the work.
- 2:17:16 M. Friedman One of the things in Lane County is, and I don't want to take up too much time, we are all solo practitioners right now. There may be some people associated with some small firms, but basically solo practitioners and the notion of bringing people in would require maybe allowing some degree of supervision where people could work under another attorney as if it were a firm. People could bring them in and then split fees or something along those lines. That is kind of one notion that I have. Thank you.
- Agenda Item No. 5 OPDS Monthly Report**
- 2:17:54 Chair Ellis Last item on the agenda is the staff monthly report.
- 2:18:18 P. Gartlan Good afternoon. This is becoming a very intimate meeting. I have three items to report on. The first is *Bowen*. The U.S. Supreme Court denied cert in *Bowen*. That has gone down the tubes.
- 2:18:44 Chair Ellis That is the 10-2 verdict?
- 2:18:44 P. Gartlan Right, less than unanimous jury verdicts. I will say that we are disappointed but I thought we made a really good run at it. Bronson James coordinated the effort and he worked in conjunction with Jeff Fisher down at Stanford. We learned a lot and we gained a lot of experience. Even though we didn't get what we wanted, we did benefit ultimately from it. That is just as an office, obviously, not on behalf of our clients. I actually have two items. Ingrid thought I should address what a case is under the law if you would like to hear that.
- 2:19:28 Chair Ellis I thought you were at least going to glow for a few minutes about the case you won in the Supreme Court on Measure 11 that judges had some discretion?
- 2:19:43 P. Ozanne You can do it, go ahead.

2:19:42 P. Gartlan I have been glowing but I didn't intend to report about that. I would be happy to report about that.

2:19:46 Chair Ellis We think you are entitled to two minutes of unmitigated glow. That is an important case. I have read it.

2:19:59 P. Gartlan We are really proud of that case because it is a landmark case. The Oregon Supreme Court once before found that a sentence was cruel and unusual or disproportionate as applied to an individual. That case didn't set out any guidelines. What this case does is it sets out criteria that trial court judges can use in future cases to identify those exceptional cases where somebody should not be given the minimum sentence or the mandatory sentence.

2:20:26 Chair Ellis Does that reopen any case that had previously had been thought concluded, or is it really just going forward?

2:20:43 P. Gartlan Probably just going forward.

2:20:41 Chair Ellis I assume the trial bar is all over this and it gives them something to talk about when Measure 11 really just feels totally wrong.

2:20:54 P. Gartlan We are hoping that defense attorneys at the trial court level will have a little more bargaining leverage, if any, with the prosecutors. If they have something that looks like the exceptional case now a judge does have that option if the judge finds that it is an exceptional case. Perhaps that will benefit trial attorneys in plea negotiations.

2:21:18 Chair Ellis As I remember both of these judges in the two cases that were consolidated had decided they did have that authority and exercised it. Have there been judges in the state system that have refused to even consider it because they assumed they did not have that authority?

2:21:37 P. Gartlan Yes.

2:21:44 Hon. Elizabeth Welch Excuse me. We have this funny notion that we are supposed to follow what the law is.

2:21:54 Chair Ellis What the law is may not be just what is said in the statute.

2:21:56 Hon. Elizabeth Welch That is a problem.

2:21:58 Chair Ellis Anyway, you have had your two minutes. Congratulations. We recognize that as a significant victory.

2:22:07 P. Gartlan I had a coach who said there is nothing deader than yesterday's headlines. That is history. Did you want two minutes on what a case is under the law?

2:22:24 S. McCrea Two minutes.

2:22:25 P. Gartlan I can tell you what I think a case is.

2:22:29 S. McCrea Now you are already qualifying.

2:22:35 P. Gartlan The Court of Appeals and I have a little disagreement on that. A case is a criminal episode. The prosecutor has to charge the offenses that arise in the same criminal episode in one charging instrument and have a hearing on that. Then there is something that the legislature enacted at least 20 years ago called permissive joinder. That is when the crimes have some

sort of commonality other than the same defendant. Even if they are from separate criminal episodes they can be joined in one charging instrument. It is really done for administrative convenience purposes. Typically you will see it in sex crimes, sex cases. You might have one defendant who let's say has abused one victim or even five victims once a day for 60 days in a row. Technically you can have 60 cases with 60 case numbers, but this permissive joinder mechanism allows a prosecutor to join all of those charges under one case number. That could be one case depending upon the definition and Kathryn has another definition and hers makes sense too. If you are just looking, in my view, strictly from the law's perspective there are as many cases as there are criminal episodes.

- 2:24:17 C. Lazenby A prosecutor can permissively join all those together. Is that free from the judiciary saying we are going to separate these out for trial?
- 2:24:27 P. Gartlan There is oversight, the legislature said if there is undue prejudice on a defendant. The legislature was clear that it is permissive. That statute was to be liberally construed. It is permissive joinder. That was the legal discussion today.
- 2:24:47 P. Ozanne So from that you are saying that the Polk County prosecutor is operating within the law?
- 2:24:51 P. Gartlan Yes. Assuming that there is that commonality that is required by statute. Commonality in the sense of same or similar crime with some ultimate goal or plan. Somebody who is accused of abusing a child 60 times would satisfy that statute.
- 2:25:20 P. Ozanne But Barnes could still send me to talk to the prosecutor and tell him to exercise his discretion in a way consistent with the rest of the state.
- 2:25:27 P. Gartlan I thought I would give a status report on House Bill 3508. House Bill 3508 was the legislative attempt to increase earned time and release people from prison earlier. It would reduce the costs so it is a cost saving measure. These are numbers as of October 12 from the Department of Corrections. They anticipate that 5000 inmates total will be notified. Three thousand have already been notified. Thus far DOC has received 1000 replies from trial courts. That is just replies from trial courts to those 3000 notices that have gone out. Thus far 900 trial courts have approved the increased earned time. Right now 90 percent of the clients are getting the increased earned time.
- 2:26:33 P. Ozanne That means in 90 percent of the cases the prosecutor hasn't requested a hearing? Is that what you are saying?
- 2:26:41 P. Gartlan I don't know that. These are just replies, so whether or not there was no objection, there was an objection and there was a hearing, those two categories are going to be combined in that number of 1000 replies. Of those 1000 replies the trial courts have allowed the extra earned time in 90 percent of those cases. Does that make sense? DOC expects to have all the notices sent out by the end of November. The procedure contemplated by the statute is if there are going to be objections there will be a hearing. The inmate will appear by phone. The inmate does not appear in person. DOC contemplates or estimates that all the hearings will be completed by the end of December this year or early in January. Right now there are 10 cases in the appellate division where inmates have been denied the eligibility for extra earned time. We haven't briefed it yet. The court had contemplated - I will try to speed it up, Mr. Chair - they did contemplate an expedited procedure and this is changing on a daily basis, literally. As of yesterday the AG has indicated that they will be challenging whether or not these denials are even appealable judgments. There is going to be preliminary litigation just with respect to whether or not these are appealable judgments. In fact, that is what Becky Duncan is going to be doing over the weekend is researching and drafting something on that because we intend to file next week. That is all I have to report.
- 2:28:50 Chair Ellis Thank you.

2:28:48 I. Swenson Just a couple of other things on 3508. It is interesting to watch the different practices in different counties. The act was designed to minimize the public defense costs. The right to counsel doesn't take effect until there is an objection by the district attorney or the victim or the judge. If one of those occurs then counsel is appointed. Many district attorneys are objecting in all cases – not many but there are more than a few who are objecting in all cases, which means that we then have to provide counsel in all of those cases. I was informed yesterday that in one of those counties, on the day of the hearing the district attorney withdraws the objection, so all of that expense was for no purpose other than to convene a hearing. We are tracking the number of appointments for the legislature. We had been asked to keep track of that because they were aware that this was something that could involve a significant expenditure of additional funds.

2:30:07 P. Ozanne Are they in big counties too? Our district attorney is on record saying he wished there was no hearing process at all and that the legislature had just granted it across the board. That is what he said.

2:30:16 I. Swenson They didn't feel that they could have or they would have. They felt that the change requires a proceeding in open court. As I understand it from Lane Borg, in Washington County there is an objection in 75 percent of the cases.

2:30:38 P. Ozanne Is an objection?

2:30:37 I. Swenson Yes.

2:30:43 K. Aylward A lot of our contractors are fine with that because other caseload is down. They have capacity and it is caseload.

2:30:52 I. Swenson Do you want to talk about 2287?

2:30:52 K. Aylward Just briefly. House Bill 2287 is referred to as the court fee bill. It continued surcharges on fees that would have sun-setted June 30. It continues them. Then beginning October 1 it increases or adds fees, filing fees, principally in civil cases. In the first couple of months, July and August, I think \$200,000 was collected. That is just the fee surcharge portion. Here is a tiny example that I find interesting where the fee is when an initiating document in a civil case is filed the fee is per party. If you have got an initiating document with 20 parties in a civil case it is a huge filing fee. What they are doing, and it did not take them long to figure it out, is one party files the initiating document and then you move to have other parties added. They are finding ways around this. However, I went to Judicial and said that you would be asking me how much money has been collected. They said it is too early to tell. I did hear someone else saying that maybe they have collected a million or million and half on their way to the 37 or 39 million.

2:32:22 C. Lazenby But they are not saying it is in a cookie jar?

2:32:22 K. Aylward Effectively it is going to be that way because it is going to be in the Department of Revenue cookie jar and they are not going to release it until they get half million dollar increments. Then it will dispersed, less their costs. Thirty-five percent of every one of those dollars is ours. Whatever it is it is positive.

2:32:43 Chair Ellis Who do we share that with?

2:32:45 K. Aylward Sixty-five percent goes to the Judicial Department of the first \$10 million. Then I am working with John Borden and Robin La Monte and Legislative Revenue staff and Judicial Department staff on – is it a task force? There is a legislative work group.

2:33:08 (unidentified) It is the Interim Joint Committee on State Justice System Revenue, comprised of four legislators, and an ad hoc member from the bar.

2:33:22 K. Aylward It will be their task to determine what happens beyond the \$10 million. What is the split and whom does it go to? I am participating in that myself. I always say, "Let's make it easy and just give us what we need and judicial can have the rest."

2:33:44 I. Swenson The only other thing, Mr. Chair, is our tentative schedule. I had suggested we cancel the November meeting. We would have three members who couldn't be present in any case. For December, Commissioner Welch has a conflict during the morning part of that day and was wondering if we could move that meeting to the afternoon if that works for other commissioners.

2:34:19 Chair Ellis It is okay with me.

2:34:33 I. Swenson Probably 1:00.

2:34:49 I. Swenson We could serve lunch at 12:30 and then start the meeting at 1:00. Does that work for everybody? Then, we don't have to act on this but I have set out some of the topics recommended for consideration in the next year by the Commission. A couple of things about that. Some of these are things you directed us to schedule sometime in this timeframe. I had spoken with you about limiting the number of meetings and possibly extending the time of those meetings. I think we talked a little bit about that at the retreat. That is what this calendar represents, fewer meetings that are probably a little bit longer. As you will recall Commissioner Ozanne had hoped that we could set aside maybe an hour after some meetings, or during the course of some meetings, for a more retreat-like discussion on some of these issues. We will try to schedule that in to at least some of them. One other piece that is not included among the prospective topics is a discussion about whether and how the Commission would like to implement a requirement for the creation of boards for at least some of our providers. I would like to work that in if that is agreeable. Also, potentially, the creation of a model attorney evaluation process and how we could go about that if the Commission wanted to do that or wanted to direct it to be done. I would like to add those two items. I sought the advice of our contractor advisory group on these this morning and I think, in general, they are supportive of both those concepts. I think that is it.

2:36:55 J. Potter Ingrid, I am putting things in my calendar. Do you have start times for all of these?

2:37:06 I. Swenson No. We should talk about whether we want to set five hour meetings or try four meetings. We only have seven meetings next year. We may need more time than four hours would provide us. Shall we set them for five? Would morning probably be the best? Would that be true?

2:37:34 J. Potter Ten to three? Ten to four? It gives us a little drive time on the front end?

2:37:46 I. Swenson Okay.

2:38:10 Chair Ellis Any other subjects anybody wishes to address?

MOTION: John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting was adjourned 3:40 p.m.

Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION RETREAT

Wednesday, September 9, 2009
10 a.m. - 4:00 p.m.
Joplin/Seeger Room
Hilton Hotel
66 East 6th Ave.
Eugene, OR 97401

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Becky Duncan
Paul Levy
Caroline Meyer
Billy Strehlow
Shelley Winn
Amy Jackson

(Retreat was called to order)

00:13 Chair Ellis This would be a really good time to raise those thoughts and kind of help us in the direction we go from here. We have put together kind of a list of topics, but I don't envision this as a session where we are discussing topic A, B, C, and D in a certain order. What I would like to do is start by going around the campfire, if you will, and have each spend just a couple of minutes on your sense of where we are relevant to where we were, your sense of where we should be spending our energies in the next year or two, and broader thoughts of that kind. Shaun, since you chose to sit where you did... You actually go back in time before any of us. You were on the board of the old system. You were here on the Study Commission 10 years ago, and you have been on the Commission from its inception. You were here when the Commission assumed responsibility for not just the appellate level but the trial level. You lived through '03 which was a major moment in the history of all of this.

2:22 S. McCrea It is interesting that you bring up the time before the Commission. I think I was saying to Ingrid that I remember being at a meeting of the State Public Defender Committee back in the old, old days, and sitting in their library in the now

Appellate Division's library and there was a hole in the roof and there was a pigeon sitting on the roof looking in at us. I just kept thinking there is something really, really wrong with this.

3:05 Chair Ellis

The pigeon only looked.

3:07 S. McCrea

The pigeon only looked. But it was appalling. It was wrong. I bring that up because I feel very strongly that while things are not ideal, it is truly amazing how far we have come and where we are today compared to where we were back then. Most of us – well, all of us on the Commission are volunteers - but the big difference is that we have staff, which makes a difference. The SPD didn't have any staff. We had an uncooperative, at some point, person we were dealing with as a head of the agency and it was just very, very difficult. I think the Study Commissions were a good experience. I think that we got a running start with this Commission. We made an excellent choice in hiring Peter as the executive director. I remember going through those interviews and talking to the candidates - and there were so many great candidates - but it was partially the cohesiveness of the members of this Commission in coming together for a common goal and toward the common good. I just feel that over the years we have been able to produce something that is bigger than the sum of the parts. I feel very fortunate that we have such a diversity of views on this Commission that we get great input from a number of different people. I feel like we are going in the right direction. Maybe part of it is I am just getting older. I am calming down more because I know that there have been some meetings where I have been very emotional. Since we are here in Lane County tomorrow, I may be back in that position.

5:07 Chair Ellis

The mellowing process we have all observed.

5:06 S. McCrea

Overall, I think that we are meeting our charge in trying to provide quality services with cost efficiency. It is not easy and there is a lot balancing but what I hope the providers feel is that everyone on this Commission is dedicated to what we do. We consider it very carefully and we work very hard at it. We try to do our very best for them, and for the system, and ultimately for the clients that we serve.

5:46 Chair Ellis

Chip? What are your thoughts?

5:53 C. Lazenby

Well, I am one of the original members of the Commission, too. I got involved in it when it was just a bill struggling in the legislature again. Wally and Ann enlisted me, from the Governor's Office, to try to help. Shortly after that, Wally came to my office and asked me to be on the first Commission. The Chief Justice of the Supreme Court? Sure, I'll do it. I had been a public defender and had ended up doing other things. I had really sort of lost touch with the system. I really didn't understand a lot of the systemic things that were going on. In the time that I have been here, the things that I think are most important, a lot of it happened on Peter's watch when we really started looking at quality control and trying to define those sorts of things. One of the things that I am most proud that the Commission has done is to try to bring some standards and some quality that a lot of people didn't think were really necessary. Now people talk a lot about them. The tours around the state have been something that not a lot of Commissions do. We have actually gone on site, visited people, seen them on their own turf, and listened to local folks talk to us about the way their systems work. It is difficult to have 36 different systems, but we are coming close, I think, to at least running a thread of quality through all 36 of those systems that makes some sort of sense. I think the success we have had in the legislature

over the last couple of sessions is testament to the fact that we have started to define, pretty clearly, how important we are and that the justice system can't really run without this group of folks and that it is money well spent. I don't think that that was something that was readily apparent in the legislature before the entrance of this Commission and moving forward. I agree with what Shaun says. It is not perfect. We still have a ways to go on a lot of those fronts, but from where it was when I first started dealing with this in 2000 or maybe '99, a lot has really changed and I think for the better.

8:08 Chair Ellis

Janet, what are your thoughts?

8:12 J. Stevens

Well, when I first got involved with this I didn't know anything about it. Not being a lawyer I just didn't have a clue. It has been fascinating to watch, and from what I gather from the Study Commission and what I have seen since, we have really changed and for the better. We do a much better job of policing ourselves, and educating the public about we are doing, which I think is great. I still sometimes think you are all talking alphabet soup and I don't have any.

8:50 Chair Ellis

That is only Kathryn.

8:50 J. Stevens

No, sometimes Chip throws in a few letters. One thing that struck me when we first got started on the Study Commission was somebody, and maybe it was you, Barnes, said something about what a great percentage of stuff falls under the purview of public defense that isn't criminal work. I am still struggling to get a sense of how much that is. I know we talk about it some, but I don't really get a sense of what its impact on the system is, and what our impact on the juvenile area would be. One of the things particularly, and I know Judge Welch thinks a lot about it and so does Ingrid, and I would like to see us spend more time looking at that because I really would like to understand whether – I know these two woman don't think it works as well as it should. Is that fair to say? If it doesn't, how can we impact that or can we? Or is it just that because Judge X says X, Y, Z, that that is what happens and we have no influence over that? I don't know.

10:13 Chair Ellis

Betsy?

10:11 Hon. Elizabeth
Welch

Well, even though I am the junior member of the Commission, since Peter has had long involvement with it - I think it is two years now, exactly, that I have been on - it has been an absolutely fabulous experience for me. I have learned a tremendous amount and know I have a lot more to learn. I am very impressed. The presentation this morning was just fabulous as far as I am concerned. It was informative and even (inaudible) for someone with a short attention span when there are pages and pages of them. We get the information that we need. If by some chance we don't, we get it five minutes later when we ask for it. What I am struck by in our trips around the state, including my trips around the state in another capacity, is the absolutely mind boggling diversity within the state in terms of everything that is pertinent to what this Commission is about. Now that there is a transparent system that has principles and rules and a strong effort to apply them fairly and in a uniform fashion, we, I think, are looking more and more at issues of quality of representation, which is a tremendous challenge and one in which my total interest is there and, of course, primarily in the area of juvenile court. I am looking forward to some discussions, hopefully a little bit today and more in the future, about the role of counsel in the juvenile court. Particularly after our last Commission meeting and what Janet was just referring

to - dealing with local culture and overcoming local culture. How much can this Commission do in the face of all of those challenges? Very exciting.

12:23 Chair Ellis

Commissioner Potter?

12:22 J. Potter

What is interesting to me about the Commission is that it came out of a culture that I think is unique in the United States in terms of criminal defense. OCDLA was started by public defenders and then they opened that organization up to the criminal defense private practitioner. At the time when that happened, the membership for public defenders was twice the cost of membership for criminal defense lawyers. Nobody else in the United States ever had that scenario as a backdrop for a public defense organization. It soon evened out so that everybody paid the same and there was a never a distinction between the public defense and private bar members within the organization. That was because the culture of this state, long before OCDLA, didn't look at it that way. Jim Hennings when he started the PD's office never drew a line that said public defenders were better or worse than the private bar. There were always hands across the aisle. OCDLA has done the same thing and the Commission then stepped into that culture. It started with a position of strength that other Commissions in other states haven't had. When I go around the United States and talk to other groups or peers in other states, I am mortified by the horror stories they tell about public defense services and how the private bar and public defenders treat each other. It is pretty horrifying, so even in our earliest stages, and even at our lowest point, we can't hold a candle to the horror stories that are happening in other states. That is a testament to the long sense of culture. When this Commission was created it wasn't without a bumpy road to get here. OCDLA for eight years, four legislative sessions, opposed the creation of the Commission and blocked it successfully for a number of years, believing that money for public defense would best be generated by a Chief Justice as the most powerful advocate in the Ways & Means Committee. There was a lot of push back that that would change with the development of the Commission. It clearly has not. Some might argue that this last legislative session public defense did better and was held in higher esteem than the courts generally were. Certainly Kathryn and Ingrid played a huge role in that. I guess I am proud of where the Commission has been and where it is going, but I am also mindful that we didn't have to start out in a hole. We started in a good place.

15:41 Chair Ellis

Peter?

15:41 P. Ozanne

I think a lot of the things I would have said have already been said. I do want to thank and recognize the men and women who work at OPDS and the amount of work they do. It is often unsung. Although, I think, increasingly people are expressing their appreciation. I also want to mention, having spent a couple years in another system, how much I admire, particularly many of the people in this room, who continue to do this work for their careers and very long periods of time without adequate compensation. Even though I was in a system where there was adequate compensation, where there was parity, and I don't want to admit this in many places, but that is not always a guarantee of quality and passion that you all have here. I think Kathryn – well I know this and maybe others don't. I think it is increasingly clear that Kathryn has to face the rough edges of the process and say some things and tell people some things, or some of her staff does, that are unhappy. I hope people know more and more how much Kathryn and her colleagues have done to advance compensation. It isn't always these big, dramatic changes, but some really inside baseball that has really made some progress towards better compensation. I want to thank Ingrid for being willing to change from being happy in Portland. Her husband John has become

a good friend. I thought he was probably going to jump me in the street when I convinced Ingrid to start driving back and forth to Salem. There couldn't have been a better successor. Having said all that nice stuff, let me say – and maybe some people will agree and maybe some won't, I really obviously broke my promise to Barnes to stay here as long as he did. I really have appreciated your support, and the rest of the board, when I was director in terms of challenging us, but also really providing the support. I think that given the people on board who I know personally and long-term - we had some board members in the past who were good but didn't really have this much passion and interest - I think the Commission could be a little more active, active in the sense of getting a little deeper into some systemic issues, some operational issues. I say that gingerly because as once your director there is kind of this tension. You want a board that really helps you with policy, but I think we can also help the staff, as for example today during executive session, we really had the best review of the contract setting. We could really say to you all, once the final decisions are made, that we were engaged for better or worse in terms of the outcome. We as a board, Commission, were really engaged in the contracting process. I think as a Commission we can get a little more involved in quality assurance. I think we may have to do some of this in executive session. I think we can back up the staff, who sometimes have to go out there and say some pretty hard things to people out there in the community who aren't doing the job. You all as the Commission have certainly spoken strongly about the quality. We have always been worried about not being an appellate court, but I think there are instances where we can really send, as a Commission, a strong message to people who when they do good work we reward them, but we really bring people up short who aren't. I've struggled, and I know a lot of other people have with the relationship between our service delivery planning where we go out – which I think is a great thing; I think we have built up support around the state for what we are doing by going all around the state – and our quality assurance where we have teams, and probably most of you out there have been on one of those visiting teams. “Have we done enough tree top level work now?” I ask myself, “Do we want to keep going around talking to judges?” With all respect, we learned enough systemically to spend a little more time drilling down into the quality issues. I think personally, and we have discussed this, I think there are places now I am eager to be a little more prescriptive. It has been nice to talk about some of the things that we expect people to do - attorney evaluations, boards of directors - and in large part it hasn't happened in places. I think it is time as a Commission to maybe say, “This is how we should do it.” Again, give enough flexibility for people to adjust to local conditions, but, I am kind of on the side of being a little more prescriptive, a little more activist. Again, I really appreciate the fact that there is a deference on the Commission for the operations, but maybe because I suffer from that experience maybe I am wanting to wade in a little too much, but ultimately I think it helps on the contract side. Kathryn and her colleagues really know we have been involved. I think it helps other folks if we were a little more involved in quality assurance. Lastly, though I have practiced only very little in the beginning of my career as a public defender in juvenile law, I am still shocked at the quality and the lack of it. I think what shocks me most is there is not a consistent conceptual framework that people share.

21:49 Chair Ellis

In juvenile?

21:49 P. Ozanne

In juvenile practice - and I think we have already started with Ingrid's leadership in particular - we need to do more. I have told folks or urged folks to consider that the support of juvenile justice and to highlight it as a key will help all of us. It is the one area where we could get widespread support for the work we do. It

is one of the few areas where, frankly, we contribute directly to public safety. This is just my personal opinion. Criminal defense is great but really in many ways you can argue whether it promotes public safety. If we are doing our jobs right we are really frustrating that machine. I think in juvenile, at least this is my viewpoint, we are making family placements. We are putting people on the right track to stay out of criminal justice. We have an amazing story to tell that is far more appealing than the criminal justice folks. I think we should highlight that. Frankly, and it is none of my business, but I am a little disappointed that OCDLA hasn't brought in juvenile justice. I think it is in the interest of the criminal justice community and public defenders or defense attorneys in the criminal area to have a tighter partnership with the juvenile. I am sure the juvenile system would benefit from a greater certainty about what practice standards are. I would, because I think we still haven't advanced much in 40 years. It is still a backwater, unfortunately. It has become professionalized, but in many parts of the state people who do juvenile work are being viewed as second-class citizens. I for one even want to propose an incentive in compensation to send a message that we care about this a lot more. Those are some thoughts I have.

23:46 Chair Ellis

Hold those thoughts.

23:47 S. McCrea

Can I say one more thing. I neglected to say this because you made me go first. In mentioning hiring Peter, I didn't mean to leave out Ingrid. I was doing this historical perspective and it was so scary. Here we were building up something and creating something, and not knowing what we were doing, or where we were going, or how it was going to turn out. I don't want to leave Ingrid out because she has been a superb person as well. All of you - I don't mean to leave any of you out. We could be here all day thanking everyone. I did mean to mention Ingrid.

24:30 Chair Ellis

I tried to think what I might say. I want to kind of pick four benchmark moments, at least in my own experience and observation. I think back to how criminal cases were handled when I first started practicing in the early sixties, which happens to have been the same time when the Gideon case came out. I have vivid memories of what a crummy system that was. Just to flush it out a little bit, I chaired a group looking at what was then the Portland Municipal Court. This was a court that was located in the police bureau. It was just a slam, bam, in and out, no process to speak of at all, and all with the rationale, "Well, you can retry them later if you have to." It was just a lousy system and then Gideon came along and 60 pages of reasonably eloquent writing defined a new, very broad right in state criminal cases and said absolutely nothing about how anybody was going to provide that service. Then I saw the roots of it starting and MPD I think is a wonderful story and it did get started right about that time. That is sort of my first benchmark is the early sixties. Then I look at it in the 1980-81 timeframe and this is when the state assumed the responsibility. What the state assumed was there was no system to it at all. There were at least 36 different ways of attempting to comply with Gideon. By and large, the counties were being overwhelmed by the cost. By and large, you still had a system where individual judges would appoint people who couldn't get clients any other way because they were inept, or too old, or had abuse problems, or were like me, a young lawyer wanting experience. What a notion - unsupervised, no special training, a young lawyer would come in and you were given someone's freedom to represent as though that were the low end of the legal spectrum. So, 1980-81 the state assumed the cost and had absolutely no system to deliver the service. It really had as much to do with the counties wanting to get out from under this boulder they were carrying around as

anything else. Then I think 10 years ago, when the study commission was formed, and that was really because OCDLA had opposed the whole idea of real change, so the best anybody could come up with was, "Would you at least agree to have some people look at it in the interim?" OCDLA was fine with that. There were some very good people who worked on that Study Commission. Some are here and some were from the legislature at that time. Ann Christian played a huge role in moving everything from just reactive to something much stronger, but I still think when they reported and the legislature passed the bill that we are now implementing, what a very hodgepodge situation we still had. It was still a circumstance where the State Court Administrator's office - good people working really hard trying to manage things - they were lucky if somebody would lob a proposal over the wall to provide the coverage. They had no real ability to take those pieces and meld them into something that would again pass for a system, something that really has consistency of quality. It was really very reactive. I remember the years when Bill Linden was doing it. At MPD we would have board meetings and we would be a year and a half into the biennium without a contract. It was just the good will of people that made the system stumble along. It really was not very much of a system. I think for the Study Commission the one big fork in the road was, "Do we go the Colorado route of an FTE system, state agency with only FTEs and provide it that way, or do we build on the base that we have but try to make the contract system work so it really does provide statewide quality service, but with local groups being the providers?" In my mind it has been one of the great privileges that I have enjoyed to be part of the process that has taken us from where we were in the mid-'60s, '80s, and 10 years ago to where I think we are now. I think there are six things that, as I was making my checklist, I think we are doing pretty well. The first is the meetings that we have had, both the ones in Salem and the ones around the state. It is not that those meetings lead to great decisions. There have been a few decision points along the way. I think the decisions have been good, but they have provided a forum. They have provided a forum for the defense community. They have provided a forum for the criminal justice community, and they have provided a sense by the communities that we have gone to that this is really important and since it is going to happen it causes all of the participants in the criminal justice system there to talk to each other, and then talk to us, and then look at where they are. I think it is the process of those meetings, more than the product of the meetings that I think has been good. Secondly, and this is a point someone has already made, I think we have made huge progress with the legislature. I must say it is just a remarkable phenomenon to walk into the hearing room now and remember what it was like 10 years ago. In the hearing room now the people on that committee, number one, they are not in need of a sales job. They are sympathetic. They believe, and I think fairly, that we are good stewards of the money, that the money they are investing with us does get spent in a reasonable and prudent way and that the system is incrementally improving. The whole tone of it is different than it used to be. Part of that is the experience from '03 which - what was it, Chip, you were saying about, "Never waste a crisis?" '03 was a crisis and I think it wasn't wasted. I think everybody learned a lot about that. I think the improvement in our appellate group has been palpable. I don't have to get into personalities or anything else, but the whole sense of professionalism, enthusiasm and sense that this is a great place to be. I think that has been excellent. I think the Quality Assurance Task Force that started on Peter's watch has been one of the - it is a terrific concept. It is peers helping peers. It is a sharing of what works and what doesn't work. It is a kind of process that is not the police coming to town; it is a helper coming to town. I think it reflects very well on the defense bar as a whole. A whole sense of we can help each other do a better job. The last point on this is I think the defense community has come together in a way that I don't

think is true of is any other professional group I know of in this profession or any other profession, that is as mutually supportive and helpful to each other as the defense community in this state. All those, I think, are extremely impressive. I do have some areas that I feel concern about and that I would like to see us try to focus on. One of those is I think we are coming to the end of a generation of providers who, for whatever reason - the '60s seemed to spawn them - had a wonderful optimism and altruism and sense of purpose. They have been the backbone of what has emerged, but they are aging. I think one of the big challenges we have is being sure that we continue to attract those optimistic, energetic, good, young people. There is a huge difference. Forty years ago those who were entering the legal profession were debt free. Today, those who are entering the legal profession are starting with a monkey on their back typically of \$100,000 to \$120,000. It made sense to borrow the money to get through law school because the economy was always going up and the legal profession was always going up. That is not true now. We do have a very difficult challenge to make defense service something that is economically feasible for those younger lawyers coming in. That is an area that is continuing as a challenge. Secondly, the contracting process, I think we are making good progress bringing order out of the way things started which was somewhat chaotic, but I will have to admit that I need to know more about it as we go forward because the contracting process is the heart of what we have attempted to do here. It is working. I think it is working, in part, because we have good people on both sides of it, but I know there are a lot of rough edges here. We still need to work our way through that. Then the last area, or group of areas, we talked about the basic structure of services geographically but we have three or four, what I think of as specialty areas, that I still don't feel very comfortable about. PCR is one of those. I think we have had a package that is a perennial loser. Somehow we have got to keep working to make that piece of it work better. With juvenile I agree with what has been said. Part of this is, as Peter said, there is a legacy of attitudes about juvenile that I think it is changing; I think within the profession it is changing, but it was certainly there 40 years ago. I keep recognizing that there is still a lot of defining going on as to just what is the right role for lawyers in the juvenile justice system. I don't pretend to personally have answers for that, but I think we could be part of the dialogue on that and help bring some sense as to just what the roles of lawyers in various parts of juvenile system are and then the last area which – and I want to phrase this fairly, is the capitol punishment area. It just bothers me where we are on that because politically the state made a decision back in the '80s. I honestly don't know if that would be the decision today. Maybe that will be something that will be addressed, but we have got this, frankly very awkward, implied contract that so long as we can keep the legal processes not ever reaching the end, the state will spend enormous amounts of money to salvage that political judgment back in the mid-'80s. It is a system that just leaves me feeling extremely uncomfortable. I am not sure what our role should be. We are not the policy makers on the ultimate question, but it is an area that when you look at that provision of our bill it talks about cost efficiency. Then when you look at the cost of the processes that have emerged, I feel very uncomfortable with it. Those are my broad comments. On the whole I am just very happy how things have gone. I think we have made big, big strides. Anyone want to pick up on any of these points?

40:38 Hon. Elizabeth
Welch

As soon as you give me a chance I will start talking.

40:41 Chair Ellis

That is what we are here for.

40:42 Hon. Elizabeth
Welch

It is the fifth thing on the list. Of course I want to talk about juvenile. There are really two things that I think we need to consider. Actually, the first one doesn't just apply to juvenile. I think it applies to the system in general. One of the things that is so fascinating again about traveling around the state is everybody says that they are doing fine. The question I have, and I assume everybody else has too, is, relative to what? There isn't any answer to that. We don't have yet, and I am sure we have pieces of it because often when I will ask what is happening on this I will get some data back somewhere in the operation, but data about the effectiveness of the system. Data about what happens. How many jury trials are there? We know things like that but there are so many things, and I am talking juvenile now because I know juvenile better than I do the other parts of the system. How long are kids held in detention pretrial? How long is the actual time to trial? How long do children wait after they are adjudicated before there is a disposition in the case, one thing after another that are measures of speed which is a very high priority. They are in our system and just how is the system functioning? From traveling around, not in our context but in my other context, the variability just in the few counties I have been to is mind boggling. The right to counsel is the first thing on the list besides the need to have data. In Clackamas County, and I don't mind being specific, in Clackamas County there was the assertion that their kids didn't get held in custody very long, that they don't have a lot of PVs. They may be right. They may not have a PVs, but there is no data anywhere that says how many PVs there are in that system, just to be specific about what I am talking about. The right to counsel in juvenile delinquency cases was established almost the same year that the right to counsel for adults was. It was just a couple of years later. I want to assert to you that based on my observations, and you don't have to get very far out of Portland for this observation to be true, that there is not a right to counsel in the juvenile court, period. There is not a right to counsel.

43:58 Chair Ellis

Do you mean that literally in courts or are you talking about these various pre-court hearings?

44:05 Hon. Elizabeth
Welch

Let me be as specific as I can. I don't want to pick on any particular court because I haven't been to all of them. The issue has to do with the waiver of the right to counsel. I was concerned about something I had observed in one of the counties in which I have worked. I asked some questions of staff from this office and we got some pretty interesting data out of that. There are counties in which a vast percentage, and please correct me if anybody remembers the numbers because I am not good at remembering numbers, but I think it was in the 60 percent range in the county in which the question was raised where 60 percent of children charged with crimes waive counsel. Just to give you an idea, in Multnomah County no child is permitted to waive counsel in a felony. It is just not allowed. It is everywhere in between. I know there are courts in which children are not allowed to waive counsel. I know that there are many courts in which they are. You have to look at it this way. Most of the people in this room are parents, but if you are not, you have lived long enough that you have been around children. The concept that a 12-year-old child, sitting in a room with a juvenile court counselor, having been removed from a detention facility without a parent present, without anybody they know being present, being charged with a crime, can be informed and understand what it means to have a lawyer and can – and I am thinking of a 12-year-old because that is probably the average kid – can make the intelligent decision that they don't need a lawyer. It is poppycock. It is just nonsense. I don't know a 12-year-old, including one that is going to go to Harvard that would make that decision. It is impossible. I am not talking

about pleading guilty, I am talking about making a decision to proceed in a matter without the assistance of counsel. I don't know what we can do about this because it is not like telling Lane, "Get your people out there," and you don't need to because it is Multnomah County anyway, but, "Get your people out there and beat bushes and make this happen." This is a system problem; it is not a defense bar problem.

46:44 P. Ozanne

I have an idea, Judge. Other than – and I am kidding you but a lot of this has to do with, Betsy, your reputation and passion around this and being here now as a judge. Besides kidding you that we want to send you around the state to sort of go to every county for a year to impose the right practice standards on that county, I think, frankly, until the judiciary gets its act together on this we are the tail wagging the dog. My thought is that we could invite the Chief, because it would have to be that, to participate in a series of educational forums in each county one by one in which we participated and had the prosecution participate, and we really did a symposium, a workshop with model people who are doing the work. They would have to be in different parts of Oregon to really say, "This is how juvenile law works, these are the responsibilities." All of this is a culture, but for some reason I think we might be able to crack the juvenile culture where we couldn't do that with the criminal culture. I guess because all the judges think they know how the criminal system works or because juvenile is assigned on rotation. I think we might have a chance to break the culture in these counties. What happens, it seems to me, in systems where you are really trying to "help people," and everybody is motivated to help people, a lot of short cuts happen and you get this kind of environment where everybody is acquiescing to the judge who thinks he or she is doing the right thing. My thought was that we could invite the Chief to start this process around the state and we would be a partner in it and so would the prosecution. We would approach each county in a diplomatic way about how juvenile law is supposed to be practiced.

48:36 Hon. Elizabeth
Welch

That would be wonderful. Going back to the data thing I think maybe it would lay a nice, strong foundation to have data that is shared throughout the state about how cases are processed, state averages and then what this county looks like and what that county looks like. Those are the first two issues, and then - I really will stop pretty soon, not because I want to - has to be counsel for children in dependency cases. If I had to pick one thing that needs attention that is it. It is my opinion that with many years of experience and my opportunities to observe that the comprehension of the role of attorneys for children is very low everywhere and not just in the benighted counties that I didn't happen to work in. I am trying to be honest about this. I think it is a big problem and I think one of the problems that most of us learned about when we went to law school - remember that bit about a good lawyer has already lost their case when they go into the courtroom. That doesn't just apply to civil matters. I think it was said in the context of civil matters but it does apply in juvenile court and it does apply in dependency cases. The important work that lawyers for children do is not done in the courtroom. It is done outside the courtroom. It is done in advocacy. It is done in keeping people's feet to fire in terms of the caseworkers and the other people that are supposed to be doing the work. At a recent meeting that I think virtually everyone in this room attended we heard a judge say "I don't appoint attorneys for children." My heart stopped and I looked at that person's face and it was obvious that there was no conviction behind that statement. There was no philosophical certainty behind it. It was sort of like he didn't understand why kids need lawyers. Probably if someone talked to him maybe he would.

51:04 Chair Ellis There is a reason that the root of the word “paternalistic” is what it is. I think you have tension that I have always sensed in juvenile court. In adult court we are used to an adversarial system. Juvenile comes from paternalistic roots of a father figure. You have family control and it is a tension that I don’t think has to my observation ever been resolved.

51:42 Hon. Elizabeth Welch When I started representing kids in juvenile court there was very, very strong tension around the issue that the judge in Dallas talked about. That is, “Well these little kids don’t have a position. They don’t know what they want. They shouldn’t be allowed to decide.”

52:05 Chair Ellis Although they are allowed to waive counsel, apparently.

52:07 Hon. Elizabeth Welch That is true. Most of these kids don’t have a position that any lawyer should be totally guided by, but that isn’t the point. The point is that child has interests and concerns and needs someone in the system that is looking at the case from their perspective, and no one else does, not the parent, not the state, nobody else. The Juvenile Rights Project is considered to be the entity in this state that has a handle on how to represent kids. Based on my exposure, I would agree with that at least relatively speaking. If everybody did the job the way those people did it we would have a completely different working system. We have to start with – again, it is not just training lawyers, which is something that needs to happen. We need to train lawyers on how to represent kids and what that means. We also need to train the rest of the people in the system to comprehend what is going on here. I don’t think it’s that people don’t care, it is that they don’t comprehend what a lawyer can do for a one-year-old baby.

53:57 P. Ozanne I meant to include dependency in my idea and I think it is why we need the Chief because it is an educational process for judges. If they don’t get educated first...

54:12 Hon. Elizabeth Welch I think I subjected you all to this. I know I subjected Ingrid to it. About five times she had to listen to me carrying on about it. In one of the counties in which I sat as a judge in recent years, a little boy, 12-year-old boy, for whom English was a second language, was present in the courtroom for a detention hearing. That is like the first appearance in a criminal case. He had been in custody overnight, 12-years-old, charged with a felony. He was in the courtroom with a juvenile court counselor and the juvenile court counselor got up and told me that, “This is so and so. He is 12-years-old. There has been a petition filed charging him with burglary. He has told me that he wants to plead guilty this morning.” I was sort of like, “You are kidding!” I asked a few questions because I obviously was from another planet. I had to figure out what planet I was on and it became clear to me that this was standard procedure. It is one thing to say all the children want is what adults want when they are in custody and that is out of here. All this kid is thinking about is, “I want to go home. I have been told that if I take responsibility for what I did and get this over with I can go home.” That is all he heard. He didn’t hear anything else the guy said. He is a frightened child. Of course I didn’t let him plead guilty. We have a long, long way to go.

56:05 Chair Ellis You had a statement with comments about we should be more “prescriptive,” I think was your term.

- 56:15 P. Ozanne I said proactive too, in part, but I will talk prescriptive because you did talk about proactive. Prescriptive would be, for example, I think it is time to really say that every consortium needs a board of directors and they need an outside member. I think we need to, and I don't know what the scope is, I think, hopefully, the public defense offices have that, and if they don't then we should prescribe it for them, and an attorney evaluation. We could come together as has often been the case in these areas of quality assurance. I don't understand why we have to have different systems. I think we could collectively agree on what the best way to evaluate an attorney is. My sense is too, having managed over the last 10 years, doing more management than lawyering, that when you are a manager you tend to really want to avoid problem areas. I don't think there is any rule we can have, but evaluations aren't about telling people if they are doing a bad job, you have to tell people right away if they are doing a bad job. Evaluations are more coaching, career mentoring, so it should really be a positive thing but ultimately, if it has to be, it is mentoring to get someone out of the business. I don't see why we can't prescribe an evaluation.
- 57:40 Chair Ellis Would you want to do it, "When you bid for a public defense contract you have to have these things"?
- 57:53 P. Ozanne I think so. When you start thinking in those terms, which I did when I was in Ingrid's position, you always hit something like, "Well, that is not going to work in places where there is nobody else or whatever." That would be the implication. I would think that the community of juvenile defense lawyers and public defense lawyers, if there is a difference, could come up with a uniform instrument and recommend a process to do it. I am not personally thinking annual evaluations are important. If it got done at all I would be happy. When I am in an organization I usually shoot for maybe two years. Then anybody who reports to me I will tell you all the time when you are doing good work, but I will also tell you right away if you are not. We have got a lot of work to do but the evaluation would be prescriptive and the formation of a board would be prescriptive. You just have to have one. I would be inclined to say that, yes, this is a condition of the contract.
- 58:59 Chair Ellis How do the rest of you feel?
- 59:00 J. Stevens I continue to have a problem. I don't mind saying that they have to have boards because they are created agencies. They are in fact businesses and they do spend public money. I still have a problem with requiring a certain makeup on the board unless I have got some evidence that not having the makeup is actually hurting them. I haven't seen any of that. If we were to prescribe a makeup of a board, I would like to see what difference that is going to make other than in perception. If it is going to make them better decision makers or anything else, I haven't seen any evidence of that.
- 59:52 P. Ozanne I think there is. I have seen it and I am not arguing it is not a completely respectable position to be more hands off than prescriptive. I think I may be a minority. Where I have seen it is where I have been able to convince a board that they needed at least a business lawyer as opposed to criminal, so that people knew how to set up the incorporation documents.
- 1:00:21 Chair Ellis You need a Chip Lazenby on every board.
- 1:00:21 P. Ozanne I think it is worth having an outside, non-lawyer as we do on this Commission.

1:00:29 J. Stevens You are required by law to have me.

1:00:34 P. Ozanne I am talking about trying to persuade you to create law here. They have an outsider who isn't a lawyer, somebody who really has deep community roots to build support in the community or has some unique business knowledge.

1:00:53 Chair Ellis How do you handle that? There are several firms around the state, some of them single member firms, who are among our very best providers. You are thinking of consortia, but I am thinking of law firm providers and there are some wonderful providers and they have really one person who runs it.

1:01:19 P. Ozanne Again, it is the problem with central planning. I would require that they have a community board that wouldn't necessarily direct them but they would be required to have other bar members, a makeup like a board. It would be an advisory committee about what they are doing. That is probably what I would try to do.

1:01:39 Chair Ellis Part of the rationale is succession. Without a board you just have no succession. Part of the rationale is this is public service and so you want a sense of public accountability, but I do wonder how we do that with the private firms.

1:02:12 P. Ozanne The "S" word. I think ...

1:02:16 Chair Ellis The "S" word?

1:02:19 P. Ozanne "Socialism." I think if they take the public's money it comes with certain conditions even though it is not enough and all of those things. Again, that is just one Commissioner's view. Maybe there is a way to distinguish the consortium from the private firm in a way that is principled. My answer in the past has been that they should have a board too but it would be an advisory board.

1:02:48 C. Lazenby I agree with Peter in a sense. The devil is in the details in trying to figure out how to make it work. The notion I think is worth pursuing. As we were having the conversation earlier and there were some elements that were being pointed out about consortia and what their problems were, I probably somewhat cavalierly said, "That sounds like a business formation problem to me rather than a real problem." They could structure it in such a way that would resolve all those (inaudible) into saying we need more money. It would also make them more accountable and make them more professional and provide a more disciplined approach in terms of the way the services are provided. If at the end of the day that is what we really want to do, is instill higher quality and more consistent quality of service across the state, then we need to have some accountability models that we can look to. To a certain extent the consortium models that we are looking at – four or five law firms that have one or two lawyers each involved in sharing this caseload, it becomes really amorphous in terms of trying to say who is responsible for quality. Not that they wouldn't step up and do that but I think we need to start asking ourselves, "Are the entities that we are giving this public money to structured in such a way that we can hold them accountable?" To the extent that there are features in this consortium where it can allow that to happen, if we want to get through and then talk about how we ensure quality we are just shooting in the dark. We won't be able to do it unless we change that structure.

1:04:32 Chair Ellis One of the great success stories of the last six or so years is Marion County. I would be interested in how people analyze what is happening. My perspective

is it was a county where there wasn't anybody doing anything wrong, but it was a private appointment system. No better. That is all it was. I think our meetings there were among the more stressful meetings that we have had. It led to creation of a PD and galvanized MCAD to now become a much stronger, much better, and much more well managed group. Part of that has to do with who is there and doing the managing part. Part of it, I think, had to do with competition really causing some change. Part of it has to do with I think they were as uncomfortable as we were in those meetings. It was not a pleasant experience on either side and I give both the practitioners and the managers a lot of credit. Instead of sulking they really straightened out and have done well. How can we build on that? That was prescriptive. That was probably the most assertive change this Commission made in any geographic area.

1:06:31 P. Ozanne

That is more, in my view, proactive. That is a situation where you look at a specific situation and the Commission gets involved. Whereas with a normal board/chief operating officer relationship, you would tell Ingrid to go solve it. This was a good example of the proactive. By the way, do they have that kind of board of directors now? I can't remember what happened. I know we got a good administrator in there, Judge Lipscomb. I would be worried that the thing would regress back to the meeting in Marion County without a robust board for us to go visit occasionally.

1:07:13 Chair Ellis

The one we see is Olcott Thompson who is a provider.

1:07:23 P. Ozanne

It is hard to talk to the founding members of a consortium about really sort of organic or quality problems. Ingrid and I had to go do that because there is so much defensiveness and there would be anyway. If you got a board with some people of different perspectives, I think it makes it easier both to talk about the issues and affect change.

1:07:43 Chair Ellis

How do the rest of you react to Peter's comments? I would describe our MO up to this point as cajoling, recommending best practices; having the quality assurance task force come in and give suggestions. It is all an effort to cause the change without imposing the change. Do the rest of you feel we have played that out as far as it goes and we ought to be more demanding and assertive?

1:08:25 J. Potter

Do we now, on the RFP - I should know this but I don't - ask the question, "Do you have a board? If not, why not? If you do what does the board entail?" The secondary question that Peter touched on - evaluations of lawyers, "Do you evaluate lawyers? If not, why not? If you do, tell us about the evaluation process."

1:08:47 I. Swenson

I don't think we do the "why not" do we Kathryn?

1:08:53 K. Aylward

No. We ask them to let us know which of the best practices they have implemented and if there is a financial reason why they haven't implemented it that they need to tell us what that is, but a lot of the responses to the RFPs were things like, "Not needed," "Not applicable," and that was sort of the end of it.

1:09:17 J. Potter

You might consider changing cultures in small steps. I would think this change is a balancing act. You can either go in reasonably heavy handed and demand it, or you can make it known that this is the distinct preference of the Commission and OPDS and put the onus on the contractor to explain why they might not want a board and sell us on that notion individually or explain why they might not want to evaluate lawyers or if they have some other alternative, but basically

sell the concept back to us so that we can say, “Oh, under that circumstance we agree, but our preference is this model.”

1:10:06 J. Stevens I think when it comes to evaluations we have every right to say, “(A) you will do it; and, (B) this is how you will do it.” We are paying for that service and we have a right to know what we are getting and know that it is working the way we intend it to work.

1:10:24 Chair Ellis You won’t see the evaluations.

1:10:23 J. Stevens I know. You need to know that it is being done. I just think you do. Because it is the state’s money and the people’s money, we have every right to say that they will do it and they will do it the way we want them to.

1:10:41 Chair Ellis Is part of the problem the classic systemic one that you have a consortium that has been together and is kind of set in its ways, and it is the devil’s own due to get them to be the ones to decide to make that kind of a change.

1:11:05 P. Ozanne We have a public option. “If you don’t want to do it we will send in our own people to evaluate.”

1:11:13 S. McCrea That is what we are doing with the site visits.

1:11:17 Chair Ellis That is the cajoling model. That has been our effort to get there by persuasion.

1:11:25 P. Ozanne We could have a statewide public option that we will bring in with our own evaluators if you don’t want to.

1:11:28 S. McCrea In storm trooper outfits.

1:11:40 J. Potter I think we are making considerable progress using the cajoling model and maybe it ratchets up a little bit. I am a little hesitant, and maybe it is just me not wanting to seem like big government –

1:11:52 S. McCrea No. I am way hesitant, John. If I were a porcupine my quills would all be popping out right now.

1:11:57 J. Potter I think you bring people along by educating them. There may be people who never want to come along and we choose that they don’t get a contract.

1:12:09 Hon. Elizabeth Welch
Welch On the evaluation thing I am thinking back about when I was still working as a judge everyday, in Portland of course, where there are lots of law firms. We were just talking about juvenile again. The people who most frequently came to talk to the judge about, “How are the people who work for me doing?” was the district attorney’s office. I am thinking about what law firms had people come and ask questions and which ones didn’t. You know what? There is a correlation there. I can’t prove it, but it was the better firms that were asking. You could find out whether or not they are polling the bench by asking them.

1:12:59 Chair Ellis The great prod that worked in Marion County was competition. In the areas where you are thinking about where you get the entrenched provider that doesn’t want to change. What about the prod of competition?

1:13:17 P. Ozanne We are still, I think - and when I say “we” I am using that pretty liberally; I wasn’t here when the public defender office got started – I think...

1:13:27 Chair Ellis You had a lot to do with the spade work on it.

1:13:29 P. Ozanne ...the jury is still out on whether that is really going to do the job. Competition is a nice idea but it gets pretty sticky. When you actually have people in the county there is some competition. It is a good concept. I think most folks, especially the ones who are dragging along I suspect they know there really aren't a lot of alternatives and we are probably stuck with them.

1:14:00 C. Lazenby Unless we can change the way that stuff happens. They will adjust.

1:14:07 S. McCrea I feel the other way. I feel like the message over the past several years has been, "If you don't start performing you are going to get snipped off the vine." I think that is kind of the word that has gotten out. I think people are really concerned about that. That is my impression. It is not business as usual. It is not like you can just get by. It is more like resistance is futile and you will be assimilated.

1:14:46 Chair Ellis To move to a somewhat different subject, Shaun mentioned and I mentioned a concern about how we bring younger people into the defense community. What is your thinking? We have talked about that from time to time over time, but how do you feel we are doing and where do you see we can do more?

1:15:12 S. McCrea Well, I am not really sure this is an answer in terms of your question. I am teaching trial practice at the U of O Law School. I am one of the group leaders. It was pretty interesting to me talking to this group of students and having a guy who had clerked for the public defender's office in Coos County. He just went off on the system – mostly it was the judges. He was really very good and I was trying to encourage him to maybe try some different counties or something. He had a pretty negative attitude, and other people - one guy in there wants to go into commercial litigation. Another guy is trying to decide between criminal defense and trusts and estates. I don't know. I know OCDLA does the new lawyers program every year.

1:16:25 J. Potter I have to say that I am not noticing a big drop in new lawyers joining the association.

1:16:30 Chair Ellis I am glad to hear that.

1:16:30 J. Potter Keeping them there may be an issue. That issue, for the most part, is student debt that they are carrying and they can't make it on \$40,000.

1:16:46 C. Lazenby One of our contractors in Multnomah County, Alex Hamalian, is a friend of mine. I have watched his operations. What Alex does is he hires young law students who are certified and brings them in through his misdemeanor docket. They handle appearances and they have supervision from more experienced lawyers. As the year progresses and they get down toward the end he may hire one to be a part of his group the next time. I have noticed that a lot of those lawyers who go through Alex's mill end up going out and practicing in other places. I am not saying that that is the best quality training that is out there. I think what attracted me to criminal law was that Professor Ozanne was one of my professors, but through trial practice and through criminal procedure I got a sense of what the practice was like. It was really the clinical program at the University of Oregon that kicked me over the top and said that this is something that I want to spend some time doing. To the extent that we can develop practical applications for law students or first or second year lawyers to get actual experience, I think that is one way we can be growing the younger ranks

and combat the graying of it. You hit it right on the head, Mr. Chair, the crushing debt that young lawyers have coming out of law school - it almost forces them into the law factories as opposed to public service work, whether it is being a defense lawyer, legal aid, or Juvenile Rights Project lawyer or something like that. The other part of the answer is we need to figure out some funding mechanisms to fund those opportunities so that people can catch the fever.

- 1:18:39 Chair Ellis Should we consciously subsidize the PDs on their new hires and go out of our way with the funding mechanism?
- 1:19:00 C. Lazenby Sort of beating a dead horse and you are going back to my description of a consortium and the organizational problems there. Contractually, I think, I can imagine if I am in one of those law firms and I am collaborating with a bunch of other law firms. I am pretty comfortable where I am and with what I am doing, but if I need to start bringing younger people in in order to keep that going that becomes an economic decision that I end up making. That gives those lawyers an opportunity to do two things, to do criminal work, but to also start to get involved in the broader practice of law. I think we help grow it that way. It is not just subsidizing public defenders.
- 1:19:48 Chair Ellis The model that has always seemed to me a very logical one is that the PD is the place that new lawyers who want to get that experience can go. Get the experience under supervision with training. Then as they gain this experience if they want to go out and enter a consortium and be a practitioner apart from the PD, fine. That is terrific. I have never quite believed it could be done, which I think is what you are suggesting. It has always seemed to me to be hard to have new entrant supervision, training and so on in the consortium structure.
- 1:20:35 J. Potter I agree. It is hard, but the other aspect of it is people who are in PD offices get the training to be lawyers. Then they go out on their own and don't necessarily have the training to run a business because PDs have a different model for running a business than the private bar.
- 1:20:55 Chair Ellis That is true in all areas of law practice.
- 1:21:02 J. Potter But in consortia you have the opportunity if you are mentored correctly. I am not saying that it has been done. I am not quite as pessimistic that it can't be done. The consortium lawyers can get mentoring not only in presenting in court but how to run a business.
- 1:21:12 C. Lazenby Keep in mind the majority of counties don't have a PD. You really are going to be dealing with folks that are going to be in some sort of private practice.
- 1:21:23 Chair Ellis Mobility by lawyers.
- 1:21:29 J. Stevens There is also the flaw that we as a group have financially favored PDs. So you say, "Go to work for the public defender who is going to make the most money, and when you have the training go to a group that is going to make less."
- 1:21:48 Chair Ellis I am not sure what you said is accurate. It does cost us more with PDs than consortia, but the individual practitioner probably makes more in a consortium than a PD.
- 1:22:03 J. Stevens I think it is beyond student debt, although I think that has a big, big impact on decision making, training and all of that. Judging from the kids I see who are

that age, and my own children and their friends, I see a lot of kids today whose notion of public service revolves around energy, organic food, it is much more personal – I don't know what the word is, but it is a much more personal sense of public service. If I can make my plot of land the cleanest plot of land, or if I can get that guy to quit polluting, then that is public service. This kind of law is not where we are going to go with our public service. We are going to do something else. I think that is a cultural thing not just here. We have to overcome that if that is the case.

- 1:23:07 P. Ozanne I agree there are forces here. As I saw teaching law mostly in the '70s and mid-'80s and then I would come back occasionally and you could see the difference, the people, what I will call the value driven student - these are obviously generalities - but they seem to be gravitating to environmental law. The '70s were the time and we had more hope and the law was better then and it was moving faster. There were a lot of people who chose criminal defense for that reason. There is some kind of a big trend there that we are bucking.
- 1:23:42 Chair Ellis What is your perception? I was very pleased to hear John say that he doesn't sense we are having trouble attracting new entrants. What do you see?
- 1:23:51 P. Ozanne I don't know anymore. I am not close enough to have a sense. It has been four or five years since I taught last.
- 1:24:02 Chair Ellis And is the fact that you taught him the reason Chip refers to you as "Sir?"
- 1:24:07 P. Ozanne I was actually still in high school.
- 1:24:12 C. Lazenby He was a student teacher at the time and I was a teen prodigy.
- 1:24:21 Hon. Elizabeth Welch I have just a very narrow question back on the other issue of board composition. When you advocate, as you have, consistently about this subject and you talk about outside people do you mean outside of the legal profession, or outside of the people who are participants in those specific practices?
- 1:24:47 P. Ozanne Both, but probably one person outside the legal profession, not necessarily, and it would be a challenge here in drafting this. As Chip said the devil is in the details. I think it has really worked well for Janet to be in this role. I think there is a good reason to have someone with a different perspective. And then someone outside of the founding fathers and mothers who are there because they invented it and they have a financial interest that is greater than anybody else. There what I mean is maybe a lawyer from outside but also really being sure there is turnover with younger members getting a chance to participate on the board. There are a number of dimensions to each. The model may need to have enough flex in it to accommodate that.
- 1:25:52 Chair Ellis Let's take a 10 minute break.
- 1:26:28 Chair Ellis Within the Commission does anybody have a burning thought they want to...
- 1:26:33 J. Stevens Peter was wondering about the status of the service delivery reviews. They are a formal way for us to get to those places and demand that people get involved. It does all the good things that he said it does and it hasn't been completed.
- 1:27:04 Chair Ellis I am duly impressed by how many of the communities we have gone to have expressed their gratitude that we came. It is not that we bring wisdom from on

high. I don't pretend that, but it gives the community a chance to talk to each other as much as to us. I have felt it is good. The second piece is as I was listening in the executive session on the contracts, I felt much more in tune. I know most of those contracts or something about them. I know those communities and have had some contact, so your ability to follow what is happening is so much better.

- 1:28:06 J. Stevens For example when we went to Baker. If you haven't spent a lot of time in eastern Oregon you might not recognize until you go to Baker how far it is for lawyers who are working in Grant and Harney counties, for example. They are driving all the time, and unless you actually see it you don't really have a concept of it. If you say, "Well, it is 90 miles away," you think of I-5. Well, it is not like I-5 at all. It is a much harder drive and the weather is worse in the winter time. Both sides benefit.
- 1:28:39 P. Ozanne I think it has been great and I would like to get around the state just as a personal matter. I was wondering though, and one of the things that hung us up, and I don't know whether it was really necessary or not, was the notion of the confidentiality with regard to the quality assurance visits. You had to keep it confidential and there will always be things that you want to keep confidential, but one of the ways is to coordinate our reviews with the site team visit and almost use the team to do the investigation level stuff. Then do the same thing with peer counseling, but then ultimately certain issues - and we would have to work on those - more general issues would come to us or thorny issues that staff thought we should get into. We are going to a place and sort of touching on quality and other problems. Then somebody else comes and drills down deeper and deals with individual lawyers and things. I am just wondering if there are ways to turbo charge both systems by combining them.
- 1:29:53 J. Stevens One of the advantages to me of the broad overview is that it forces the entire system within a county to think about what it is doing and how they are interacting with each other. It gives us a way to know where it might be worth digging deeper or not. I think the idea that you end up with judges and district attorneys and defense lawyers all in the same room talking to us about the system allows them to see the system in a way that they might not otherwise see it. I think that is good.
- 1:30:31 P. Ozanne I do too, and actually the team goes around and solicits input from all of those constituents too. It would have to be thought out. We divided them because of this notion that we thought people wouldn't participate in the quality assurance process. Correct me if I am wrong, Ingrid. That was sort of one of the things that we kept separate from the Commission in that way. I am not sure we need to do that.
- 1:30:57 Chair Ellis Any reaction on that?
- 1:31:04 P. Ozanne I would welcome it, Mr. Chair, if we could get input from some people out there who might have a real world reaction.
- 1:31:13 Chair Ellis I would welcome input from anybody that is here on anything that we have talked about.
- 1:31:22 P. Levy Insofar as I have real world experience with this issue and the site visits, I think we need to - and the Quality Assurance Task Force will talk about this too - move on from how we are doing them now. I think we probably get just as good information from folks without the promise of confidentiality. I like the idea of

a peer team doing the front end work and then having the Commission, where necessary, come and follow up. I think tomorrow is an example of how we could have done things much more efficiently had our review in Lane County been not under the guise of confidentiality. It is a way to make the two processes work together.

- 1:32:25 Chair Ellis My memory of the origin of that, which was seven or eight years ago when it started, was the notion that offices around the state would react very defensively if they thought contracting bodies were landing on them and the police from Salem were coming. You get more candor and a more open sense if it was just peer to peer and not going to be a part of the contracting process and the contractor selection process. I certainly accepted that at the time. Is it your judgment that life has moved on that people that are contractors now are far less likely to have that mindset? We don't need to worry about that?
- 1:33:24 P. Levy Well, we were just in Pendleton doing a follow up for the Commission. There were no problems with confidentiality. In fact conflict didn't even come up and people, I thought - Kathryn was part of that - were very frank with us. The contractors cooperated fully with the visit. I am not sure if we need to assume that there would be resistance.
- 1:34:01 P. Ozanne I think we also felt that the participants, because we worried about how many people we could get on the team. That turned out to be fortunately kind of fictional. Would they feel like they were just tools of the Commission? That was another reason why...
- 1:34:34 A. Sherbo I think that people are either going to dread the review or not. The confidentiality is not a huge issue. I think there is still concern amongst people that the police are coming and that they are going to be told what to do and be micromanaged. I think that that is still a concern that I hear from my peers and have seen when I am on site reviews. I don't believe that the confidentiality is the big component of that. I think it is more of a resistance to being told what to do. People feel like they are doing things the way they want to do them and the way they are best, so people are resistant to being evaluated. I don't personally think that the confidentiality piece has hindered or helped the process.
- 1:35:18 I. Swenson I still have the concern that Peter raised which is we ask the best lawyers in the state to participate in these site reviews. I think part of their motivation has been that it was a process to assist their colleagues in improving what they do. I just don't know if we preserve that when we say, "Oh, and by the way, whatever you say we are going to act on it as a Commission." Right now as it plays out, if the site team says to the Commission, "We think you need to come back here and take another look," they have the authority to do that. They have done it on a couple of occasions and they can also recommend that OPDS take particular actions with respect to a contractor. I am just not sure how that would affect people's feeling about what their contribution is and to whom they are making it.
- 1:36:17 G. Hazarabedian If I can chime in on something, a different topic you talked about earlier, I wanted to - as I told the judge during the break - I wanted to strongly commend to the Commission Judge Welch's suggestion that we look for some sort of outcome data in dependency cases and delinquency cases the way we already have ways of finding it for criminal cases. The juvenile review of Lane County that happened a couple years ago of the juvenile system here was largely critical of the culture in this county where there is much less litigation than in Multnomah County in dependency court. Yet that is governed by the court that

runs that system. I am less effective as an agent to change that if I don't have any data supporting the proposition that my clients or my office and Karen's consortium are actually worse off for the different culture in this county in dependency than they would have been in Multnomah County. I don't know whether that is true or not. Certainly the Quality Assurance Task Force had no way of assessing that. I think if this Commission could actually gather data it will either put the lie to the idea that everybody has to do it like Multnomah County, or, it will in fact give us some tools to change it if we should change it that way. I think the data on outcomes in dependency court would be a huge benefit whatever the data showed.

1:37:47 Chair Ellis Walk me through the kinds of things you think are susceptible to data collection.

1:37:56 G. Hazarabedian It is not hard to track the outcome of a criminal case. Somebody plead guilty or they went to trial and lost or they got a deal. It is harder to assess from a data type way what was a good outcome in a dependency case. I don't know whether the judge has ideas as to how to gather that data. I certainly don't. I think if there were some way to do that where we could look at outcomes in juvenile dependency systems, it would either give all of us collectively real strong tools to change systems that aren't working well for clients, parents, or children, or it would put us at ease that systems can work differently than that in Multnomah County and still be providing a good service to the clients. I think we want one of the two. I just thought I would chime in on that.

1:38:59 A. Sherbo I wanted to follow up on a couple of things that Judge Welch said as well and then respond a little bit to Greg. I think there are some, if not outcome elements that we could look at, there are certainly some outputs, I guess, that the judicial department tracks, like the length of hearings. In the case that Judge Welch expressed really outrage about where a juvenile court counselor would bring a child before her and say he is ready to plead, that would show up in the OJIN numbers as a one minute long proceeding. If one takes a look across the spectrum of a dependency practice and looks at how long it takes for a judicial officer to make a decision about the rest of the life of some young person, that in itself to me is somewhat shocking. Again, you have the whole issue of averages and stuff. You can see where things go to trial. I think it is trickier to look at outcomes and how many acquittals there are. In the dependency area you have got the same Commission and office funding two different parties to the same proceeding. Well maybe one of them is going to win and the other isn't if you can even determine what winning is. I think it is difficult. If you will indulge me for just a couple more minutes. I really wanted to follow up on the quality issues with respect to juvenile law. I think there are sort of three areas that the judge raised. First there is the no lawyer issue which is something that I have seen throughout the state with kids being asked to waive - no colloquy, no nothing. Add to the picture that she drew of the young person in the juvenile court counselor's office making that decision without a parent, add shackles and add lifetime sex offender registration for a felony conviction un-counseled and think about whether that is the kind of practice that we all ought to be (inaudible). I think Peter's idea that at least at that stage, where you have no counsel, it is obviously the judiciary that has to be involved. The judicial officers have got to make a change because we aren't even there. We don't know this is happening. Sometimes I read it in a transcript and it is too late to appeal. Then with respect to that is the no lawyer situation. Then there is this whole category of what I would call poor lawyering but not utterly criminal lawyering. Again, Judge Welch had it right that the activities that go on if you are able, because you either came to the position without law school debt or have an organization that values supervision and modest caps on caseloads. If

you are able to do that then the kind of work that you can get done for your child or parent clients is so much more than simply appearing in court and making an argument for no reasonable efforts, for an additional hour of visitation. The kind of things that have come across my desk just in the last two days in terms of supervising other lawyers and looking at challenging legal issues are as diverse as the Hague Conviction. I have two little kids who live in Coos County whose adoption has been stalled now for two years whose home studies from Mexico are a page long and the initial advocacy going on in the juvenile court around that. The juvenile court doesn't have the authority to make those decisions. All of the advocacy about what and where those two little kids, kindergarten and head start, where they are going to live the rest of their lives is taking place outside of the courtroom, outside of the country, in fact. Social security, disability, SSI, Developmental Disability Services eligibility impact the rest of the lives of many of the kids in foster care and the dependency system now because those kids are disproportionately disabled in one way or another and eligible for other services, but you can't act on it and we don't understand how they work. The caseworkers don't understand how they work. The interaction of those systems can make a difference that is life long but it takes time. I have two little kids now that we are going to try and help through our helpline who are first and second graders from the State of Washington who were sent to the State of Oregon under what is called the 30 day visitation of the ICPC. Along with the directive from the State of Washington that if the foster parent here in Scappoose enrolls them in school she will be violating the law. So these two little kids, first and second graders, are not in school. There is immensely complicated federal law with respect to the things we deal with. I guess all I can say is that I am toward the end of this. I have been doing this a really long time and I love it. I really want it to have the respect that it ought to have and I am so grateful to the Commission, Ingrid, to others, to the Appellate Division for taking on the parent representation project. I think we are making a difference, but I really urge you to think about tying some of these performance activities and measures to contracts. Give that kind of little stick along with some of the carrots. We are going to be doing even more free training around the state for lawyers representing parents and kids. I don't think it is just a training issue. I really do think that somebody has to set the expectations so that if you are lucky enough to work in an organization where the expectations are such then you live up to them or you do something else. If you are not, then some other entity has got to take that over. I guess the last thing I would say is that sometimes it is not just inadequate but over the course of the time that I have been working with Pete and reviewing transcripts now I am seeing, besides just being in Multnomah County doing it the Multnomah County way, which is not all that different in terms of going to trial than the Lane County way, I see and I read transcripts where it is not just no lawyering, I see examples of lawyers who are acting in the role of prosecutors with respect to their teenage clients. They are so confused about their role when their role is to represent someone who is 16-years-old. If you can waive at 12 and go to prison at 16, and you have a state paid lawyer, by golly that lawyer ought to be representing you and your interests and should not be, as I have seen in reviewing these transcripts, going to the judge and the other side and saying that my client, whose clear desires are to be at home with family, or in one instance where the child was both a mother and a ward, to have contact with her child, "Oh that wouldn't be good. That would be bad for my client. Judge, take the baby away from my client. Judge, take my 16-year-old away from her mother."

1:47:21 J. Potter

Does that fall into malpractice as far as the bar is concerned?

- 1:47:23 A. Sherbo
It may well. I have taken some action on it. Those are terrible instances and I don't mean to suggest in any way that it is representative of people's practice, but that kind of practice is permitted to go on partially because there is confusion about roles and partially because the expectations haven't been set high enough. We might as well not be paying for those young women to have lawyers. There would be fewer people against them if they didn't have a lawyer.
- 1:48:02 P. Ozanne
In the counties like Multnomah and Lane and probably a handful of others we have a shelter from the storm, I will call it, where they can challenge the culture and influence over time of the judges. That seems possible, but in some of these counties where two or three judges and half a dozen lawyers scattered all over – that is the tail wagging the dog it seems to me. That is why we have to get judicial leadership to talk about it. I can't believe that there are so many judges who don't understand what they are supposed to be doing.
- 1:48:50 C. Lazenby
The complexity of what you just laid out and you have admitted that those are extreme cases, I was struggling to find a way to put metrics in a contract for providers and say you have clearly violated A, B, and C. Therefore, we are going to do X to you under your next contract or not renew it. I just can't find the objective metric that I can put into a contract because it is so subjective.
- 1:49:18 A. Sherbo
One of the things that are in this document that OPDS prepared for you are some ideas, caseload sizes, training requirements, some best practices, but you are right.
- 1:49:32 Hon. Elizabeth Welch
It is not enough. We did not plan this in advance. Picking up on some things that Angela has just said, one of the things that I had on my list if I got a chance to talk again was the issue of zealous representation. It is a cliché but in this field, having heard Angela's examples, you can see that it is a rather loaded cliché. In my travels I have talked to judges who say, "Oh, yeah, the lawyers in this county that work in my court are so good. They don't waste my time with a lot of motions. They know that we would just get so bogged down. They just save their fire." Then you see, in that particular county where that statement was made, a lawyer who does indeed raise issues that I have never seen a lawyer in Portland raise, a good lawyer far away from Multnomah County raising issues about, in the case that I am thinking of, children at a shelter hearing - representing a child and actually getting up and saying something. There is a lot of emphasis in OPDS evaluations of offices on whether or not there are lawyers at shelter hearings. Well, there is being there and there is doing something. Being there is necessary in order to do something, but just because they are there it doesn't mean that anything is happening. I can promise you in most places there isn't very much that lawyers do at shelter hearings. I raised zealous representation at one of our last meetings with the people in Clackamas County in the actual interaction with them. The folks got defensive and I don't blame them. They are very good lawyers and they mean well, but when you are facing a judiciary which has a very clear notion about how things ought to be done - back to Peter's point - after a while you just quit trying, I guess. I guess that must be it. They all know what it is they ought to be trying to do. There are too many kids in detention in this state. I know I am starting to sound like a preacher. Another issue in juvenile, and I was involved in this with Ingrid several years ago when it was decided that we were going to have means testing and try to collect money from parents in juvenile court cases. That was, to say the least, a fiasco. It got stopped somewhere along the line except it didn't stop. I have been to at least two courts where children are routinely denied counsel. I am not talking about dependency, I am back to delinquency again, because their

parents either refused to fill the forms out or didn't qualify. Now, let's say that your kid gets arrested and is charged with something. The kid has stolen your car. You know what happened and you know he did what he was charged with. You are sitting there in the courtroom and you have filled out the form. The judge looks at the form and says, "You don't qualify. You are a lawyer yourself. You are going to get your kid a lawyer." "No. I am not. The kid did it and we just want to get this over with." What is a judge supposed to do in that situation? I won't answer the question. It is an issue that arises regularly in many, many courts. There is this notion that if you don't qualify as being indigent, and what the standards for that are I have never know. Ingrid and I have talked about this but not for a long time. I don't know what the standards are and to use the same standards as you use when Peter commits a burglary. He puts his income on the line. If I didn't commit a crime, my child committed a crime, why would the standard be the same when I have a household to run and I didn't break the law. The system never came up with anything other than using the same standards for indigency as they are using in criminal cases. It is nonsense. In any event, there are lots and lots of kids that are denied lawyers because their parents refuse to get them an attorney and the judge determines, correctly or incorrectly, that they are over the indigency standards.

1:54:47 K. Aylward

It is actually up to the Commission to determine the policies and procedures for verification, so if you want to change that you are in a good spot to do it. The Commission can just say, "Nope. We are not going to do verification on delinquents," or whatever you want to decide. There is one thing in the current policy that says that if the parent is a victim of a crime then we don't expect the parent to pay.

1:55:09 I. Swenson

One of the things that we want the Commission to look at within the next year or so is the eligibility standards generally, which are also your responsibility.

1:55:20 Hon. Elizabeth
Welch

One thing that I wanted to comment on from this morning was the proposed solution for small counties of basically saying there is an irreducible minimum amount of resource that has to be provided. I consider that to be probably the most important policy decision that has been made in the two years that I have been on the Commission. I really applaud that. I think that it is just the right thing to do.

1:56:16 Karen Stendar

I am Karen Stendar and I am the director of the consortium that does juvenile stuff here in Lane County. I also really appreciate everything that the Commission and Ingrid's office has done. When I started doing juvenile 11 or 12 years ago it felt very much like the stepchild of the legal system and to some extent even of the defense bar. It feels a lot different now and it is very gratifying, so, thank you. I agree with all the comments that have been made about concerns about representation across the state. I guess that I just want to put out there that it is also difficult to hear about us being potentially required to document things and do things that a criminal defense attorney wouldn't have to do. I think the Commission is wrestling with how do we keep things accountable? How do we make sure that the attorneys are doing their jobs? I think that that is a very righteous mission and one that I really embrace, but I also have to say from a practitioner's point it is hard to think that I have to keep a checklist and somebody is going to review me. Those things are difficult as a practitioner to hear because it feels like even we are becoming less of a stepchild are we also then going to be held to a different standard than other attorneys? This sort of paternalistic notion that you can't trust these attorneys to do the right thing - I understand that that reputation may be deserved in some places. I

guess I just want to put it out there that it a little tough to think that guidelines are one thing, but sort of a reviewable checklist or commitment to attend every meeting regardless of whether my judgment would be that that is a meeting that absolutely needs to be attended. That is tough to hear. I appreciate very much the interest and the attention. Those are my thoughts.

- 1:58:05 Chair Ellis Ingrid, I am hearing quite a lot of interest in juvenile. You have heard three or four sort of subject matter focuses. Looking at the passage in paragraph 2(b) about how Commission meetings could be used to best advantage and what substantive areas of public defense oversight we should review in the next one to two year period, I think we are getting a pretty strong signal that there are various elements in juvenile we would welcome more focus on. On that subject, what would you all like to do with this coming year? Assume we are on a school year basis and it is just starting today. What are the things you would like to see us do between now and a year from now? I think I am hearing keep going on the regional and I share that. I think it is good for us. I think it is good for the communities we go to. I am hearing, obviously, the juvenile piece that we just talked about. Other areas that you would like to focus on in the coming year?
- 1:59:30 C. Lazenby I don't think that we ought to consider the quality piece finished. I think we really need to keep pressing. I also think, not just in the juvenile area, we should probably if we have got the ability to do something about eligibility rules for court appointments...
- 2:00:00 Chair Ellis If you read the statute, Kathryn is quite right. It is right there.
- 2:00:05 C. Lazenby We'd be locking horns a little bit with the Ways & Means of the legislature around that issue.
- 2:00:17 Chair Ellis I would cite you to ORS 151.216(f)(A) and it is telling what the Commission's responsibilities are. It says, "The determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense." To my knowledge whatever is out there is out there.
- 2:00:51 C. Lazenby If I recall that also feeds into the unitary assessment and feeds into some other pieces in terms of when it gets recaptured and where the money goes when it gets recaptured and all that. Doesn't it?
- 2:01:00 K. Aylward Recoupment money goes to the criminal fines and assessment account. The courts have been pushing us to revise our guidelines because they are using old charts that are showing you can go out and get your own attorney if you have \$300. Of course people come back and say, "No I couldn't." The court wants us to update those. We have been holding off on doing it because if we make more people eligible then our caseload is going to go up and it is going to require more money. If we have a little money we would rather put rates up than increase caseload if it were an option. I have urged the courts to actually document if what is happening is the person comes back to court and couldn't find anybody, and they get appointed an attorney anyway, then we are just wasting everybody's time. We might as well put the level up to a \$1,000. We won't see an increase in caseload. We will just save the court and client a lot of running around. They would be thrilled if we looked at that.
- 2:02:08 C. Lazenby We just appealed a bunch of administrative rules at Portland State that required us to give notice to the *Oregon Journal* before we have a hearing.

2:02:22 P. Ozanne I have something I would like the Commission to consider. I will put it under the notion of problem or challenged contractors. I think we were interested - for example, you recently asked as a result of one of our service delivery experiences and testimony whether we wanted to have someone come back and report to us - I would like us to consider probably an executive session workshop with some problem contractors. Maybe they have all gone away since I was working on the staff. People were sort of perennially not getting the message that we want certain things done and they aren't getting done. This is kind of a version of the proactive Commission. Maybe hold it in executive session. Invite people down and have a heart to heart.

2:03:35 Chair Ellis I think if there is the right case for that I could support that.

2:03:44 P. Ozanne I have a list of candidates, maybe three or four, but maybe the site visit teams have an issue that they would like help resolving.

2:04:05 Chair Ellis Any other areas that people would like to see us address in the next 12 month time frame? This is an off legislative year so we get to do less defensive issues.

2:04:25 J. Stevens At least until February.

2:04:26 P. Ozanne Are we done with the cycle? Are we starting to repeat ourselves? How many more new counties do we get the chance to go to?

2:04:32 I. Swenson Well, depending on whether you include the site visits, we have essentially done everything. There are a couple of counties we haven't been to but there is a reason we haven't. Either a site team or the Commission has visited everybody but Tillamook at this point. Civil commitments are an area of practice that badly needs some review and some proactive kinds of interventions. That is an interesting area because I think the courts and the state's attorneys also feel like there are issues with all three groups. Before Peter Shephard left the Attorney General's Office he had suggested a joint training for all of those folks because of the number of reversals that occur in the Court of Appeals and some issues that continually arise. Paul and I have been thinking about a good approach to training. The Commission might want to take a look at the practice too.

2:05:41 Chair Ellis I will be honest I know next to nothing about that. That would be helpful. Anything you need to tell us?

2:06:01 J. Potter Well, Peter keeps bringing out the big hammer and I feel lucky to bring out the small ball peen again. On the board issue, I was talking to Karen Stenard at the break, and as we try to encourage more board development for those folks that don't have boards, she pointed out that she was one of the foot draggers in developing a board. She has a board now and has found it to be effective and a tool for her. She mentioned Jennifer Nash and there were others that were also naysayers that ended up having a board. Using those people as spokespeople at management conferences or gatherings like this rather than using the Commission as the heavy voice may yield some results.

2:07:07 Chair Ellis Converts make the best preachers.

2:07:20 Karen Stenard It was not so much just foot dragging, it is also feeling overwhelmed. You have never had a board and all of sudden, "How do you do it?" I think peer counseling on that was helpful for me.

2:07:33 Chair Ellis Any other comments? Thank you all for being here. I think it is a good exercise to have an unstructured discussion every now and then, take the pulse of where you think we are and also look at where we have come from. There is fog up ahead but it is not too bad.

2:07:59 P. Ozanne Not to step on your opening line but it might be good throughout the year to have an hour. One of the things that I have always found on these groups is it is hard when you are reacting to agenda to hear more about what your colleagues are thinking. This is of value to me. If we could have an hour every couple of months.

2:08:23 Chair Ellis I would welcome that. Anything else to cover, Ingrid?

2:08:31 I. Swenson Meet you at 5:30 at the front desk.

2:08:41 Chair Ellis Thank you all very much.

Attachment 3

LANE COUNTY SERVICE DELIVERY REVIEW

December 10, 2009

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

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

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

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

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

History and Description of the Lane County Public Defense Panel

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

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

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

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

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

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

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

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

Administration and Structure

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

³ For the list of best practices, see:

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

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

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

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

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

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

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

Case intake and distribution

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

Case Management and Support

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

Community Involvement

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

Summary of Comments received from Criminal Justice System Representatives prior to September 10 PDSC meeting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. OPDS's October 23, 2009 recommendation to PDSC for amendment to service delivery plan for conflict criminal cases in Lane County

OPDS recommends that the Commission authorize a change in the service delivery plan for Lane County by approving the offer of a contract for a portion of the conflict caseload with a group of attorneys seeking to organize a small consortium of experienced lawyers.

After three and a half year's experience with the Lane County Defense Panel, OPDS believes that the current structure does not best address the needs of public defense clients in the county.

The local bar has been committed to maintaining an avenue for new attorneys to enter practice in the county by directing public defense cases to them through the panel, and before the creation of the panel through the court maintained appointment list. While it is important to provide for the entry of new attorneys into the practice of criminal law, that value appears to have outweighed other important values in the operation of the panel.

The greater the access provided to new attorneys, the greater the need for oversight and supervision. Unfortunately, the panel has not provided the necessary level of either. While it was hoped that the administrative services provided by Mr. Friedman and his staff would permit more training and oversight to address the problems inherent in the list, at least one experienced

lawyer said that the system had not changed in 20 years and that the loss of good people is endemic in a system that won't exclude anyone.

It would be a challenge for a group of experienced lawyers to train more than a few new lawyers at any given time. Because this panel remains open, it is continuously having to absorb new attorneys. Unfortunately, as indicated by District Attorney Alex Gardner, it may take 18 to 20 months before it is clear that a lawyer is not going to be able to provide the desired level of representation. How many clients will that lawyer have represented in that time period, probably without any significant supervision by a more experienced lawyer? Even very capable, well intentioned lawyers can't be receiving sufficient training and mentoring when their principle resource is to seek out information from other lawyers when they think they need advice. Young lawyers won't always know when a case presents issues about which they may need the advice of others.

The unusual circumstance presented by the Lane County caseload mix has aggravated the problem. The number of misdemeanors filed in the county is very low as a result of limited law enforcement resources that have required the public safety system, including the district attorney's office, to focus on more serious criminal behavior. As a result there are relatively few cases that are suitable for entry level attorneys. As indicated by the witnesses at the September 10 hearing, there are far too many lawyers on the panel who are qualified to represent clients in less serious cases and too few attorneys to handle the more serious cases. Essentially, the system in Lane County is designed to create ready access for new attorneys in a jurisdiction whose caseload is inappropriate for that model.

Judge Bearden said that the judges shudder when another experienced attorney leaves the panel. While the hourly rate system may not be principally responsible for the departure of many of those attorneys, attorney retention is fairly high in most consortia, all but one of which contract for case rates. The addition of the proposed new provider in Lane County would go a long way toward resolving the problem of the lack of a sufficient number of attorneys to handle serious cases.

It is clear that a multiple provider model works in other counties. District Attorney Gardner pointed to Douglas County where he worked for ten years. He believed the quality of representation in that county was significantly better than that being provided by panel attorneys in Lane County. Providers in that county include a public defender office, a consortium, two private law firms and a list.

With respect to the balance of the caseload, OPDS can either continue to provide administrative support for the panel or reinstate a smaller list if panel members choose not to continue the panel with a reduced caseload.

4. Summary of testimony at the October 23, 2009 PDSC meeting

Ingrid Swenson said that OPDS staff was recommending a change in the service delivery plan for the criminal conflict caseload in Lane County. She said that the panel approach did not appear to be well suited to the circumstances in Lane County, including the unusual caseload mix that includes twice as many felonies as misdemeanors and the limits on funding for law enforcement. The caseload is inappropriate for training significant numbers of new attorneys, which was one of the principal goals of the panel approach. The major quality concern expressed by justice system representatives in Lane County was the lack of oversight and the failure to mentor and monitor new lawyers. There were reported to be far too few lawyers qualified to handle serious cases and too many lawyers eligible to handle the lower level cases. OPDS received a proposal from a very experienced group of lawyers to form a consortium to handle a portion of the more serious cases. Ingrid Swenson said that were the commission to allow OPDS to explore a contract with this group, the balance of the caseload could be handled by expanding the group's proposal or seeking a proposal from another group or continuing a smaller panel or list.

Commissioners discussed what role the Commission should play in developing and approving an alternate proposal. Chair Ellis said that he had concluded that the panel arrangement wasn't working and asked whether other Commissioners were in agreement. He noted that lawyers in Lane County had strongly supported an open panel but that an open panel conflicts with quality. Commissioner Potter agreed and said he could support a consortium of 12 to 15 people that set aside a small portion of cases for new lawyers to help them get training and get into the courtroom since the public defender's office is not able to perform that function because of the lack of turnover on their staff. Commissioner Ozanne said that there would probably be a lack of turnover in a consortium as well and inquired how a portion of the caseload could be reserved for new attorneys and whether new Lane County lawyers shouldn't be encouraged to go elsewhere. Ingrid Swenson said that, while not a perfect model, the Clackamas County consortium had established a mentoring program that provides training to a number of new lawyers who are then assessed by the consortium board for possible membership when a vacancy occurs. Most of those mentored are not hired. Commissioner Potter said that some consortium attorneys might decide after a period of time to reduce the proportion of public defense cases in their workload, eventually making room for a new member or members to be added.

Chair Ellis inquired how the transition would be handled between what is currently in place or available, and a large consortium. He suggested that PDSC could let it be known that a change was going to be made, probably to a system with one or two consortia and a list that would be phased out. Commissioner Potter said he did not favor starting a small consortium with the panel still in its existing form and that once it became clear that the panel was being phased out, Lane County attorneys might come up with other proposals. Commissioner Ozanne said that he would like for the Commission to review any proposals that were forthcoming and have an opportunity to examine the structure and the personnel involved, probably in an executive session. Chair Ellis asked whether Ross Shepard could assist in the process as a mediator or facilitator. Commissioners Ozanne and McCrea supported his involvement. Kathryn Aylward said it was important to have an early resolution and suggested that a sub-committee of commission members assist with the screening of proposals and provide input to staff. Commissioner Potter said the subcommittee could meet and start open discussions the following week and could plan for the full Commission to review proposals at the December meeting. He recommended that the direction to Lane County lawyers should be that the Commission is interested in a unit based contract or contracts with a reduced number of lawyers with a certain type of caseload. Then the question would be is there a group that wants to bid for all of the cases and if so, who would be the administrator? If there is not one group there could be two with different administrators.

Commissioner Ozanne apologized to any Lane County applicants who had been kept waiting on their contract proposals. Chair Ellis invited Elizabeth Baker to comment.

Elizabeth Baker said that she and three other attorneys had submitted a contract proposal. Their interest was in protecting the interests of their clients. They did not believe the panel model was working for their community anymore. The panel was a big project. They wanted to create a smaller group with increased oversight. While she values mentorship and has served as a mentor to others, criminal defense is not a hobby or a way to figure out what you really want to do. She and two other members of the proposed consortium, Mike Buseman and Brad Cascagnette, described their professional backgrounds and the training they had received. They said that they were considering having two administrators and were talking to potential board members. Ms. Baker said that their longer term goal would be to have a larger, more well established group handling all of the conflict caseload. They could probably bring in four more attorneys in this proposal once the community was convinced there would be a change. One limitation is the lack of knowledge about how many "cases" as defined by OPDS, are available. A very large consortium would not work the way the Commission would like it to.

Commission Ozanne asked whether consideration had been given to using a non-lawyer administrator. Ms. Baker said they the four attorneys all preferred practicing law to administering

a consortium so that they were open to the idea. She said that their bid had assumed that they would start their contract work on January 1, 2010 but that they would need four to six weeks to expand the proposal. She would prefer to start with the group of four and have time to get it up and running and then bring on two or four more within the first six months. Brad Cascagnette said that all four of the attorneys in the proposed consortium concentrate almost 100% of their practice on criminal defense and they would like other members who also specialize in criminal law. Mike Buseman said that as part of their practice they would need to do some retained work for financial reasons, probably about 20 to 25%. He said that if a contract were awarded to the four attorneys the balance of the cases could go to attorneys on a court appointment list or continue to go to the panel. The group indicated a willingness to work with Ross Shepard to discuss possible options with other attorneys. Kathryn Aylward explained the process for adding other names to an existing proposal. She also said there had been more than 1893 conflict cases in FYE 2009. Elizabeth Baker said they had submitted a proposal for 793 cases.

Greg Hazarabedian suggested that the Commission issue a statement that could be distributed to the Lane County legal community setting forth the preliminary decisions it had made so that people would have information they could act on.

Commissioner Ozanne said that the legal clinic at the Lane County Public Defender's Office was started at the University of Oregon Law School with a federal grant. He said that the Commission might want to look at the use of this asset in meeting the training needs of criminal defense attorneys.

Chair Ellis summarized the Commission's position on a change in the service delivery plan for Lane County by saying that through no one's fault the current panel structure was not working. Between October and December a subcommittee consisting of Commissioners Ozanne, McCrea and Potter would work with staff and the community to create a proposal or proposals for review at the December 10 meeting. Any such proposal or proposals would be likely to build on the proposal that has already been submitted. The subcommittee would probably enlist the services of Ross Shepard to facilitate a meeting with interested parties. Proposals would not need to involve a January start date. The Commission would be willing to work with any emerging proposal to find a realistic start date.

Marc Friedman was invited to comment. He said that after the September meeting he had met with most of the judges and with Alex Gardner to get their input on panel members since he realized that the group was too large. He also let panel members know that the hourly system would probably be going away. He prepared a draft proposal that would have included the four attorneys who submitted the consortium bid but there has been no resolution. He believed that clear direction from the Commission would be helpful. One of the fundamental values of the panel was its openness. He felt that the court appointment structure worked well and that a proposal could be designed that would meet all of the Commission's expectations. Mr. Friedman agreed that it would be helpful to have Ross Shepard involved in the process.

Commissioner Ozanne said that he was not interested in an open panel and that the rate issue was secondary to the structural one.

5. Service delivery plan for Lane County

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

Attachment 4

Public Defense Services Commission Service Delivery Plan for Polk County (December 2009)

Introduction

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

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

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the functioning of public defense system in Polk County undertaken in preparation for PDSC's public meeting in Dallas on Thursday, August 6, 2009, a summary of testimony and discussion at the August 6 and October 23 PDSC meetings and a service delivery plan for Polk County.

PDSC's service delivery planning process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

Background and context to the service delivery planning process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

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

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

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

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

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

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

Most of PDSC’s other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the “performance”

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

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

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

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

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

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

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

the most cost-efficient means to provide quality services in each region of the state.

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

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

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

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

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

managed by administrators who serve at the pleasure of their boards.

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

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

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

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

³ Id.

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

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

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

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

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These

methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

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

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

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

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

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

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

PDSC’s Preliminary Investigation in Polk County

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

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

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

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

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

OPDS's Findings in Polk County

Brief Description of the County⁴

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

The Circuit Court, District Attorney and Police Agencies

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

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

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

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

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

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

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

Procedure in Criminal Cases

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

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

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

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

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

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

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

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

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

Procedure in Juvenile Cases

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

Dependency cases:

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

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

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

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

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

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

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

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

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

Delinquency cases:

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

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

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

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

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

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

Public Defense Providers

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

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

Comments regarding Local Public Safety System and PDSC Providers

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

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

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

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

Providers:

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

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

Criminal cases:

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

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

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

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

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

Juvenile cases:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Structure

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

The Juvenile Dependency System

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Testimony Presented to Public Defense Services Commission on October 23, 2009

Ingrid Swenson said that The Lillegard firm had been providing public defense services in Polk County since 1984. The firm is reported to provide quality representation, particularly in criminal cases. Conflict cases are generally assigned to attorneys from Marion County. In the course of preparing for the Commission review, it was learned that parties to juvenile dependency proceedings were not represented between court hearings because it had been the practice of the juvenile court to terminate attorneys' representation at the conclusion of each hearing. She reported that the court had changed its practice and is now continuing attorney appointments.

Kathryn Aylward said that conflicts represent approximately 25% of the caseload in Polk County.

Commissioner Ozanne inquired about the impact of the court's high caseload per judicial officer and its effect on providers. Mr. Lillegard said that the attorneys in Polk County are very experienced and don't believe they are overworked. He said that a new district attorney had taken office in January of 2008 and that they were now seeing 30 and 40-count indictments which they had not seen under the previous district attorney. As a result the firm has been exceeding its contract quota. Commissioner Lazenby inquired whether the change in charging practices actually cost PDSC more. Kathryn Aylward said that OPDS uses the alleged incident date to identify counts on which it will award multiple credits. Alternate theories alleging the same offense do not receive multiple credits. Regardless of the number of counts the maximum number of credits that will be awarded in most cases is five. Commissioner Ozanne suggested that the Commission might want to send a letter to the district attorney. Mr. Lillegard said that the new district attorney was doing what he said he would do as district attorney. Mr. Lillegard said he would be willing to meet with the district attorney and let him know how his charging practices were affecting public defense.

Chair Ellis said that at this stage that would be more appropriate than sending a communication from the Commission. Peter Gartlan said that prosecutors are required to charge offenses that arise in the same criminal episode in a single charging instrument. In addition, the legislature has authorized permissive joinder of crimes having a connection with first crime or set of crimes. It is often done in cases alleging multiple sex crimes that occur on different days. The prosecutor could file separate cases or join them. There can be as many cases as there are criminal episodes.

Kathryn Aylward described the proposed new consortium of attorneys which she was recommending be approved by the Commission. Three attorneys, Martin Haberkost, Steve Walls and Scott Howell would each work halftime under the contract. Since OPDS cannot determine what the caseload under a unit-based system will be compared to the caseload assigned on an hourly basis there may still be a need for a private bar list for criminal cases. Mr. Lillegard said all three were well respected by the judges in Polk county.

Commissioner Welch said she was pleased that representation would now continue in juvenile dependency cases but she encouraged Mr. Lillegard to look into increasing representation for children since Polk County seems to be out of step with other counties in this respect. Mr. Lillegard said that steps were being taken to bring practices up to standard.

Chair Ellis said that by approving the proposed contracts, the Commission would be approving a revised service delivery plan for the county and asked that a final report be prepared for the December 10, 2009 PDSC meeting. The Commission then approved the contract proposal from the Polk County conflict consortium, having previously approved the proposal from the Lillegard firm.

Service Delivery Plan for Polk County

Based on the information received in two public meetings and in reports provided to PDSC regarding the criminal and juvenile justice systems in Polk County, the public defense providers in the region, and the size and nature of the public defense caseload, the Commission approved a service delivery plan including a primary provider and a principal conflict provider. The Commission approved proposed contracts for the Lillegard firm as the primary provider and for the Polk County Conflict Consortium as the primary conflict provider. The private bar list will continue to be used for conflicts in juvenile cases and, if needed, for conflicts in criminal cases.

Attachment 5

Materials for PDSC consideration of Drug Court Representation Guidelines

At its October 17, 2008 meeting, PDSC heard testimony from Devarshi Bakpai, the drug court grant supervisor with the Criminal Justice Commission and Heather Jefferies, coordinator of the Clackamas County drug court program. At its November 20, 2008 meeting, PDSC heard testimony from public defense attorneys from Marion, Josephine, Multnomah and Lane Counties who represent clients in drug court proceedings. Summaries of the testimony of the witnesses at both hearings are set forth below. The Commission considered that testimony at its April 16, 2009 meeting and reviewed an initial draft of proposed guidelines at its May 21, 2009 meeting. Commission members instructed staff to amend the proposed guidelines to address the responsibilities of defense attorneys rather than the court and other parties. Further consideration of the draft guidelines was continued until the December 10, 2009 PDSC meeting.

After the May meeting, OPDS staff prepared an amended draft of the drug court guidelines addressed to attorneys rather than the court, and sent copies to all of the providers receiving public defense funds for representation in drug courts requesting that they review the document, provide it to other members of their local drug court teams including the court and the district attorney, and send their comments and recommendations to OPDS.

In September 2009 the National Association of Criminal Defense Lawyers issued a comprehensive report on “America’s Problem-Solving Courts”¹ that, while expressing a preference for a public health model over a criminal justice model, recognized that until drugs are decriminalized drug courts will have a role, and provided recommendations addressed to drug court organizers, judges, prosecutors and defense attorneys about how such courts should be organized and operated. A copy of this report was sent to OPDS providers representing clients in drug courts.

After reviewing the NACDL report and responses received from OPDS providers², the draft guidelines were amended to address some of the issues raised. A copy of the revised draft is included with this summary.

1. Minutes of Previous PDSC Testimony regarding Drug Court Representation

- a. October 17, 2008

Heather Jefferies, the administrator of the Clackamas County Treatment Courts testified about the structure of most drug

¹ The complete document may be reviewed on line at www.nacdl.org/drugcourts.

² Responses were received from only four providers. Jack Morris submitted three specific suggestions that were all incorporated into the draft.

courts in Oregon, and some of the particular features of those courts, particularly the Clackamas County court. She described the National Association of Drug Court Professionals' ten key components for drug courts, how they are implemented in Clackamas county, and the importance of adhering to these principles. She noted that the Clackamas program targets high risk offenders since the program has limited capacity and the county believes it is more cost effective to focus on these individuals. She described the role of each of the participants, including the defense representative.

In response to questions about the effectiveness of drug courts, Devarshi Bajpai, the Grant Manager for the Oregon Criminal Justice Commission which administers drug court grants in Oregon, pointed to a Washington State Institute for Public Policy meta analysis of drug court research which concluded that a conservative estimate of the effectiveness of drug court programs indicated that they are 11.7 percent more successful in reducing recidivism than "business as usual."

b. November 20, 2008

Alex Bassos, Gary Berlant, Robert Hutchings and Phil Swogger testified about defense participation in drug courts.

Phil Swogger - Marion County:

Phil Swogger is the principal attorney assigned to drug court in Marion County. He is with the Marion County Association of Defenders. When the court was initiated the only cases eligible for drug court were "stand alone" possession of controlled substance (PCS) cases involving first time offenders. There were a lot of such cases as a result of a police "knock and talk" initiative. Officers knock on the doors of residences where drug activity is suspected and talk with anyone who opens the door. This often leads to the observation of drugs or drug paraphernalia in plain sight. Mr. Swogger said that in the early days, he recommended drug court to only approximately half of the individuals who were eligible because the court was not appropriate for defendants who were charged only with misdemeanors or who were not addicts. Originally, cases that included allegations of child endangering or neglect (exposing children in the home to drug related activity, for example) were not considered appropriate for drug court by the district

attorney. There are still no written criteria for admission to drug court but the district attorney has gradually expanded eligibility criteria. He and others have recognized that the drug court can deal successfully with a variety of defendants. Controlled substance delivery charges are still not eligible for drug court although probation violations in which the underlying charge is delivery are eligible. Successful completion of drug court allows a defendant on probation to avoid revocation and the imposition of a prison sentence. Because of the fact that many PCS cases include child endangering or neglect charges, there are often three courts (drug court, criminal and juvenile court), and sometimes three attorneys, involved with drug court clients. The program generally lasts for 12 to 16 months. Weekly court appearances are required in the first phase of the program. Participation in NA/AA meetings is required. (There are no secular alternatives in Marion County but Mr. Swogger has never received a request for one.) Approximately 85% of participants complete the program.

Mr. Swogger attended a week-long training at the National Drug Court Institute's (NDCI) annual convention this summer. NDCI offers training in many relevant areas including understanding the nature of addiction and different approaches to addiction treatment.

In Marion County potential drug court cases may be identified by the court, by assigned counsel and sometimes by the probation officer. The attorney who is initially assigned to the criminal case generally recommends to the defendant whether or not he should have a trial. If the client does not want a trial, counsel then discusses possible plea agreements, including participation in drug court for those who are eligible. Defendants who are interested in considering drug court are invited to observe the court before they make a decision about participating. They can observe for five weeks or more and are also invited to talk to staff about the program. Clients who decide to participate agree to a stipulated facts trial if they fail. If they are admitted, they are required to pay \$10 per week to help cover the cost of treatment. There is significant community support for the drug court. Mr. Swogger, for example, serves on the board of a non-profit organization, Road to Recovery, which uses contributions to purchase extraordinary treatment services. There are many volunteers who provide transportation, food, etc. to those who need it.

Mr. Swogger is paid a flat monthly fee for his services in drug court (and in the mental health court in which he also the assigned attorney.) Mr. Swogger maintains an office and staff. He believes staff is necessary to meet the needs of these clients.

Mr. Swogger believes that only very experienced lawyers should be assigned to drug court. In order for a drug court to succeed the assigned judge needs to be an advocate and the lawyers need to abide by that judge's rules. He also recommended that clients be permitted to discuss the case individually with an attorney after discovery has been provided before they have to make a decision as to whether or not to participate in drug court. He recommended that the Commission not support drug court participation by defense counsel if clients are required to plead guilty to multiple felonies in order to participate when they would be required to plead to fewer charges if they decided on a plea bargain rather than drug court, as was reported to be the case in Umatilla County.

In general, Mr. Swogger believes that drug court works to the advantage of his clients and he has very high job satisfaction from his work in this program.

Gary Berlant – Josephine County

Gary Berlant with the Southern Oregon Public Defender Office in Grants Pass, participated in the formation of the Josephine County drug court twelve years ago and provided defense representation in that court until very recently. Two years were spent planning for the court and Mr. Berlant was a member of the planning team. He had a significant amount of input but did not control the decisions that were made. It is assumed that a drug court cannot operate without the participation and support of the district attorney although Mr. Berlant believes that the court has the authority to operate a drug court without such support.

In contrast to the practice in Marion County, the Josephine County program targets relatively high level offenses and the defense is continually pushing to broaden the list of eligible offenses. Property offenses are being added, but not person offenses. Originally a guilty plea was not required for participation in the court and the defendant agreed to a stipulated facts trial instead. Even when there were multi-

count indictments it was the state's practice to dismiss all charges upon successful completion of the program. For those who failed, however, the factual stipulations permitted their conviction on all counts. Now each case is negotiated separately into the court. With more serious charges, the district attorney sometimes demands a plea to at least one count that will not be dismissed upon successful completion of the drug court so that if the defendant is charged again in the future he or she will not be eligible for treatment as a first time offender. Under the current system, defendants' exposure is more limited if they fail to complete the program since agreements have already been made about which counts will be admitted and which dismissed.

When the court was started the emphasis was on getting clients into the program and treatment without delay. Complete discovery was not available and the cases had not yet been presented to a grand jury. Their approach has now changed. Defendants are not rushed into a decision and defense attorneys urge them to agree to participate only after they have enough information to make an informed decision. If an investigation is necessary in order to assess the likelihood of prevailing at trial, the defense can take the time to complete an investigation. If, however, the defendant decides to challenge the admissibility of the evidence, or pursue other pretrial motions, the state will not agree to drug court participation. When the defendant is not certain if he wants to contest the charges, the defense will proceed to file any appropriate motions. An arguably meritorious motion may improve the defendant's bargaining position. If, however, he chooses to litigate the motion, the state will withdraw its approval of drug court participation.

At first, since defendants were not on probation, they had to agree to supervision as a condition of their "release agreements." After the court had been operating for some time, the probation department felt that it needed to have authority to do home visits, to put detainers on defendants, to put them in custody under certain circumstances and to conduct searches of their persons and residences. They pushed for supervised probation in every case but for simple possession cases conditional discharges are still sometimes available. Currently, the defense is able to negotiate the charges. There can be a plea and sentence on one count with supervised probation, an agreement to dismiss some charges at the outset and a stipulation to facts on others that will then be handled by the drug court.

Prior to establishing the Josephine County court, the planning group reviewed several programs in California and Oregon and ultimately modeled their court after the STOP program in Multnomah County. After issuing a request for proposals to provide drug treatment services, the workgroup selected Choices as the sole provider. Choices has been very flexible in meeting the needs of the court and in providing intensive treatment services. Clients are also required to participate in a 12 step program. In Josephine County there are secular alternatives to Narcotics Anonymous and Alcoholics Anonymous. When a defendant enters the drug court program he or she signs releases and waivers so that all treatment and compliance information can be shared with the team. The court and all the parties have been very conscientious about not letting information go any farther than the team. There is no formal agreement with the state that prohibits the state from using incriminating statements by the defendant against him in another proceeding but early in the process the district attorney assured the drug court team that there would be no such use and there has not been.

Once a person enters the program there is a 14 day trial period during which he or she may opt out. Anyone who opts out is required to pay a \$100 fee. Those who remain must pay a program fee of \$500. Payments are made monthly. The most common reason for termination from drug court is a new person or property offense in which there is a victim. Participants who have dropped out and resumed drug use are not necessarily terminated. Even after an absence of more than a year some clients have been accepted back into the program. Some clients drop out more than once. If the treatment provider is willing to continue working with the person, generally they can remain in the program. A jail term is not the first option for non-compliance but can be imposed if other sanctions are ineffective.

With respect to participants who are not U.S. citizens, the current drug court attorney, Joe Maier, tries to work with the district attorney's office to modify the charges so that the defendant's immigration status is not negatively affected.

Attempts to transfer a drug court participant from one court to another have presented difficulties. Josephine County has often been the receiving court. If someone wants to

transfer to the Josephine County program, the person must follow Josephine County rules. The court then reports to the home court. It has been difficult to transfer someone out of Josephine County because the programs in other counties are less intensive and may not want to accept cases with serious charges. Josephine County won't allow its drug court clients to transfer until they are well integrated into the program.

Gary received his training in drug court representation by visiting other sites with team members. They observed their courts and heard from their counterparts in those courts. The national association has annual meetings that include a lot of training and sharing of information. Grant funds used to pay for their whole team to attend these meetings. Now, only the judge's way is usually paid. When Joe Meier took over as the drug court defense attorney, Gary was able to train him. There is a need for more training on drugs, drug testing, drug treatment, etc. Recently the local team had an expert come in and make a presentation on urinalyses testing.

The Josephine County Drug Court currently serves 50 clients. The workload is approximately the equivalent of a half time caseload. In addition, a legal assistant, Casey Black, serves as staff to the drug court.

Gary believes that each program is unique but that there are some common values that could be identified for defense participation. Defense guidelines would help to empower defense representatives in the planning of these courts, especially if they had been endorsed by the district attorney's organization. Guidelines might include the following requirements: that defense counsel is an experienced defender, that there is only one assigned defense attorney in the court, that the rules regarding drug court eligibility are not too rigid but are left up to the team, that there is a policy-making steering committee that is independent of the treatment team, and that appropriate compensation is paid so that clients receive proper representation.

Alex Bassos – Multnomah County

Alex Bassos is the attorney supervisor of the Special Courts section at the Metropolitan Public Defender Office in Portland (MPD). One of those special courts, the STOP

program, is the oldest drug court in Oregon and the second oldest in the country. Currently there are approximately 240 clients in the court. MPD provides services to the court in addition to the representation of clients. Its staff provides the initial orientation for all potential drug court clients and the MPD legal assistant who staffs the court is the person who generally calls the case during drug court proceedings. Mr. Bassos does not believe MPD's performance of these administrative functions is confusing to clients and he believes it allows MPD to have more influence in the proceedings. The Court has been evaluated on more than one occasion, most recently in April of 2007 in a study performed by NPC Research of the court's operations and outcomes over a 10 year period. One conclusion of the study was that the incidence of re-arrests for drug court participants within the five-year period following the initial drug court hearing was 30% less than that of offenders who were eligible for the court but did not participate.

Only PCS cases are eligible for drug court diversion in Multnomah county. Manufacturing and delivery cases, property offenses (even though they are closely associated with drug abuse) and probation violations are not eligible. (Cases involving only drug residue amounts were previously handled in STOP court but due to the high volume of these cases they are now referred to the community court.) Drug court participants are required to waive indictment on felony charges and plead guilty. Some defendants are first time offenders; some have long criminal records. Since eligibility is largely charge-driven, most candidates can be identified by the time of arraignment. This accelerates the process so orientation usually occurs the day after arraignment. Orientation is done by MPD staff. While there is an effort to get defendants involved in drug court as soon as possible following arrest, they can get more time to consider whether they want to participate or not. There is also a 14 day trial period after starting drug court when the defendant can decide not to participate without penalty. If a defendant decides not to participate in drug court a "quick plea" can be arranged which results in 12 months probation with "drug package" conditions but no jail time. The standard plea offer after that includes a two-day jail sentence and 18 months probation. Most of those who decide to enter the drug court are addicts and most of them are seeking treatment rather than trying to avoid a sentence. In other counties, such as Washington County, drug court is a very attractive alternative to someone who may be facing a

lengthy prison sentence if convicted. Not many participants are terminated from drug court but the sentence for those who are is generally 10 days jail with no credit for time served and 18 months probation. Drug court lasts 12 months or longer. The average is 14 months. Some participants are there for three or more years if they are just not able to get their addiction under control. The sanction for non-compliance is usually sitting and watching drug court proceedings. This is called a “sit sanction.” Jail is rarely used as a sanction except when the client needs “detox” and a bed at the Hooper Detox Center is not available. Jail sanctions are authorized under the conditional discharge statute. InAct, a program sponsored by the Volunteers of American (VOA), is the sole treatment provider for court participants. (When the program was initiated the only treatment available was acupuncture.) Participation in twelve-step programs such as NA or AA is not required. Most people have to go through a matrix program that involves mandatory activities seven days a week. There is not much communication between the attorney and the client between court hearings. The attorney gets the treatment provider’s report just before court so there is usually no opportunity to discuss it with the client before court. In the near future STOP attorneys will have direct access to VOA’s data bases.

MPD receives a flat fee for its work in the STOP court.

Although Alex doesn’t necessarily agree that defense representatives should be involved in deciding which categories of offenses are eligible for drug court, he would like to see lower level property crimes included.

At MPD the trial assistant assigned to drug court usually remains in that position for two or three years. Only experienced felony attorneys are assigned to STOP. Training for lawyers new to drug court includes a review of drug court materials and a discussion of how a “collaborative court” like STOP works. Training about drug treatment and testing is not necessary in Multnomah County since there is only one provider and one treatment model in use. It would be beneficial for drug court attorneys from around the state to be able to get together for joint training sessions. A break-out presentation at OCDLA’s annual conference might draw the most participants.

Bob Hutchings – Lane County

Bob Hutchings is the principal drug court attorney in Lane County. Most drug court cases there are PCS cases, many of which involve only possession of residue. The district attorney does the initial screening. If the DA approves, a paper is put in the file and the court notifies the defendant at arraignment that he appears to be eligible for drug court. The defense attorney then meets with the client and discusses the client's options. If the defendant agrees to participate in drug court he completes a petition that includes a stipulation to facts that would establish the charged offense. There is a two week trial period. If the defendant decides against drug court participation the plea offer is usually 10 days in jail (or an alternative sanction) and 18 months supervised probation. Clients who continue in drug court pay of weekly fee of \$10. Absence from treatment can result in termination from the program. An absence of thirty days resulted in the termination of two participants recently. Bob believes clients should be given at least 90 days before they are terminated.

Bob is part of the Oregon Association of Drug Court Professionals but there are very few other defense attorneys involved. Bob also sits on the Chief Justice's Advisory Council. He would like to see the Commission develop some standards regarding the training and experience defense attorneys should have in order to represent clients in drug court. The Commission should also look into the operation of juvenile drug courts.

During his presentation to the Commission, Gary Berlant noted that defense attorneys in drug court cases are not permitted to advocate for what attorneys believes to be in their clients' best interest. The defense attorney is required to explain the evidence and the options to the client and let the client decide what is in his or her best interest. The other presenters agreed.

c. April 16, 2009

Ingrid Swenson summarized the testimony and other information provided at previous PDSC meetings regarding drug courts and the recommendations that had been made by the four public defense providers for standards that should be considered by PDSC. Chair Ellis said that the requirement in Umatilla County that a defendant plead guilty

to all counts as a condition for being admitted to drug court was particularly concerning. Commissioner Ozanne said that standards in this area of practice could provide attorneys with the same kind of protection provided in early disposition programs by the adoption of PDSC standards for those programs. There is also a need to remind lawyers of their obligations in this new environment. Chair Ellis said that the court has an obligation not to permit unconscionable pleas. Commissioners noted that since the client is the one who determines whether or not to participate in a drug court program, it might not be appropriate for court appointed counsel to refuse to assist a client who wants to participate in a program that does not conform to PDSC standards. Judge Welch said that district attorneys can control whether cases are processed through these courts and can walk away if they are not satisfied with the court's structure and processes. It was agreed that PDSC standards would be of value to an attorney advocating for a properly structured drug court. Standards would provide the defense attorney with more leverage in the design and operation of the court. Staff will prepare draft standards for review by the commission and others.

d. May 21, 2009

Ingrid Swenson said that at a previous hearing Commissioners were informed by some of the attorneys who work in drug courts that it would be beneficial to have a set of guidelines regarding the role of counsel for the defendant in these courts. The current draft directs the guidelines to the court. Commission members discussed whether it would be appropriate for the Commission to advise the court that it either "shall" or "should" follow the guidelines and determined that it would be more appropriate to direct the guidelines to the attorneys who represent public defense clients in drug court proceedings. A revised draft will be prepared.

2. NACDL Executive Summary and Summary of Recommendations regarding Defense Counsel and Ethical Concerns³

a. Executive Summary

³ America's Problem-Solving courts: The Criminal Costs of Treatment and the Case for Reform, National Association of Criminal Defense Lawyers, September 2009, pages 12-13, 55. (Footnotes deleted from text.)

Until decriminalization occurs, the conventional paradigm is likely to continue, and drug courts will have a role. Drug courts are largely well-intentioned efforts to offer substance abuse treatment as an alternative to lengthy prison terms and lifelong felony convictions. Much of the support for drug courts ultimately turns on their existence as the sole, or best, alternative to draconian punishment. Although drug courts may offer some positive benefits to some participants, they also cause problems and engender disparities in many areas, including the admission process, the role and ethical obligations of defense counsel, and the misguided use of limited public resources.

▲ A defendant should not be required to plead guilty before accessing treatment.

Most drug courts require a guilty plea as the price of admission. When guilty pleas are required before offering treatment, drug courts become little more than conviction mills. In post-adjudication courts, the defendant must plead guilty before entering drug court, and even if he or she is successful and completes the program, the conviction will never go away. In pre-adjudication courts, the defendant must plead guilty, but then, if he or she successfully completes the program there is a possibility that the plea can be withdrawn and the charge dismissed. Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure. A pre-plea, pre-adjudication program preserves due process rights, allows defendants an opportunity to seek treatment, and provides a strong incentive for successful completion. If the participant successfully completes the program, the charge is dismissed. If the participant does not succeed, the traditional court process can be pursued. Pre-plea, pre-adjudication programs are also the only ones that permit informed, thoughtful decision making by defendants and counsel. Conversely, in post-plea programs defendants often lack sufficient time to make informed decisions, do not have discovery, and are unable to litigate motions. This often creates impossible ethical quandaries for defense counsel.

▲ Admission criteria must be objective and fair, and prosecutors must relinquish their role as gatekeeper.

Criteria for admission to drug court must be transparent and fully disclosed. Currently, many courts have no official criteria or have stated criteria that are backward or counterintuitive. For example, many drug courts exclude all violent offenders, including defendants charged with domestic violence. Excluding domestic violence offenses leads to the odd result of “the domestic violence offender who gets drunk and beats his wife up checking with his probation officer once every six weeks” while nonviolent offenders are appearing regularly for status hearings, giving random weekly urine samples, and attending 90 meetings in 90 days.

In many courts, whether a defendant is permitted to enter drug court is up to the prosecutor. Prosecutors are frequently hesitant to allow higher risk offenders, even those who desperately need and want the treatment and supervision, into drug court out of fear that they will be blamed for participant failure or recidivism. As one witness testified, when prosecutors serve as gatekeepers they face the political risk of “a headline waiting to happen.”

To avoid politics improperly affecting access to drug court programs, prosecutors should not be able to determine access. Admission criteria should be drafted by a panel or commission with broad representation from stakeholders in the criminal justice community, including judges, prosecutors, defense counsel, and social service providers. Admission criteria should be broad, allowing those who need and want treatment access to the program.

▲ Ethical rules should not change; the drug court framework must accommodate long-standing ethical rules.

Drug courts seek to impose a team concept on defense lawyers, creating difficult ethical dilemmas and virtually no role for private counsel. In many situations, the current structure of drug courts requires defense attorneys to set aside their ethical obligations to further the purpose and framework of the drug court. That must change. When counsel says nothing in representing the interests of clients, defense lawyers appear headed “to an old Soviet Union

model where your job as a lawyer is simply to hold your client's hand as they go off to the gallows — here's what's going to happen next.”

Protecting defendants' Sixth Amendment right to competent counsel requires a process that allows defense attorneys to satisfy their ethical obligations of loyalty, confidentiality, and zealous advocacy. Doing so will not dismantle the drug court process or its objectives; rather, it will enhance the credibility of the process with both the participants and anyone who observes the court.

▲ Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.

Too often, the criteria and process for admission into drug court are guided largely by tough-on-crime politics, focusing on first-time or nonviolent offenders, with little consideration of smart-on-crime approaches that target those most in need of intensive treatment who would otherwise spend a long time in prison. The Task Force wholeheartedly agrees with the judge who testified he was “tired of everybody talking about being tough on crime. It's about time we get smart on crime.”

Courts frequently select those most likely to succeed to participate in drug court — a process called skimming. As one witness noted, when they engage in skimming, the drug courts are “sucking up all the resources that the community has to deal with this very thorny issue of addiction, and . . . using it on cream puffs.” In fact, drug courts, with their program of intense supervision, should be utilized for high-risk offenders for whom everything else has failed. Courts should focus on those who are facing the longest sentences and most need treatment, “where we would get the biggest bang for our buck.”

Other less intensive alternatives to drug courts must be developed for low-risk offenders, who perform better without intensive judicial intervention. Communities should not “invest all of their addiction resources into one program. You can't ignore the people who don't get into drug court who are drug-and alcohol-involved. They have the same needs, the

same rights, and impose the same dangers as everyone else.”

▲ Drug courts must be open to all people regardless of race, economic status, or immigration status; methodologically sound research must be done to ensure drug courts are open to all.

After 20 years, significant concerns continue to exist about the populations served by drug courts. Too often it seems that drug court eligibility and admission criteria serve to exclude mostly indigent and minority defendants. Drug courts must address these fundamental and disturbing disparities. Entry requirements must be carefully considered to ensure the same road to success is available to all. Opening doors for a privileged, Caucasian client base without doing the same for minorities, immigrants, and the poor cannot be tolerated. Not only must courts be equally available to all who wish to take advantage of the services, the road to graduation must be a realistic one with reasonable assistance from judges and drug court teams who truly want participants to succeed. Methodologically sound research must be done to ensure these basic requirements of fairness are met.

b. Summary of Recommendations regarding Defense Counsel and Ethical Concerns

- ▲ Drug court “theater” must include a leading role for defense counsel.
- ▲ Ethical rules do not need to change; the drug court framework must accommodate the rules.
- ▲ The defense bar must have a significant role in the creation of any new drug courts.
- ▲ Training for defense lawyers must be readily available and broad enough to cover the key aspects of representing clients in drug court.
- ▲ The same lawyer should represent a client throughout a drug case.
- ▲ Senior and highly skilled lawyers should be assigned to drug court.

▲ Caseloads of lawyers representing clients in drug court must take into account the special nature and demands of drug court.

3. Draft Drug Court Representation Guidelines

**The Public Defense Services Commission's Guidelines
for Public Defense Attorneys in
Drug Court Programs**

D R A F T

To ensure that individuals who are eligible for drug court programs receive legal representation that is consistent with ethical, statutory and constitutional standards, PDSC adopts the following five guidelines for court-appointed attorneys who represent clients eligible for drug court programs. The primary purposes of these guidelines are to ensure: (1) that public defense clients make knowing, intelligent, voluntary and attorney-assisted decisions about whether to participate in a drug court program, and (2) that clients who participate in such programs receive effective representation during the period of their participation.

Guideline 1. Defense counsel shall establish and maintain an attorney/client relationship with the client.

Commentary

Although drug courts use a collaborative model to support clients who elect to participate in them, Oregon's Rules of Professional Conduct govern the relationship between the client and the attorney in drug courts as they do in any other criminal proceeding, and counsel may not, for example, agree to the imposition of certain sanctions or disclosures of attorney-client communications in the course of representation without the client's consent.

As noted by the National Drug Court Institute in "Ethical Considerations for Judges and Attorneys in Drug Court," May 2003, at page 21: In drug court cases, "defense counsel protect the participant's due process rights while encouraging full participation. Defense counsel's two duties reflect the normal, bidirectional nature of legal representation. With a participant in drug court, defense counsel explains the court's processes, prepares the participant for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court. Within the drug court team, defense counsel ensures that the client's perspective

is heard and respected, the client's rights are protected, and the court's procedures are followed."

Guideline 2. Before an eligible client decides whether or not to participate in a drug court program, defense counsel shall investigate and review the evidence with the client; provide the client with discovery materials and/or⁴ discuss the materials with the client; and determine and address whether the client's circumstances, such as immigration status or a mental health condition, could affect the client's decision to enter into a drug court program.

Commentary

Article 1, Section 11 of the Oregon Constitution provides, "In all criminal prosecutions, the accused shall have the right to be heard by himself and counsel...." This constitutional right to counsel would be meaningless without an adequate opportunity for counsel to inform himself or herself about the nature of the charges against the defendant, the factual and legal circumstances of the case and the background of the defendant.

The following Oregon State Bar Principles and Performance Standards for Counsel in Criminal Cases (the Oregon standards) require defense attorneys to carefully review charging instruments, police reports, and relevant background information with defendants. The Oregon standards also require counsel to conduct necessary independent investigation or consultation with experts in appropriate circumstances before advising their clients concerning participation in drug court programs.

STANDARD 1.1 – Prerequisites for Representation

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness, and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy to the client.

STANDARD 1.2 – General Duties and Responsibilities of a Lawyer to Clients...

Upon being retained or appointed by the court, a lawyer should contact the client as soon as practicable and maintain regular contact thereafter. A lawyer should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Oregon Rules of Professional Conduct.

⁴ This modification from "and" to "and/or" is in response to a comment from Jack Morris that unless specifically asked for by the client, attorneys will sometimes provide only a summary to in custody clients.

STANDARD 1.3 – Role of the Lawyer

Except as provided by Oregon Rules of Professional Conduct 1.2(b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation in accordance with ORPC 1.2 and shall consult with the client as to the means by which they are to be pursued in accordance with ORPC 1.4. When representing a client with diminished capacity, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

STANDARD 1.4 – Initial Client Interview

A lawyer should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning the lawyer's representation and the case proceedings.

STANDARD 2.7 – Independent Investigation

A lawyer should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Guideline 3. Defense counsel shall conduct a confidential consultation with the client regarding all matters relevant to the decision to enter drug court, including:

- a. the nature and purpose of drug court,
- b. the rules regarding eligibility,
- c. the nature of a therapeutic courtroom and the roles of the court, the prosecutor and others,
- d. the difference between adversarial and non adversarial processes,
- e. the fees that may be imposed by the drug court,
- f. the drug court agreement and any related documents,
- g. the requirements for successful completion of the program, including the nature and extent of required treatment, the frequency of court appearances, and any other requirements of the program,
- h. the consequences of complying or failing to comply with drug court rules, including any system of graduated rewards and sanctions, including termination,
- i. the legal consequences of successful completion or voluntary or involuntary termination,
- j. any rights the defendant will be required to waive to enter drug court, such as the right to speedy trial, jury trial, and any other right that the defendant will be required to waive,
- k. the nature and extent of any investigation that will be done,
- l. whether pretrial motions may be litigated,

- m. the client's alternatives to drug court, the advantages and disadvantages of each alternative, and the likelihood of success of the alternatives in view of the information available from discovery, from the client and from any investigation conducted in the case,
- n. the legal protections that have been established by court order or agreement with the state that protect the client from the use of statements made or confidential medical, drug treatment or other records disclosed in drug court from use in other proceedings,
- o. the expectation of the court that the client will be open and truthful with the court and staff about substance use, assuming that adequate legal protections exist,
- p. the role of defense counsel in the drug court setting,
- q. that it is the client's decision whether or not to enter and remain in drug court, and
- r. the attorney's advice on whether the client should enter drug court (based on the client's legal interests and interest in recovery).

Commentary

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements

A lawyer should:

1. *with the consent of the client explore... diversion and other informal and formal admission or disposition agreements with regard to the allegations...*
2. *...*
3. *fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;*
4. *keep the client fully informed of the progress of the negotiations;*
5. *convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;*
6. *continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and*
7. *not enter into any admission or disposition agreement on behalf of the client without the client's authorization.*

Oregon Rule of Professional Conduct 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The National Drug Court Institute's model rules for defense attorneys in drug courts provides: "Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary

training regarding substance abuse and treatment and locally available treatment options.”

Guideline 4. Defense counsel shall:

- (a) be knowledgeable about confidentiality protections for drug records, medical and other records and have working knowledge of⁵: controlled substances and the nature of addiction, available treatment options, the treatment of coexisting disorders, links between domestic violence and substance abuse and the reliability limits of individual drug tests, and
- (b) have the training and experience needed to accurately assess the merits of the charges against the defendant and any substantive or procedural defenses that might be available, to communicate effectively with drug court clients and staff, and to protect the client’s right to due process throughout the proceedings.

Defense counsel shall participate in CLE programs and other types of training that allow the attorney to remain current on legal and other issues affecting drug court clients.

Commentary

“Critical Issues for Defense Attorneys in Drug Court,” Monograph Series 4, National Drug Court Institute, 2003.

STANDARD 1.1 – Prerequisites for Representation

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness, and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy to the client.

Lawyers for clients in drug courts should obtain adequate training in the following areas: cultural competence, treatment issues, reliability limits of individual drug tests, protection of due process rights, confidentiality protections for drug records, medical records and the like. Missouri defense attorneys’ guidelines for representation in drug court, “Critical Issues for Defense Attorneys in Drug Court,” Monograph Series 4, National Drug Court Institute, 2003.

⁵ The previous draft required that attorneys “be knowledgeable about” rather than “have a working knowledge of” specific drug and treatment related issues.

Guideline 5. Defense counsel shall seek to participate in the planning, design, and operation of the drug court program.⁶

Defense counsel's participation in the design, development, and operation of drug court programs will promote institutional values of fairness and efficiency without jeopardizing clients' legal interests. Some of the client interests that defense counsel should advance are: the recognition that client participation must be voluntary, that unsuccessful participants should not be penalized for voluntary or involuntary withdrawal from drug court, that eligibility criteria should be broad and should not discriminate on the basis of race or gender or any similar protected trait or membership in a protected group; that defense statements made in negotiations and in drug court are not to be used outside the drug court setting, that clients' rights to confidentiality are to be protected and no disclosure or use is to be made of confidential materials outside the terms agreed upon, that treatment or other program requirements should be the least restrictive necessary to achieve agreed-upon goals, and that costs and fees should not be unduly burdensome.

Commentary

Derived from "Ten Tenets of Fair and Effective Problem Solving Courts," American Council of Chief Defenders, National Legal Aid and Defender Association, and "Critical Issues for Defense Attorneys in Drug Court," Monograph Series 4, National Drug Court Institute, 2003.

⁶ Defense counsel does not always have the opportunity to participate in the planning of drug courts. When members of the defense community become aware of an effort to create such a court they should seek to have a defense representative included in the planning group.

Attachment 6

Public Defense Services Commission

Strategic Plan for 2009-11

Draft – December 3, 2009¹

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

¹ PDSC's strategic plan for 2007-2007 may be found on PDSC's website:
<http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

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;

Comment: Who are PDSC's "representatives" other than its employees?

- 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 will report to the 2010 Special Session of the Legislature on current caseload trends and any resentencing costs required by legislation enacted during the 2009 session.

The 2009 Legislative Assembly approved a budget for PDSC that is projected to be \$10.6 million less than will be needed to provide public defense services funded from the Public Defense Services Account for the full 09-11 biennium, assuming PDSC receives 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. The deficit will be greater than \$10.6 million if revenue under HB 2287 is less than projected or if other revenue sources relied upon by the 2009 Legislative Assembly to balance the 09-11 budget do not materialize.

Strategy 2: Continue to build legislative support for adequate funding and remind legislative leadership of need for a supplemental appropriation.

- A. OPDS's Executive Director will meet with key legislators before the 2010 session to keep them informed regarding caseload trends and the need for additional funds in the Public Defense Services Account before the end of the biennium. Depending on the December 2009 revenue forecast and the outcome of the January 26, 2010 election on two legislatively approved tax measures, PDSC may also need to return to the Emergency Board or to the 2011 Legislative Assembly to report on caseload projections and the amount of additional funds needed to provide trial level representation through the end of the biennium.
- B. OPDS staff will keep Legislative Fiscal Office staff apprised of caseload trends and resentencing costs².

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

² PDSC plans to review the eligibility standards for appointment of counsel in 2010. Depending upon whether or not revisions to the standards would expand the number of persons potentially eligible for court appointed counsel, the public defense caseload could increase. Any such projected increase in the current biennium would have to be communicated to Legislative Fiscal Office staff and discussed with legislators.

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.

- A. **Pay Parity** – If PDSC so directs, 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 the 2011 session.
- B. **Other budget priorities** – If PDSC so directs, OPDS staff will also discuss with legislators PDSC’s continuing support for the creation of a post-conviction relief unit at OPDS and for funding to reduce caseloads and increase compensation for attorneys in juvenile cases, and will develop policy option packages to be included in its 2011-13 budget.

Strategy 4: Meet the targets established under PDSC’s Key Performance Measures to assure the Legislative Assembly that PDSC is managing state funds devoted to public defense cost-effectively and develop an additional performance measure if so directed by the Legislature.

PDSC’s proposal to delete former KPMs 1 through 7 because they relied on insufficient data or were simply not useful measures of performance was approved by the 2009 Legislative Assembly. Two new measures were added. KPM No. 8 is a measure of customer satisfaction. The target for the next customer survey in 2011 is to have 95% of PDSC’s customers rate their satisfaction with the agency’s services as “good or “excellent” in the categories of overall customer services, timeliness, accuracy, helpfulness, expertise and availability of information. In 2008 OPDS met or exceeded these ratings in all categories except availability of information. KPM No. 9 measures the percentage of best practices met by the Commission in its structure and operation. The Commission currently meets 100% of the requirements. KPM No. 10 measures the median number of days for the Appellate Division to file an opening brief. Former KPM No. 1 simply counted the number of cases in the Appellate Division backlog, which could vary based on factors other than productivity. KPM No. 10 allows OPDS to focus on its ultimate goal which is to maintain or lower the average number of days required to file the opening brief. A third proposed new measure – “Capacity for Providing Quality Representation” was not approved and PDSC has been directed to work with the Legislative Fiscal Office to evaluate the need for additional Key Performance Measure changes during the 2009-11 interim.

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

Strategy 1. With funding provided by the 2009 legislature, OPDS will apply the priorities PDSC has developed and refined over the course of the last several biennia to assure the maintenance of qualified providers in each judicial district. This will require that these providers receive sufficient compensation to allow them to recruit, train and retain an adequate number of qualified attorneys and support staff to handle the assigned caseload in an efficient and effective way.

As OPDS informed both the 2007 and 2009 Legislatures, 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, 2010.³

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 law⁴, 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

³ PDSC approved many of these contracts at its October 23, 2009 meeting and will be asked to approve the balance at its December 10 meeting. 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.

⁴ Further discussion of the Commission's review of public defense practice in particular areas of law is included below under Goal II.

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 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,⁵ 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,

⁵ PDSC has performed service delivery reviews in Baker, Benton, Clackamas, Clatsop, Coos, Curry, 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, Deschutes, Douglas, Grant, 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.

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 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 five years it has guided these reviews, the Quality Assurance Task Force has assembled a list of "best practices"⁶ 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 2009, OPDS coordinated peer reviews of 36 individual public defense providers who handle a majority of the statewide adult and juvenile public defense caseload.

The most recent site visit occurred in November of 2009 in Klamath and Lake Counties. OPDS and the Quality Assurance Task Force hope to complete additional site visits during the 2009 - 2011 biennium. Significant reductions to CBS's essential budget level may diminish the number of visits that can be conducted 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

⁶ This document may be viewed on the PDSC website:
<http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

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 February 2009.
- 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,⁷ offer a detailed, comprehensive guide to good practice at all stages of the proceedings.
- D.** PDSC has established a formal complaint policy⁸ 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

⁷ http://www.osbar.org/surveys_research/performancestandard/index.html

⁸ PDSC's complaint policy may be found at <http://www.ojd.state.or.us/osca/opda/CBS/index.html>.

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.

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 Bar⁹ and the Oregon Secretary of State's Audits Division¹⁰ 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

⁹ 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.

¹⁰ 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.

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.

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 PDSC¹, 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 is the excessive caseloads handle by juvenile lawyers and which are 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 indicates that in some counties a large percentage of youth waive counsel and appear *pro se*. In March 2010 PDSC will conduct a hearing to review the frequency and causes of waiver. As part of its exploration of this issue and others, PDSC will seek to obtain any available data that would reveal the scope of the issue and allow for comparisons between, for example, different counties and different public defense providers. PDSC may decide to issue recommendations or policies regarding the waiver of counsel and may ask other stakeholders (such as the judges, the district attorneys, the juvenile departments and PDSC's providers) to participate in the discussion of possible solutions.

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.

If a policy option package creating a discrete OPDS unit does not receive legislative approval and if OPDS's Appellate Division is able in the future to fill its vacant positions and to eliminate its backlog of pending criminal appeals and reduce the time from settlement of the record to filing of the opening brief to an acceptable time period, PDSC could then consider whether to move some of the attorney positions in the criminal appellate section into a new post conviction section or division.

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 the case 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. As of October 2009 the resource attorney had assisted teams in approximately fifty capital trial-level and post-conviction cases.

- D. **Other practice areas** that the Commission plans to review in 2010 are appellate representation, including the work of the Appellate Division of OPDS, and 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.

- A. OPDS will continue to urge public defense contractors that don't already have them to establish boards of directors or advisory boards.
- B. OPDS will continue to include a segment on boards of directors and advisory boards in its annual Public Defense Management Conference.
- C. PDSC should consider, on a case-by-case basis, requiring boards of directors or advisory boards with outside members as a condition of contracting with the Commission.

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 will review attorney evaluation procedures currently in use and determine whether it would benefit contractors for PDSC to develop and promulgate model evaluation procedures.

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 will make a presentation to PDSC on the training resources currently available to public defense providers and PDSC will consider how best to address any unmet needs.

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 2010 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. While PDSC will review specific contracts and proposals only under limited circumstances¹¹, it will continue to establish the principles and priorities which govern the contracting plan for each biennium and, before the final terms of contracts are negotiated by OPDS, it will review OPDS's outline of the statewide plan and be advised how PDSC's principles and priorities were applied. PDSC can accept, amend or reject the proposed plan. Once it has approved a statewide plan, PDSC will approve contracts offered and accepted under the terms of that plan.
- B. 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.

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.

¹¹ PDSC will undertake a detailed, in-depth review of the terms and conditions of an individual public defense contract at a regular monthly meeting only if (a) requested to do so by the Executive Director or (b) requested to do so in writing by a contractor or prospective contractor and, in the opinion of a majority of PDSC members in attendance, the request justifies such a review.

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 will update its attorney practice and procedure manual, combine it with a new secretary's manual and provide it to all AD staff in 2010.
- 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. AD will nevertheless continue to seek reduction of the backlog.

- E. PDSC will seek sufficient funding from the 2011 Legislative Assembly to add positions to address any caseload increases and to fill vacancies that have remained open since the 2009 legislative session to address the reductions made to the AD budget in the end of session budget reconciliation bill.
- F. OPDS staff continues to upgrade and improve AD's databases, which now include a brief bank introduced in 2009.
- G. AD's Juvenile Section is fully functioning and already 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 will also serve as a resource center for juvenile dependency lawyers at the trial level and will work 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. OPDS will urge the Commission to again include a policy option package in its 2011 budget request addressing this issue. If such a package is approved by PDSC, OPDS staff will need to 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 attorneys continue to respond to inquiries from trial level defenders on a broad range of questions relating to substantive Oregon law and the preservation of issues for appellate review.
- C. 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.

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.

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. 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.

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 7

Table of Contents

Introduction	page 2
Agency Mission	
The Right to Counsel	
Role in Public Safety System	
Oregon's Public Defense Delivery Model	
I. Agency Organization and Operation	4
II. PDSC's Accomplishments in 2007-2009	5
Contract and Business Services Division	
Appellate Division	
Service Delivery Reviews	
Site Visit Process	
Efficiency of Operation	
III. PDSC's Challenges in 2007-2009	11
Quality Issues	
Compensation Issues	
Funding for 2009-2011	
Conclusion	14

PUBLIC DEFENSE SERVICES COMMISSION

The Executive Director's Biennial Report to the Oregon Legislative Assembly (July 1, 2007 – June 30, 2009)

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Gideon v. Wainwright, 372 US 335, 344 (1963)

"Our criminal and juvenile justice systems fail when defendants lack access to independent and effective counsel."

Written Testimony by Attorney General Eric Holder to Senate Judiciary Committee, Washington, D.C. ~ Wednesday, November 18, 2009

"The right to representation by counsel is not a formality.It is the essence of justice."

Kent v. United States, 383 U.S. 541, 561 (1966).

Introduction

Mission: The Public Defense Services Commission (PDSC) is an independent commission in the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon's public defense system. That system delivers trial level and appellate legal services in criminal, juvenile and civil commitment cases across the state. In carrying out these responsibilities, PDSC's mission is to deliver quality, cost-efficient public defense services through skilled and accountable management, effective quality assurance oversight, and performance measurement.

The Right to Counsel: The legal services provided by PDSC represent an essential component of Oregon's public safety system. Under the United States Constitution, the Oregon Constitution and Oregon statutes, financially eligible individuals charged with crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental health concerns are entitled to representation by court-appointed counsel at trial and on appeal. In FYE 2009 Circuit and appellate courts appointed attorneys to represent indigent clients in more than 171,000 cases.

Role in Public Safety System: Public defenders defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused and protect the interests of all Oregonians by advocating for parents and children in cases of alleged abuse or neglect and by asserting the rights of allegedly mentally ill persons not to be inappropriately deprived of their liberty.

The state cannot prosecute crime¹, remove children from their parents, or involuntarily commit those in need of treatment without providing constitutionally mandated representation to financially eligible individuals subject to these proceedings.

In addition, defenders contribute directly to public safety by (1) advocating for effective criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for families involved in dependency cases that help them to avoid or limit disruption of the family unit, lead to early reunification or, when reunification is not possible, help children find permanent safe and

¹ In the 01-02 biennium in several special sessions the Public Defense Services Account was reduced by 27.6 million (17%) from the legislatively adopted budget. Although \$5 million of that cut was subsequently restored, these cuts occurred so late in the biennium that public defense funding was virtually eliminated during the last quarter. Crime rates increased, repeat property offenders could not be held. Fox Butterfield reported in the June 7, 2003 edition of the *New York Times* that "Because [there is] little money for public defenders, Mark Kroeker, the Portland police chief, said officers were now giving a new version of the Miranda warning when they arrested a suspect in a nonviolent crime. 'They effectively have to say, "If you can't afford a lawyer, you will be set free. Enjoy.'" Chief Kroeker said. Noting a significant increase in shoplifts, car break ins and other crimes, Kroeker said, "The scary thing is that the worst results are still six months down the road, as the bad guys realize nothing is going to happen to them...."

supportive homes; and (3) assisting allegedly mentally ill persons find safe and effective alternatives to involuntary hospitalization.

On the appellate level defenders play a critical role in clarifying the law and ensuring its consistent application across the state. On both the state and local level defenders participate in public safety planning groups and provide valuable input to policy makers regarding effective approaches to controlling crime, protecting children and providing for the mentally ill, and facilitating the efficient operation of the courts and the public safety system as a whole.

Oregon's Public Defense Delivery Model : PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff in its Appellate Division. PDSC approves and provides representation for all trial level cases and appellate cases not handled by AD through its Contract and Business Services Division, which negotiates and administers contracts with private contractors and administers payments to hourly providers.

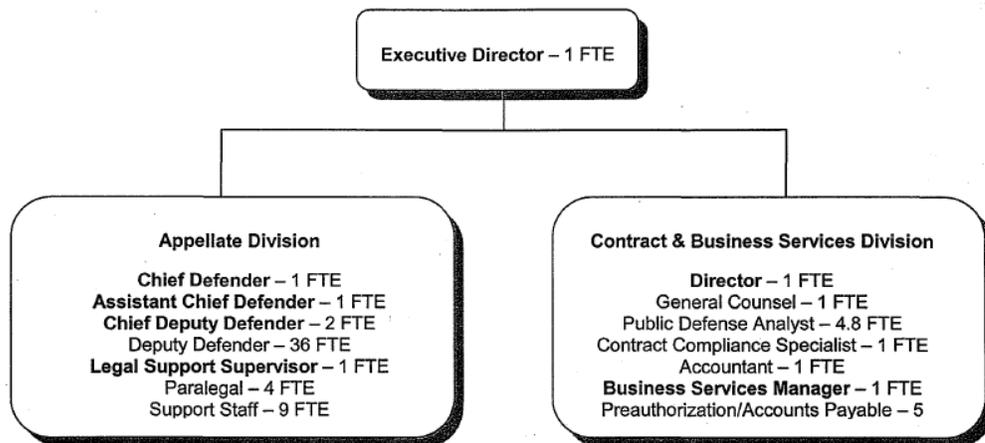
I. Agency Organization and Operation

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for the administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice who serves as an ex officio, non-voting member. By statute, two members must be non-attorneys, one must be a former prosecutor, and another must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state. The current members of PDSC are listed in Appendix A.

The commission established the Office of Public Defense Services as its administrative agency and appoints the agency's executive director. Ingrid Swenson is the current executive director of the agency.

As shown below in the Organizational Chart for 2007-2009, the Office of Public Defense Services is comprised of two divisions. The Contract

and Business Services Division (CBS)² manages the business functions of the two divisions, administers the Public Defense Services Account which funds representation and related services in all criminal, juvenile, and civil commitment cases at the trial level and in those appeals not assigned to the Appellate Division. CBS negotiates with private contractors for these services and authorizes and pays for expenses related to representation in public defense cases. The Appellate Division (AD)³ provides direct legal representation in the state appellate courts in criminal cases, juvenile dependency and termination of parental rights cases, and parole cases.

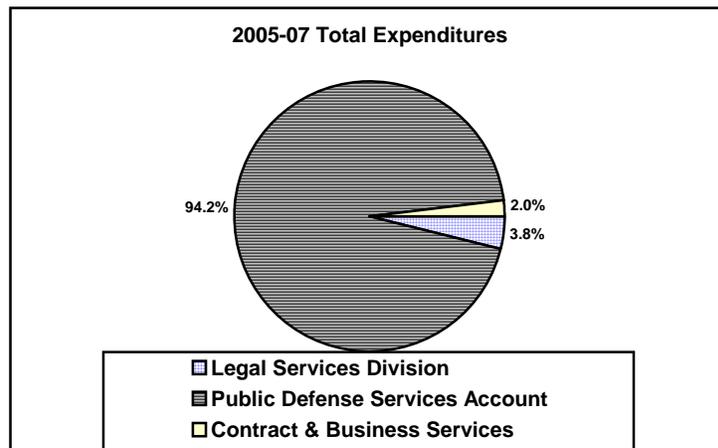


² Prior to the creation of the PDSC, the responsibilities of the Contract and Business Services Division were managed by the Indigent Defense Services Division of the Judicial Department.

³ Formerly the State Public Defender's Office.

Kathryn Aylward is the manager of the Contract and Business Services Division. Peter Gartlan is the Chief Defender and manager of the Appellate Division.

The chart below sets forth the 2007-2009 funding allocations for the two divisions and for the Public Defense Services Account which funds private contractors, hourly rate attorneys and other private service providers such as investigators and expert witnesses.



II PDSC's Accomplishments in 2007-2009

- (a) Contract and Business Services Division - With respect to the provision of trial-level representation services, the agency's Contract and Business Services Division was able to successfully negotiate contractual agreements with more than 100 private providers in every region of the state to ensure representation in approximately 340,000 cases during the biennium. The level of compensation negotiated under the contracts was adequate to meet at least the minimum needs of these organizations to survive and provide quality representation.

In addition to negotiating and administering contracts for the provision of legal services, the Contract and Business Services Division manages the non-routine expense authorization

process that was formerly overseen by Circuit Court judges in Oregon's 27 judicial districts. The expense authorization process requires OPDS to review each request for approval of fees for investigators, expert witnesses, discovery materials provided by other parties, and the like. The agency uses a peer-review process to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 30,000 such requests in 2007-2009. It is important to process these requests for services and the more than 50,000 invoices for completed services as promptly as possible. In 2007-2009 the agency exceeded its target by processing 98% of requests within five days of receipt and 98% of invoices within ten days of receipt. By assuring prompt and reliable payment the agency finds that providers are more willing to work at the below-market rates paid by PDSC. OPDS's Customer Service Survey in 2008 rated the agency very high in helpfulness, accuracy, timeliness, knowledge and expertise.

- (b) Appellate Division - In order to allow the division to manage its criminal caseload and address a backlog of appellate cases, the 2007 Legislature approved the addition of eight new attorney positions to the Criminal Section of the division.

In an effort to improve the quality of representation in juvenile dependency cases, the 2007 Legislature also authorized the creation of a Juvenile Appellate Section within the division with four attorney positions.

The division used the positions to address the needs identified by the Legislature. The division assigned 3,919 cases during the 2007-2009 biennium. In addition to significantly reducing the case backlog the division reorganized its staff and designated two chief deputies to assist in the achievement of several long-standing administrative goals such as updating the attorney manual, instituting a measurement tool for gauging appellate workload and providing additional support and supervision for the attorneys.

The Juvenile Appellate Section now represents parents in the majority of appeals in juvenile dependency and termination of parental rights cases. The agency created a juvenile case management database that served as a model for a revised case management system in the Criminal Section.

The Appellate Division increased the support it provides to trial level public defenders through various means. For example, every brief the division files is electronically sent to the trial attorney. An “attorney of the day” is available to respond to trial attorney inquiries about specific issues and opinions. Appellate Division attorneys regularly make presentations at continuing legal education training sessions sponsored by others, and also developed and presented two half-day in house trainings for its own staff attorneys. The evaluations from attendees consistently indicate a high level of satisfaction with the content and professionalism of AD presentations.

Appellate Division attorneys, OPDS staff, the executive director and its general counsel participate in a number of planning groups that prepare and present education and training sessions for public defense attorneys handling various types of public defense cases.

- (c) Service Delivery Reviews - In pursuit of its mission to assure quality, cost effective public defense services in 2007-2009, PDSC continued its service delivery review process in four regions of the state and in one specific substantive area of law. This process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the commission’s management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial investigation. The commission then meets in the region to

hear directly from the stakeholders in the local justice system. The commission then develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region.

In previous biennia, PDSC completed investigations and evaluations of the local public defense systems and developed service delivery plans to improve the structure and operation of local systems and the quality of legal services in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam, Sherman, and Wheeler Counties.⁴ The Commission also conducted service delivery reviews in juvenile dependency cases and in death penalty cases⁵.

In the 2007-2009 biennium, PDSC conducted service delivery reviews in Washington, Coos and Curry Counties, Jackson and Josephine Counties, Grant, Harney, Baker and Malheur Counties and in Clackamas County. It also reviewed service delivery in post-conviction relief cases. At the conclusion of its review of post-conviction relief (PCR) representation it endorsed a number of approaches to improving the quality of the work provided, including a request to the Oregon State Bar to create a workgroup to develop performance standards for attorneys in PCR cases. A workgroup was formed. OPDS's General Counsel served as the reporter for the workgroup and assisted in all phases of the project. The bar's Board of Governors approved performance standards in February of 2009 that are now available to guide practitioners in the preparation and presentation of their cases, and to be used as a standard against which PDSC can measure performance. PDSC

⁴ As they are completed these plans are posted on the PDSC website:
<http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

⁵ As a result of its examination of representation in death penalty cases, PDSC adopted the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. It also approved the creation of a Death Penalty Resource Attorney position to provide expertise, training and assistance to other death penalty attorneys, investigators and mitigation specialists in the preparation and presentation of their cases. The efforts of the resource attorney enable other attorneys to be more efficient and effective.

staff has also organized a specialized training for post-conviction counsel for March of 2010.

- (d) Site Visit Process - Since 2004 a task force⁶ of PDSC's contractors have served as volunteers in developing and overseeing a systematic process to review the organization, management and quality of services delivered by the commission's contractors. The site visit process, apparently unique to Oregon, engages volunteer attorneys from across the state with expertise in public defense practice and management, in a comprehensive statewide evaluation process.

Teams of volunteer attorneys visit and evaluate the offices of the state's public defense contractors, administer questionnaires and interview stakeholders in the contractor's county, including the contractor's staff, prosecutors, judges, other defense attorneys, court staff, corrections staff and other criminal and juvenile justice officials regarding the contractor's performance and operations. After a site visit and deliberation among the team's members, the team prepares a report to the contractor's director and PDSC's executive director outlining its observations and recommendations. If significant problems are identified, the team can recommend that OPDS review the operations of the provider. In most instances, site teams find a mix of good practices and areas in which improvement is needed. Teams often commend contractors for special achievements and share these "best practices" with other contractors. Most contractors are quick to address concerns but failure to follow through can trigger further investigation by OPDS and may result in a decision not to renew a contract.

Among the best practices identified in previous site visits are regular and systematic evaluation of the contractors' attorneys and managers, independent boards of directors with relevant

⁶ The Quality Assurance Task Force includes volunteer representatives of some of PDSC's major providers and OPDS staff including its executive director, the director of contract and business services and its general counsel. The group is chaired by Jack Morris, an attorney in private practice, whose firm represents public defense clients in five Central Oregon counties.

business and management expertise, and financial management practices that conform to accepted accounting standards. In addition to improving operations of the contractors who are the subject of the site visits, the process is designed to improve the operations of other public defense contractors by sharing information about successful practices and polices.

In previous biennia site teams evaluated contractors in Deschutes, Douglas, Clackamas, Lane, Linn, Lincoln, Jackson, Morrow, Multnomah, Umatilla and Washington Counties. In 2007-09 teams evaluated providers in Benton, Columbia, Crook, Jefferson and Lane and Multnomah Counties.

- (e) Efficiency of Operation – As a consequence of its statutory mission to provide public defense services “in the most cost efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice,”⁷ and as part of its institutional culture, PDSC’s staff as well as the independent contractors who provide public defense representation at the trial level and the experts, investigators and other service providers who work with them understand that cost-efficiency is a consideration in every decision that is made by the agency. From the outset PDSC adopted a business-model approach to the operation of its two divisions.

For example, when an out-of-town expert’s testimony is needed in a trial, PDSC asks the attorney to consider having the expert appear by video instead of traveling to the location of the trial if it will not prejudice the defendant’s case. If multiple parties to the same case have similar interests, PDSC will ask the attorneys for those parties to share expenses if possible.

Efficiency of operation and the need to conserve resources is a part of every monthly OPDS staff meeting. Employees know that identification of cost saving approaches to their work is

⁷ ORS 151.216(1)(a).

welcomed. Employees responsible for agency purchases are skilled at identifying the most cost effective options including use of state surplus materials and used equipment. Efficient use of time is also emphasized. In February 2009 the agency provided its staff with a training in time management. The training was offered at no cost by the Professional Liability Fund of the Oregon State Bar.

The Appellate Division meets regularly with the Court of Appeals and the Attorney General's Office to streamline the appellate process and provide more timely case resolutions for its clients and the system. For example, the division works with the Attorney General to identify "lead cases" that will control the disposition of multiple cases presenting the same or similar issues. The division sits on the Oregon Rules of Appellate Procedure Committee, appears in the legislature as a resource and proposes statutory changes to improve the efficiency and cost effectiveness of the appellate system. For example, the division shepherded a 2007 statutory change that eliminated an unnecessary layer of litigation in appeals from the Board of Parole and Post-Prison Supervision that had proven to be unnecessary.

III PDSC's Challenges in 2007-2009

- (a) Quality Issues – With respect to the provision of public defense services at the trial level, PDSC believes that the majority of clients receive quality, cost-efficient representation. There are some areas of practice, however, in which quality is not uniformly good, and in many parts of the state caseloads exceed national standards. As noted below, the agency continues to seek solutions to these challenges.

When I arrived at court that morning, I was told this is my lawyer. My lawyer sat down with me for five minutes, asked me a couple of things, and told me to admit to my drug addiction. I didn't know anything about a fact-finding hearing. I wasn't told what my rights were. I wasn't told the

procedure of court. I didn't have any idea what was happening, and I was very much afraid, because the most important thing in my life had just been lost.⁸

Representation in juvenile cases is one area of particular Concern in Oregon. Indigent Defense Task Force Reports II and III issued by the Oregon State Bar in 1996 and 2000 underscored the need for significant improvement in juvenile representation.

In 2005 the Oregon Secretary of State's Audits Division identified it as an area of management risk to the agency. In the fall of 2006 a group of interested legislators formed a workgroup to address the issue. The workgroup recommended a reduction in caseload for juvenile attorneys, an increase in compensation and the creation of a resource center for attorneys.

SB 411 in the 2007 session would have funded the work group's recommendations. At a public hearing on the bill in the Senate Judiciary Committee, members heard testimony about the success of a Washington State parents' representation program that began as a pilot program in three counties and was extended to 25 counties after the initial performance evaluation was conducted. In the Washington program, attorneys were required to commit to meeting a series of performance requirements. The program was deemed highly successful and resulted in significant reductions in termination of parental rights cases, significant increases in family placements and more timely resolution of cases.

In order to achieve similar success in Oregon, significant additional funding would be needed. Policy Option Package No. 100 in the agency's 2009 budget proposal would have

⁸ Moynihan, Forgey, & Harris, *Symposium: Fordham Interdisciplinary Conference Achieving Justice: Parents and the Child Welfare System*, 70 *Forham L. Rev.* 287, 330 (2001) (citing testimony by a member of a panel of parents who participated in the Conference and had previously been involved in the child welfare system), which testimony has been echoed by parents in Oregon in presentations to Oregon lawyers across the state.

allocated an additional \$17 million to the agency for the purpose of decreasing juvenile caseloads. PDSC has determined that caseloads for its contract attorneys exceed national standards by 30%, and in October 2006 when OPDS requested a total client tally on two separate dates from contractors who represent only juvenile clients, all reported caseloads exceeding those of their Washington State counterparts in the pilot counties, some by more than 200%. The policy option package was not funded and PDSC continues to explore other kinds of assistance to offer its providers.

OPDS arranged for one of its premier providers to serve as a resource center for other attorneys. In addition, it created a parents' representation project at the same contract office to offer trainings and provide expertise to other contract attorneys in the representation of parents.

OPDS has worked with other groups interested in the representation of parents and children to sponsor and support a number of training opportunities for lawyers. PDSC believes that adequate training is now available to all juvenile attorneys.

With the budget approved by the 2009 Legislature, PDSC will be seeking to concentrate a greater portion of its resources on juvenile representation in the hope that even a relatively minor decrease in caseload would allow attorneys to be more proactive in the representation of clients in these cases.

Another area of practice in which quality of representation continues to be an issue is post-conviction relief. Although PDSC sought legislative approval for the creation of a new division within OPDS to handle these cases, when that request was not approved, PDSC attempted to concentrate the work among the best qualified contract providers. As noted above a set of performance standards is now in place and a special training on the standards has been scheduled for 2010.

- (b) Compensation Issues – As PDSC reported to the Public Safety Subcommittee of the Joint Ways and Means Committee in both 2007 and 2009 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 sense of commitment to public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices these older attorneys have made, especially in view of the sizeable loans the younger attorneys have had to assume in order to finance their college and law school educations. PDSC’s contractors, particularly its non-profit public defender offices, report that recruitment and retention of attorneys are significant concerns.

The other category of public defense providers who have been chronically underpaid are attorneys and investigators who work at hourly rates.

PDSC’s Policy Option Package No. 101 would have allocated additional funds for both these groups of providers but, as with other agencies in the 2009 legislative session, not only were policy option packages not funded but even essential budget levels were not met.

- (c) Funding for 2009-2011 – At the conclusion of the 2009 Legislative session, funding for trial level representation was reduced by more than \$14 million which means that PDSC will be unable to provide public defense services for the final seven weeks of the biennium assuming an average monthly expenditure of \$8.8 million per month. A portion of the deficit is expected to be filled by \$3.5 million in Other Funds from revenue generated by HB 2287 and additional revenue from that or another source could be allocated by the 2010 special legislative session. PDSC has been instructed to report to the 2010 special session on caseload trends and any costs incurred as a result of resentencing proceedings authorized by the 2009 Legislative Assembly.

Conclusion

PDSC understands its mission and is dedicated to realizing its dual goals of providing representation that is consistent with the Oregon and United States Constitutions and Oregon and national standards of justice and doing so in the most cost efficient manner possible.

PDSC looks forward to meeting the challenges and providing the leadership and direction essential to a healthy, effective and efficient public defense system in Oregon.