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Barnes H. Ellis, Chair  
Shaun S. McCrea, Vice-Chair  
Michael Greenfield  
Henry H. Lazenby, Jr.  
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 13, 2007  
9:00 a.m. to 1:00 p.m.  
Labor and Industries Building, Room 260  
350 Winter Street NE  
Salem, Oregon 97301

**AGENDA**

1. **Action Item:** Approval of Minutes of PDSC's November 7, 2007 Meeting, *(Attachment 1)* Barnes Ellis
2. Discussion of Testimony from Invited Guests at November Meeting in Judicial Districts 6 and 10; Initial Discussion of Service Delivery Plans *(Attachments 2 and 3)* Barnes Ellis
3. **Action Item:** Contract Review and Approval Kathryn Aylward
4. Review of the Executive Director's Biennial Report to the Legislature *(Attachment 4)* and Annual Report to PDSC *(Attachment 5)* Ingrid Swenson
5. PDSC Key Performance Measure Progress Report *(Attachment 6)* Kathryn Aylward
6. **Action Item:** Approval of PDSC Public Record Procedure *(Attachment 7)* Paul Levy
7. 2008 PDSC Agenda *(Attachment 8)* Ingrid Swenson
8. OPDS Monthly Report OPDS's Management Team

9. **Executive Session:** Performance  
Review of Executive Director\*

Barnes Ellis

*\*The executive session will be held at approximately 12:30 p.m. pursuant to ORS 192.660(2)(f) and (h).*

**Please note:** *Box lunches will be provided for Commission members at **noon** in the meeting room.*

**Next meeting:** *The January, 2008 meeting of the Commission is **cancelled**.*

*The next meeting of the Commission will be on February 14, 2008 from 9:00 a.m. to 1:00 p.m. in Salem at a location to be announced.*

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Wednesday, November 7, 2007

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

Room 316

Umatilla County Courthouse

216 SE Fourth St.

Pendleton, Oregon 97801

MEMBERS PRESENT: Barnes Ellis  
Michael Greenfield  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Paul Levy  
Peter Gartlan

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[The meeting was called to order]

**Agenda Item No. 3 Presentations on Public Defense Delivery in Judicial Districts 6 and 10**

After an introduction by Chair Barnes Ellis the Commission heard from the following guests and presenters: Circuit Court Judge Ronald Pahl, Circuit Court Judge Phillip Mendiguren, La Grande attorney Rick Dall, Umatilla County District Attorney Dean Gushwa, Circuit Court Judge Jeffrey Wallace, Intermountain Public Defender director Doug Fischer, Citizen Review Board representatives Toni Sloan and Nancy Paxton, Blue Mountain Defender administrator Craig Childress, Umatilla County Drug Court Coordinator Nina Kik, and La Grande attorneys Anne Morrison and Victoria Moffet.

**Judicial District 6**

Judge Ronald Pahl testified that he is the juvenile and family law judge. His courtroom is located in the courthouse in Pendleton. He said that there is a "pretty good group" of attorneys handling juvenile cases in Umatilla County. He recently implemented a policy requiring attorneys to be present for initial appearances in juvenile cases and believes the new process is working well. Occasionally it is difficult to find enough attorneys for all of the parties, especially on short notice. He encourages attorneys to meet with child clients and believes there has been some improvement in that regard. In some cases Judge Pahl has seen an attorney for a child appear to be intimidated by an attorney for a parent into not advocating the child's position. One area in which attorneys may need additional training is in the law applicable to Indian Child Welfare Act cases. In delinquency cases only about half of the youth who come before the court request court-appointed counsel. The others, sometimes with input from their parents, waive counsel. Umatilla County is one of the Casey foundation's juvenile detention alternative initiative sites. The defense lawyers have been skeptical about the benefits of the initiative for their clients but that may be because they have

not yet received any training. There has not really be an overcrowding issue at the county detention facility but the records kept by the project will be useful in identifying trends and whether there is minority overrepresentation. Judge Pahl is also the drug court judge. The Pendleton drug court had a graduation recently. It is a great program. It has a fifty percent success rate but that is good. The county also has conditional discharge and diversion options. With respect to the requirements for admission to the drug court program, Judge Pahl can understand that when an attorney believes that a case has been overcharged that they would be reluctant to recommend a guilty plea to their clients since the fifty percent that don't succeed end up with a conviction. The Hispanic population of the county is approximately fifteen percent although it is closer to fifty percent in some areas. Judge Pahl does not believe there are any Hispanic attorneys in the area. There are Native American attorneys who practice in the tribal court and occasionally appear in the county courts.

Umatilla County District Attorney Dean Gushwa said that he was appointed by the governor in January of 2007. He was a deputy district attorney in the office for thirteen years and also worked briefly as a defense attorney in private practice. He has eight deputies who prosecute cases in four courtrooms in two separate courthouses. It takes forty-five minutes to travel from one courthouse to the other. The county did not provide any additional staff for the office when the new courthouse opened in Hermiston. He has tried to create uniform policies for both facilities and meets weekly with all of the deputies. There needs to be proportionality in negotiated pleas and the handling of cases. One deputy is assigned to juvenile court and is located at the juvenile department. She handles both dependency and delinquency cases. His office has experienced significant turnover this year, losing four of its deputies, but there have been more applicants for open positions lately. IPD is doing a very good job and maintains a very collegial atmosphere among its attorneys. The attorneys comport themselves professionally and have good working relationships with his office. In the past some non-IPD lawyers filed frivolous motions but IPD lawyers do not. They use whatever ethical legal mechanisms they can, however, to help their clients. In death penalty cases, Mr. Gushwa believes that if the conduct meets the elements for aggravated murder, the sentencing jury should be the body which decides whether a death sentence will be imposed, not the district attorney, unless there is a very unusual circumstance such as mental retardation. Mr. Gushwa said he believed that other district attorneys take an even stricter view. Since he took office he has made it his policy to provide discovery to the defense at the time of arraignment. He would like to be able to provide it electronically in the future.

Judge Jeffrey Wallace is assigned to the Hermiston courthouse, which opened in March of 2006 after the previous structure was destroyed by fire. With more cases now being heard there the defense attorneys have to do more traveling. Because the western part of the county is growing more rapidly than the eastern portion it is expected that number of cases assigned to Hermiston will continue to grow. Blue Mountain Defenders also handles cases in Heppner, the county seat for Morrow County, which is located forty-eight miles south of Hermiston. Judge Wallace has been very happy with both IPD and Blue Mountain Defenders. They are dedicated lawyers who do a good job. He is pleased with the quality of representation they provide. Post conviction relief cases filed by inmates at the two prisons in Umatilla County are generally heard by senior and *pro tem* judges in Salem.

Doug Fischer, the director of IPD, described the board of directors that oversees his office. He said that IPD continues to have difficulty recruiting and retaining attorneys. All of the members of the BMD consortium were initially recruited and trained by IPD. Three attorneys have fifteen years or more of experience. The others all graduated from law school within the last couple of years. Training is provided to new attorneys by Mr. Fischer and other experienced attorneys. He would like to see public defense providers pool their resources and create training programs for new attorneys. While attorneys in the past believed that when they represented children in dependency cases they could just adopt the position taken by DHS, that approach is changing. It is now becoming the expectation that counsel in these cases will make an independent decision about the interests of the child.

Toni Sloan and Nancy Paxton with the Citizen Review Board said that while attorney attendance at CRB hearings is very good, the attorneys often appear not to have met with their child clients prior to the hearing. They generally express what they believe to be in the child's best interest, although they may have no independent information upon which to base this belief. They do not generally inform the board what the child's wishes are. More children, especially those who are fourteen or older, should be encouraged to attend the reviews and express their own preferences. They are also concerned that attorneys for children may sometimes align themselves with the position taken by a parent's attorney even though it is not in the child's best interest. In most cases IPD is appointed for one of the parents and BMD is appointed for the child and any other parent.

Craig Childress, the administrator of the BMD said that he organized the consortium. It operates like a small firm with some "satellite" attorneys available in conflict cases. There are a total of eight members of the consortium. Mr. Childress and attorney Dan Stephens share office space and handle most of the cases. In setting up the office they created the necessary safeguards to protect clients from conflicts and breaches of confidentiality. If they take similar positions on behalf of their individual clients it is because each of them has determined that such a position is in the client's best interest. Cases are assigned within the consortium according to criteria established by the members specifying the type and number of cases each of them wished to handle. The attorneys meet regularly and discuss their caseloads. The attorney handling a case receives the full amount of compensation that the consortium is paid by OPDS. BMD is proposing to create a board of directors in 2008. Mr. Childress also volunteered to respond to questions that Commissioner Welch had posed to Mr. Fischer. Commissioner Welch said it might be appropriate for the larger juvenile court community to discuss the role of counsel for children. Mr. Childress agreed and said that he does visit with child clients and explores both the expressed wishes and the best interest of his client and conducts his own investigation. He said he went to law school to become a juvenile attorney and worked for seven years in Douglas County before coming to Umatilla County. He and all the members of the BMD consortium have passion for their work. Not all lay people understand the role of attorneys and the need to question witnesses and sometimes take an aggressive stance in a case.

Nina Kik is the Umatilla County Drug Court Coordinator. She described the creation of the drug court, the eligibility criteria, and the process for screening applications and admitting clients. While Mr. Fischer was involved in the planning committee for the drug court she would like to see other defense attorneys participating in the decisions that are being made about the policies of the court. Some attorneys discourage clients from entering the program. She acknowledged that some were likely to fail (twenty of the forty-four who had entered the program had been terminated from the program) but said that the program tries to meet the needs of the individual clients, including those who require in-patient treatment.

### **Judicial District 10**

Judge Phillip Mendiguren, the presiding judge in Judicial District No. 10, discussed how both the two judges in the district and the defense attorneys must spend a significant amount of their time traveling between courts. He described the operation of the "rocket docket" in Union County, the drug courts in both counties and the recent addition of a juvenile drug court in Union County. He described a recent encounter with a drug court graduate which made him realize how worthwhile the time and effort invested in drug courts can be. He said that if he became aware that an attorney was not performing adequately he would notify Rick Dall, the new consortium administrator. But quality is a product of adequate compensation. Conflicts do arise between attorneys and their clients but when communication breaks down a motion for substitution is almost always granted. It is difficult for the court to rule on some of these motions because the attorneys do not provide any information about the substance of the

conflict, which they say they cannot ethically reveal. On legal issues attorneys can be trusted to cite appropriate legal authorities.

Rick Dall described the history of the two public defense consortia in the district and their proposal in this contract cycle to form a single consortium - the Grand Ronde Defenders - comprised of all six members of the existing consortia. The group has already arranged with an independent attorney to handle drug court cases in Enterprise so that consortium members do not have to make that weekly appearance. In addition, this attorney has agreed to cover arraignments for consortium attorneys. The group intends to create a board of directors and a more structured organization that will have the capacity to remove members, if necessary, who are not performing adequately. Cases are currently distributed among members on a rotation basis although a single attorney will generally be assigned to all of the pending cases for a particular defendant. All of the member attorneys are qualified to handle all of the case types that the group contracts to handle. Caseloads have been down in Union County in the past year although both the district attorney and the defense lawyers expect that they will increase now that the new district attorney has been appointed. Under the circumstances, there has been no need for additional defense lawyers. Mr. Dall noted that attorneys in the consortium receive lower rates of compensation than attorneys in neighboring counties even though they do more traveling.

Anne Morrison and Victoria Moffet described their own backgrounds and the formation of the "women's consortium." Ms. Moffet has been a member of both consortia. They discussed in detail the difficulties involved in trying to visit with clients who may be located in distant parts of the state because of the lack of local treatment and placement services, about the lack of defense resources such as investigators, interpreters and mental health evaluators. They suggested that OPDS recruit investigators to the area and consider whether it would be possible to assign a "courtesy" attorney to juvenile clients who are located in distant areas, much like the "courtesy workers" assigned by DHS. Both attorneys noted that the court's recent decision to appoint counsel at shelter hearings has had a significant impact. Some cases proceed no further than the shelter hearing when it becomes clear that there are no jurisdictional grounds. Ms. Moffet also said that the early disposition program is resolving some of the minor cases to the benefit of clients. She said that it has been difficult to communicate with the district attorney's office in juvenile delinquency cases and that the juvenile department staff has not been adequately trained to draft petitions or determine whether the requisite elements of an offense are present before filing a petition. District Attorney Tim Thompson is working to improve this process.

**Agenda Item No. 1      Approval of Minutes of PDSC's October 12, 2007 Meeting**

**MOTION:** Mike Greenfield moved to approve the minutes; Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

**Agenda Item No. 2      Approval of the Minutes of PDSC's August 10, 2007 Retreat**

**MOTION:** Mike Greenfield moved to approve the minutes; Janet Stevens seconded the motion; hearings no objection, the motion carried: **VOTE 4-0.**

[The balance of the agenda items were carried over until December 13, 2007.]

The meeting was adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, November 7, 2007

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

Room 316

Umatilla County Courthouse

216 SE Fourth St.

Pendleton, Oregon 97801

MEMBERS PRESENT: Barnes Ellis  
Michael Greenfield  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Paul Levy  
Peter Gartlan

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**TAPE 1, SIDE A**

[The meeting was called to order]

**Agenda Item No. 3 Presentations on Public Defense Delivery in Judicial Districts 6 and 10**

001 Chair Ellis

Let me give you a little background on the Commission and why we are here. The 2001 Legislature created the Public Defense Services Commission, and it charged us with administering funds the legislature appropriates to provide indigent defense services in all those cases where either by constitution or statute they are required, consistent with national standards, but working hard to be sure that the taxpayers get good bang for their buck. In 2005 the Commission started a series of regional meetings. This, by my count, is the eighth region that we have visited. Our purpose is to hear from providers, judges, and other system participants, how things are going here in this region and to dialog a little bit about how we could do our job better to make sure that we have the right structure, the right providers, as best we are able to, in place. It is an opportunity for you to share with us both the good and whatever criticism you may have, for us to kind of share with you some thoughts we have. But I would say at the outset, one thing that has characterized our work is that we are not of the view that one size fits all. This is a very diverse state. Obviously, the issues that are involved in the very high population counties are different when we come to areas east of the mountains or in the southern part of the state or the coastal part of the state. Different communities have worked out indigent defense services, each a little differently than the other. We are not here to impose a single model, but we are here to share some of what we think we are learning elsewhere in the state with you and share elsewhere in the state what we learn from you. So that is the spirit in which we are here. We very much appreciate the interest that people have shown. I understand Judge Pahl has a court hearing waiting for him so if he would like to step forward we will go ahead and hear from you first, Judge Pahl, if that works.

- 035 J. Pahl I do have to get down there but do you have some questions?
- 037 Chair Ellis What we have done elsewhere is get the witnesses to kind of share with us their observations and then we probably will have questions. Of course you are very famous, Ron Pahl, is a name we have all heard.
- 039 J. Pahl I heard I am running for president.
- 040 Chair Ellis I understand you got a lot of money from the internet just last week so that is pretty exciting.
- 041 J. Pahl I haven't got it yet.
- 041 Chair Ellis If you would tell us a little about yourself and the role you play here and then any thoughts you have.
- 043 J. Pahl Concerning indigent defense, I do have a drug court here and I am also a juvenile court judge and family law judge. Of course in juvenile court we use your services a lot. Many of my cases have three or four attorneys or sometimes even more and it can be difficult at times. We do have the Public Defender's Office and the Blue Mountain Defenders and for the most part we are able to get the attorneys that we need.
- 052 Chair Ellis Are you able to get them promptly when you need them?
- 053 J. Pahl I would say for the most part. The problem I guess is when I do the shelter care hearings. We have changed that process within the last year and so now I am requiring the attorneys to be at the shelter care hearings and a lot of times they have only a couple of hours' notice. But for the most part it has worked out really well. That is just a new process that we have started within the last year. If you know how shelter care works - it is kind of difficult but usually we will have to have somebody from the Intermountain Public Defender's Office and at least two attorneys from the Blue Mountain Defenders. For the most part, I have been very pleased with that. I try to have an open door and meet with the attorneys, the district attorneys, because I think it is really important for fair representation for parents to have attorneys right at the start.
- 064 Chair Ellis We have heard in some parts of the state and I think perhaps here as well, some attorneys have not been meeting with child clients. Is that an issue here?
- 068 J. Pahl I try to encourage visits, especially with children four and over, but even when they are younger to meet with foster parents. You are talking later on about dependency, but I try to make sure. I definitely think that that has been a problem but I think that it is moving in the right direction now. I am not very happy when I have attorneys that represent children, especially older children, that haven't even met them yet. As a judge I try to push them in that direction. I am seeing that improve.
- 076 Chair Ellis Do you feel that the lawyers that you see in the juvenile system have the training and expertise they need to do the job they are doing?
- 079 J. Pahl Like I said, I have a need for a lot of different attorneys. There are some very experienced attorneys that do work in my juvenile cases. As far as training, and I did review the draft here, I have some that may need some training in the Indian Child Welfare Act type issues. We do have the confederated tribes right here and we do have some of those cases that take a little more expertise.
- 088 Chair Ellis We had a meeting about a year ago when Commissioner Welch was then Judge Welch in the juvenile court in Multnomah, and I came away very impressed with the complexity of the legal issues that juvenile representation involves. It kind of struck me that for a lawyer to do

the job right they have to know a lot of things, both federal law and state law because they overlay. I am trying to get a sense from you; do you think there is enough training going on to get to that level?

- 096 J. Pahl As a juvenile judge, and I love that part of my job and I think it is very important what happens to the kids, there is some sense that doing other types of cases is more important but I see juvenile law as extremely important, not only delinquency but also dependency, when the parent's rights are at stake and the future of the children. And you are right, it is very complicated. I want to say it is not taught in law schools either.
- 103 Chair Ellis Do you have the same lawyers doing the delinquency piece as doing the dependency piece?
- 104 J. Pahl A lot of them do. In delinquency, I don't use nearly as many attorneys. I would say that probably in less than half of my delinquency cases the kids have attorneys. My use of the public defenders is a lot lower in delinquency cases, but in dependency I use a lot of attorneys there.
- 112 Chair Ellis I know Commissioner Welch is going to have some questions for you because she really does know this.
- 113 J. Pahl I know she does.
- 114 Chair Ellis One other issue we have seen is some lawyers define their role a little differently than other lawyers in terms of when they advocate for a position for the child. Some kind of hold back and wait until everyone else has had their say before taking any position for the child. How is that working here?
- 120 J. Pahl I always appreciate it when I have an attorney that I know has really spent time with a child when I am going to have to make a decision on whether or not there is jurisdiction and I am going to have to make a decision whether we are going to keep custody of the child, or even permanency type issues. I hear what you are saying about some of them holding back. It is hard for them when maybe it is one their friends that is representing the mother and they have to take the position against the mother and the other attorney, but that is their job.
- 130 Chair Ellis That shouldn't be an issue should it? Just because a friend of yours is representing ...
- 131 J. Pahl Well, I have just seen intimidation more that way when an attorney is not strong enough to represent this two-year-old child or something.
- 135 Chair Ellis Any suggestions you have how we can do our job better and be more helpful to you to be sure that you are getting adequate representation in these cases?
- 138 J. Pahl Well, right now I think there is a pretty good staff of attorneys available, but I know there have been other times when we haven't had them. We still have to go out of town, sometimes over to Union County, to get available attorneys in some of our cases.
- 144 Chair Ellis What is the role here of the Citizen Review Board hearings? That varies around the state.
- 145 J. Pahl They are very active here and I know that because I get those reports on every case. They review the cases and I do see sometimes when attorneys haven't appeared. I see those notations in the CRB reports that I get. I am not sure what their rate of attending those is. I see some do it by phone. Some appear by a letter, representing their client that way. I am not real sure what the rate of attendance is.
- 156 Chair Ellis Did you have any comments on the draft report.

- 157 J. Pahl I just sort of read it off the internet and speed read it. I don't have any real comments.
- 159 Chair Ellis When you have a little more time to look at it please feel free to give us input on it. It is just a draft and our process is we try to have our staff come ahead, meet with people, try to get a sense of the community and then put out a draft so there is something we all can be looking at, but it is certainly not set in stone. We certainly are looking for input. Any other questions for Judge Pahl?
- 165 E. Welch I am curious how you feel at this point about the JDAI effort that you have undertaken as it relates to the function of the lawyers and your court? I am not sure if everybody knows what I am asking. Your county or your judicial district, I guess, got a grant from Annie Casey to do a detention reform undertaking. It was Multnomah County years ago and now you are the second one.
- 173 J. Pahl Right. We have been doing this for about two years actually. We have been getting training on that and I think the attorneys, like I stated, I want to say about half my delinquency cases have attorneys and I am not real sure on the percentage of that, so the attorneys that are involved in that we're trying to inform them of that process. I have met with them and they have been skeptical of it. I think what they need to realize is that it is in their best interest. I know that and you know that and so I try to work with them because they haven't gotten any of the training and they don't understand the process necessarily either.
- 185 E. Welch Are they participating in your preliminary hearings in a more active way or are they even able to be present?
- 186 J. Pahl Again, it is probably maybe fifty percent of my cases where I have juvenile representation and we use those risk assessments on all of them except for probation violation cases.
- 190 E. Welch Are you seeing any kind of change? Having traveled around a little bit, there are jurisdictions where every single juvenile that is arrested is held in detention. That might be a slight overstatement but it certainly is, relatively speaking, the case, just because of the distances involved I suppose.
- 196 J. Pahl We do have a detention facility here but we haven't had that kind of problem. I have been to those other jurisdictions where it has been a huge change. The record keeping of JDAI and those types of things I really find important because I can see trends and different things over minority issues and we have been working on those types of issues.
- 202 E. Welch On the ICWA issue, do you feel like there are lawyers in the area that know ICWA well enough to be resources to each other.
- 204 Chair Ellis That is the Indian Child Welfare Act?
- 204 J. Pahl Indian Child Welfare Act yes. I think there are. Actually, I started out working out there as the prosecutor for nine years so I understand that law a little bit better than a lot of them. I think there are attorneys that definitely have more experience.
- 209 E. Welch There has been some discussion about maybe having some lawyers statewide that are fully trained about ICWA and that are made available to other attorneys so that they know what to do if they have a particular issue.
- 212 J. Pahl I think that that would be great to have a regional type CLE on that one.
- 214 E. Welch Thank you.

- 214 Chair Ellis You haven't talked to us about your drug court and I understand you had your first group of graduates just a couple of months ago. Can you tell us a little how that seems to be going?
- 217 J. Pahl I just took over the drug court here in Pendleton recently and it was after the graduation, but we did have a graduation in August. We have Judge Reynolds in the Hermiston court and he has taken over that end of it. Actually, there are more in the drug court in Pendleton at this time, but we did have a graduation. I think I saw a figure that showed five graduates, but I think ...
- 225 Chair Ellis You had 44 participates it said.
- 225 J. Pahl Yes. The graduation in August was three really.
- 229 Chair Ellis Does that seem to be a program that you are optimistic about to this point?
- 230 J. Pahl It is a great program. It is a tough interaction type job but I think it is very rewarding. A lot of people - I know when I first found out about drug court when I heard it was only a fifty percent success rate, and I thought "Wow that is horrible" but it is not really because we are changing lives and I think it is a great program.
- 236 Chair Ellis Is that the only early disposition program that you have?
- 237 J. Pahl Well, we have conditional discharge and diversion type cases, if that what you are talking about.
- 238 Chair Ellis Right.
- 238 J. Pahl We do have those types on the criminal side. By statute there are conditional discharges for drug cases and diversion type cases.
- 241 Chair Ellis Do you feel the lawyers representing the clients on the decision whether to go into the drug court program are doing a good job? It does require a plea. Are you satisfied with that?
- 244 J. Pahl I can see both sides of that and we have had some issues where attorneys have been advising their clients not to go into drug court. I can see both sides of that. A lot of times there is a situation where maybe the case is overcharged and like you stated, we do require a guilty plea up front for drug court and I think that is pretty unique. As I stated also, you have fifty percent that may fail drug court and then they are just sentenced.
- 254 Chair Ellis So all those guilty pleas come home to roost.
- 255 J. Pahl Right. All those guilty pleas come home to roost. I think the attorneys have to advise their clients and talk to their clients on where they are. The thing about drug court is, it is up to the individual and it is a lot of work to get off drugs. I can order them and threaten them with jail; I can take their kids away and I have a lot of them that say "Okay, I am still going to use." It is a huge hurdle and if an attorney feels their client is going to fail at that, they are probably going to advise them not to do that.
- 265 Chair Ellis What is the magnitude of the Hispanic population here?
- 266 J. Pahl The what?
- 266 Chair Ellis Hispanic population.
- 266 J. Pahl Percentage?

267 Chair Ellis Yes.

267 J. Pahl Maybe 15 percent or something. Different parts of the community are different. I think on the west end it is a lot higher. It may be up into the 50 percent range and maybe higher in the Milton-Freewater area. Right here in Pendleton it is lower. We do have a growing population.

272 Chair Ellis Do the lawyers have enough Spanish fluency with either interpreters or direct speakers?

274 J. Pahl We have them available through the court system and I am not sure whether I have that many attorneys that are bi-lingual.

278 Chair Ellis Are there any Hispanic attorneys or Native American attorneys?

279 J. Pahl Not that I am aware of. There are some Native American attorneys that work out at the tribe and once in awhile I will get them on a dependency case when they want to be involved.

283 Chair Ellis Any other questions for Judge Pahl?

284 E. Welch I do. You said a couple of times that you had used attorneys in about 50 percent of delinquency cases. Could you expand on that? Can you differentiate between the kids who get attorneys and those who don't? How does that happen?

288 J. Pahl They are all advised of their right to have an attorney. I usually just see that that has been done. I think a lot of times in the more serious cases where they are going to be placed in OYA care, then I think definitely the percentage that have attorneys is a lot higher. If it is a minor case where they are just going to admit to jurisdiction – and of course their parents are involved too in that decision. The parents are involved in the right to an attorney, but I just see it as a lot less attorney involvement.

298 E. Welch Is there a high rate of informal resolution of your delinquency cases?

300 J. Pahl Well, the informal resolution occurs before it gets to me. By the time it gets to me I realize that a lot of these kids have been through an informal process and I don't get the first time MIPs. I don't get the first theft in the third degrees.

305 E. Welch So when you say 50 percent you are saying 50 percent of the kids who are not diverted?

306 J. Pahl Right and again that is just a round number. In dependency cases I have lots of attorney needs and delinquency is a lot less.

310 Chair Ellis Thanks very much. We appreciate your info.

310 J. Pahl You're welcome.

312 Chair Ellis I understand the DA's office wants to appear at 10:00 so we have a window here before they get here. Who else here would like to share some thoughts with us?

315 J. Mendiguren Good morning. I'm Judge Mendiguren from the Pendleton district. I am not as eloquent as Ron because I didn't run for President.

318 Chair Ellis You didn't get the contributions either?

318 J. Mendiguren I didn't get the money either, no. I was reading some of the stuff I had here when Ron was doing his so I am not sure how you started it for him.

- 320 Chair Ellis                   What we like is to get acquainted first of all so tell us a little about yourself and what role you play and then any observations you have on defense services in the community and then we can dialog a little bit.
- 323 J. Mendiguren                I am judge Phillip Mendiguren. I live in La Grande but have both counties, Union and Wallowa County. It is a two judge district so one of us is always going up to Enterprise on Wednesdays to handle the regular Wednesday arraignments. One of us is doing the Union County arraignments on Tuesdays. Then we split off and trade off going up to Enterprise for the trials that they have depending on whether or not one of us is recused or affidavited off the case. Judge West is the other judge and he was the prior district attorney for 17 years or something like that in Union County. There are some conflicts, or apparent conflicts, with him handling certain cases. He might get affidavited or he might have handled somebody as a defendant before, so he is limited in what he can do at that time. We just now started our juvenile court in Union County. We have had the juvenile court along with the adult court in Wallowa County for a number of years and they actually meet at the same time. The juvenile court in La Grande has only one juvenile right now. We have had a number of adults in the drug court and we have had a number of people that have graduated. Judge West figured it out and he thought it was like a 96 percent success rate, success being people that had graduated that did not have another criminal charge within the first year. Just a little aside - a couple of months ago after going to church on Sunday, my family went to a restaurant there in La Grande and we were meeting with some other people there and there was a young lady that was smiling and waving. It turned out she had graduated from drug court about three or four years earlier and had been down in Florida. She had a business down there that was very successful and that just really makes the job worthwhile and fulfilling to think that there are people who were really messed up.
- 358 Chair Ellis                   She was back visiting?
- 358 J. Mendiguren                She had family there. She was eating breakfast that morning with her baby and the person that was her sponsor in NA that had been there three years ago. It is a good feeling.
- 363 Chair Ellis                   I am listening to you describe your life, which sounds like it includes a lot of travel between courts. Distance sounds like a real issue here.
- 366 J. Mendiguren                There is a lot of travel.
- 367 Chair Ellis                   How is that being handled on the defense lawyers' side to get coverage, given the distances and the caseload?
- 369 J. Mendiguren                It is always a problem with the defense attorneys having to go up to Enterprise because sometimes you only have one or two cases for the whole day and it takes - it is 65 miles on mountain highways so you can't make it in an hour. For me it is more like an hour and 15 minutes.
- 370 Chair Ellis                   Each way.
- 372 J. Mendiguren                Right. It is 130 miles. I have my trial court administrator. I have Rick Dall, who is the administrator for the drug court for the defense attorneys and I have two ladies who are public defense attorneys, Vickie and Anne, and they can answer some and I am probably going to make some mistakes in what I say because between what Rick does for his consortium, what my trial court administrator does for the court, and what the attorneys do, I don't have to do that much trying to keep them straight.
- 384 Chair Ellis                   Are you able to get lawyers?

- 386 J. Mendiguren Right now we have six attorneys that are in the consortium and I believe they just added another attorney, Aylssa Slater, who went into private practice up in Enterprise. She was an assistant district attorney for a while, and now is back in private practice and I think she is going to help pick up some of the Enterprise case appearances that they would otherwise have to handle. I am not sure exactly how many of those cases she is actually going to be handling herself, but she is part of the consortium. In Union County we have at least one of the attorneys at arraignment, at what we call a rocket docket. If the people want to talk with an attorney for no cost to see what their options are, they can talk to that attorney. Sometimes we get people from that that are ready. They have seen the offer that the district attorney has made because normally they don't. If they say they want to apply for an attorney, the district attorney, because of ethical rules, is being very careful on it. They don't want to give an offer to a client that has asked for an attorney so they have to wait until they either waive their attorney on the record or whatever. This way they get the offer and they know what the bad news is and what the good news is sometimes on what the district attorney will be offering them. That has really helped us. I think this takes about 15 percent of defendants that actually plead out after that first one. That is probably pretty close.
- 412 Chair Ellis I am not sure you have had this experience yet but if you had a defense lawyer that you felt was underperforming - we have seen in some areas of the state defense lawyers that don't stay in touch; they can't be reached; they miss hearings that sends the whole system into disarray - who do you go to?
- 419 J. Mendiguren An easy person for me to go to would be Rick Dall, because he is the consortium head, and let him know. They have their meetings and I know that they have discussed that type of thing among attorneys if there is a problem. I believe they have. I would definitely talk to the district attorney because Timothy Thompson came over from the AG's office and has just been a godsend for us in that he is a nice person. He doesn't have any roots set in yet so that he is not slow to change or refusing to change. He is a sounding board for me, too, so I can go to him. I can go to my TCA who used to be my JA. She hasn't been in the TCA position for a even a year and she was a secretary of mine 20 years ago. We communicate very well and I would be talking it over with her also. Those are probably the three people.
- 437 Chair Ellis Do you know how to find Ingrid Swenson and Paul Levy in Salem if you need to.
- 439 J. Mendiguren I think my TCA would point me in that direction.
- 440 Chair Ellis What could we do to make it better for you?
- 441 J. Mendiguren I was a public defense attorney before I was ever on the bench. I know what it is like to do the things they are doing. I think I read there that they are asking for a percentage pay increase for them. I think that is one way. You get quality attorneys by paying them a decent rate. Some of that stuff I didn't understand and I had to ask Rick Dall about getting paid for CRB hearings and they get paid, I think, \$230 for that. It makes it worthwhile. You can't expect them to do all that stuff in the juvenile cases when they are run ragged anyway. It is okay if you try to average the cases and figure out how much time you are spending on the cases, but if you get into a criminal case or a juvenile case that goes to a hearing or trial, it can really eat up the percentages to where you are down there making not even wages for attorneys.
- 459 Chair Ellis One of the issues that we have found in some of the other areas of the state is that conflicts develop, but later in a case, so that a lawyer gets started on a case, spends real time on the case, then discovery discloses a witness that he has a conflict with, and he has to withdraw, substitute, and there is a big expense. You get two or three months into the case and then the clients starts objecting to the lawyer. Do you have much of that issue here?

- 469 J. Mendiguren I'm not sure what the term "much" means. We definitely have it and if the client feels that there is a real conflict with his attorney and he expresses that, the attorney can't handle it because of ethics and they are going to get themselves in trouble trying to finish up their representation for somebody when they are not able to even talk to the client because the client is upset with them. Those are almost always granted and we get another attorney. Some clients just don't want to go to trial and ...
- 482 Chair Ellis This is a way to delay.
- 482 J. Mendiguren Yeah, to delay. I don't know if I have an answer to how I handle it or what I do. I have two active retired judges in the La Grande area with my judge partner, Eric Valentine and then Warner Wasley. I use them as sounding boards besides talking it over with Russ West or talking it over with my TCA and that. Sometimes, it is almost a piecemeal type of decision.
- 492 Chair Ellis The problem that exists in some areas of the state, and where we could do better, is the information gap. The lawyer gets assigned a case at a time when no one has really looked at what the potential conflicts for that lawyer might be. In some counties they have court administrators that are legendary. They know what is going on so they help the judges at the appointment stage to not appoint someone who is likely to have a conflict. Do you see that that is either not an issue or could be improved here?
- 505 J. Mendiguren I had about three different thoughts while you were talking and I think they all went out of my head. I don't know. You might have to ask Michelle Leonard, my trial court administrator, about that, or some of the attorneys. I know one of the things is that it is a real problem for me to understand what is going on where the clients want to get a new attorney. It is a pretty standard affidavit that will say that because of things that they really cannot reveal they have a problem. Then I don't know what it is that has caused the problem in the first place. I have to go on face value that what the attorney is telling me is correct. They can't reveal the grounds because that would create an ethical dilemma so definitely the attorney is getting out. On some serious cases if it happened more than one time I finally would have that defendant before me and say "Listen, I am not sure what is going on but it seems to be a pattern" and the next time it happens I warn them, and I'm not even sure if I can do it, but I do it. But I tell them that this is the last time unless there is something extraordinary that they can tell me. We have to try and stop it.
- 532 Chair Ellis One thing that is a special issue here is you have two state prisons in the area. I think I am right on that.
- 536 J. Mendiguren Well, we don't have any in either Union or Wallowa County. Umatilla has two – I don't want to say this but I haven't done any post conviction relief cases.
- 540 Chair Ellis That was where I was headed. That doesn't happen?
- 541 J. Mendiguren Well ...
- 543 Chair Ellis Knock on plastic.
- 543 J. Mendiguren We don't. Of course that would be another area of expertise that we judges are going to have learn if it ever gets to that. Right now Russ West and I handle everything. People ask me what do you do as a judge, what kind of cases, and I say I do everything from small claims to million dollar lawsuits and all kinds of civil matters on the civil side, from traffic cases to hunting cases all the way to murder cases on the criminal side. I do mental hearings and all the juvenile stuff. We do everything so we have to bone up on some of the stuff when we get it. I know the attorneys, generally, and they are same ones coming into court. I know which ones I can really trust for giving me the law. I think that is basically all of them. If they give me a case they are not making it up or cite something that doesn't exist.

562 Chair Ellis Or hiding the one that hurts?

562 J. Mendiguren I don't know about that one. I think that is the case generally and I have enough faith in the quality of attorneys that I have, both public defense attorneys and the private practicing attorneys, that if the other attorney tries that the other side is going to catch them.

569 Chair Ellis Any other questions? Any other thoughts about how we can do our job better?

571 J. Mendiguren I appreciate that you folks came here. I was looking at the names across there and I recognize some names but we live on the east side so don't get over to Salem much. Do you all reside in that area?

577 Chair Ellis I'm from Portland.

577 J. Stevens I'm from Bend.

578 J. Mendiguren People say "I've been to eastern Oregon; I've been to Bend." It is not eastern. Yeah, I went to the Dalles one time. It is not the same. I appreciate the fact that you folks are coming here and listening to us. It was a very pleasant experience talking to Ingrid and John at my office.

585 Chair Ellis Well, now you know where to find us.

585 J. Mendiguren Yes I do and you know where to find me too.

587 Chair Ellis Thank you very much.

591 R. Dall Hi. I am Rick Dall and I am the new administrator for the Union/Wallowa Public Defense Consortium. I took that job over for Kip Roberson who was the prior administrator. He quit his practice and left to the Bahamas and so he has given that role to me. Do you want me to give you a general breakdown?

598 Chair Ellis Describe the consortium a little bit and how it got started and who the players are?

600 R. Dall I am a little fuzzy on dates. The current consortium that we have right now was started probably about 12 years ago by Martin Birnbaum, who later went on to become the district attorney and is now retired. I was part of that original consortium that he formed and I am guessing it was probably about 12 years ago. That consortium pretty much stayed intact.

609 Chair Ellis How many participants?

610 R. Dall We have always had anywhere from about four to six, four to seven, attorneys at any given time. Some have come. Some have gone. Some were original and then they decided not to do the public defense anymore. The way it currently stands in Union County, our consortium was made up of about five, six attorneys. Ms. Morrison, who is in the room, was one of those attorneys. She was an employee for Kip Roberson. They decided to part ways and as a result of that, Mr. Morrison was given her own portion of our overall contract. Our consortium remained intact and Ms. Morrison got her own separate piece of that. She then formed, and she could answer the question better than I, she formed a separate consortium and for lack of a better term we have called them the "women's consortium".

629 Chair Ellis Sounds like the gender line.

631 R. Dall It is not really a men's consortium and a women's consortium. The consortium that we have currently consists of myself, Kent Anderson, Victoria Moffet who is also here, and then it was Kip Roberson and Kip is now gone. We separately contracted with Alyssa Slater. She is an

attorney in Enterprise. She doesn't want to be part of the consortium as far as taking cases but she did agree, on a strict, flat fee contract type basis, to handle our arraignments up there. Really, just because of the travel issues that we have it is much easier to have somebody local there who can be there every Wednesday and she also does our drug court. Actually, she is not doing arraignments. Excuse me, she is currently just doing drug court but we have asked her on this new contract to also consider doing arraignments which she said that she would do. Ms. Morrison then took her piece or her contract and added Ms. Moffet and her partner, Janie Burcart, who was with the DA's office and now is in private practice. They kind of formed what we now refer to as the "woman's consortium" and then we have our other consortium. Coming up for a new contract we decided that since Kip is no longer here that there was really no need to have two consortia. We all have the same goal in mind. We all get along so we decided for this new contract we were going to form a new consortium, which is going to be called the Grand Ronde Defenders. That is the proposal that you have.

- 660 Chair Ellis Will you be the administrator?
- 661 R. Dall Yes. I took over for Kip probably about three or four months ago. I am still getting my feet wet as far as the reporting and some of the technicalities.
- 664 Chair Ellis The new one will be six to seven lawyers?
- 666 R. Dall We will have six and it will include everybody within the two consortia - myself, Kent Anderson, Victoria Moffet, Anne Morrison, Janie Burcart will be the five main members of our consortium and then Alyssa Slater over at Enterprise will do the drug court and the arraignments.
- 671 Chair Ellis In your own situation, what percent of your practice is public defense versus other things you may do?
- 674 R. Dall I think I have a very good private practice along with my public defense work. Most of that is because I have a tremendous legal assistant. Probably mine is about 60 percent public defense and about 40 percent private practice. I take privately retained cases, divorces, private criminal cases, whatever comes in. Two of our members, Kent Anderson and Victoria Moffet, do strictly the public defense work.
- 684 Chair Ellis So they are 100 percent?
- 685 R. Dall More or less. I know that Mr. Anderson will take some private cases. He does some appeals. I think Vicki also does some appeals. Ms. Morrison, the same thing. I think most of her practice is public defense and again she could answer as to what private cases she has. Same thing with Ms. Burcart. I think the majority is public defense but she also does appeals. She also does juvenile cases and domestic relation cases. But I think most of our practice is public defense. Some of us do some privately retained work.
- 697 Chair Ellis Do you have a board?
- 698 R. Dall We don't. Again, I wasn't really a part of organizing the current consortium. We are a corporation but there really weren't any internal agreements between the members of the consortium. We are small group of attorneys. We have always handled things in the past on kind of a majority rule. If there were ever an issue that needed some clarification or discussion we would meet, we would take a vote, and a majority decision would be made. What we are going to be doing that we haven't done yet is, in talking with Ingrid and John, they suggested a model for us to use which would be Benton County's model as far as their consortium and their contract attorneys. We haven't formed that yet because frankly we are still waiting to see if we are going to be getting the upcoming contract. But we are planning on it. I would prefer as an administrator, and I think I could speak probably for most of our

members, that we would like a little more structure and in going through that Benton County model I really like the way that they put that together with a board that kind of oversees everything, an administrator, and I guess some more structure about how to handle it if an attorney is not doing the job that they are supposed to do or how we would bring in new attorneys if we did bring in new attorneys, where complaints could be made...

- 728 Chair Ellis I think the model that we think has been most successful for consortia is to have a board structure including some non-member board members, non-consortium players.
- 735 R. Dall I am open to any suggestions. I do not want to reinvent the wheel if there are good systems in place that work and keep good organization and structure. I am all for that.
- 739 Chair Ellis There are two issues that are hard. One is the issue of making it possible for new and younger lawyers to come into the practice and the other is if you do have an underperforming lawyer do you have a structure that will really allow responsible people to make a judgment that this isn't working and we need to make a change. That is hard to do and especially in a smaller community. You have given us a little information on the underperforming issue ...
- 752 R. Dall Yeah, we will have some structure in place. As of now, again, we have never really had the issue come up. Several years ago we had an issue with an attorney. She ended up retiring, so we really didn't have to get to the point where maybe some harder decisions would be made as far as whether to vote that person out or try to get her some help, or try to figure out what the issues were that kept her underperforming. Again, we are such a small group of attorneys that you really can't hide much. If there is an issue, we get together and we talk about it, and we have always resolved it. We have never gotten to the point, I think, where our lack of structure has hurt us at this point, but I don't want to have us continue with that in the future, so we are planning on changing our model.
- 770 Chair Ellis How do you assign the cases?
- 771 R. Dall What we have been doing for the most part to try to make things equal between all the attorneys is to do it on a rotating basis. Whoever is next in line gets the next case. Sometimes that doesn't work because sometimes there will be a conflict and if that is the case then we will go to the next attorney, and then that attorney who had to maybe give up the case for a conflict would then take the next one. We have tried to even it out as much as we possibly can. The one thing that, and it is not an official policy, but what we have kind of done with current clients, for example, is if I had a client who I was already working with on a pending case and then he got a new charge or something else, then we are not going to give the same client three different attorneys. Those clients would go to the same counsel.
- 790 Chair Ellis Do you differentiate between the lawyers in your group that have the experience to handle Measure 11 cases versus those that need more experience before they should be handling Measure 11s.
- 794 R. Dall We don't because all of our attorneys at this point are very experienced. I have been practicing 15 years, Ms. Burcart is over 20 years, and Ms. Moffet and Ms. Morrison, so we are all at this point very capable. We don't do, as part of our contract, we don't do murder cases but we do up to the Measure 11 cases. If we brought in new attorneys and they weren't qualified obviously we would have to make some compensation for that.
- 805 Chair Ellis Who is handling the murder cases?
- 806 R. Dall I guess they get assigned to the state. I know Dennis Hackler, here in Umatilla County, seems to be handling most, if not all of our murder cases for Wallowa if they are not privately retained attorneys. I would have to defer to the court on that one. I am not sure how they assign those out but because under our contract we don't take them.

- 814 Chair Ellis Does your consortium do juvenile as well as criminal?
- 816 R. Dall Yes. We do juvenile dependency cases, juvenile delinquency cases and we have a drug court in Union County. I am part of the drug court team. I was part of the original team that formed our drug court a number of years ago. We handle our Citizen Review Board hearings and mental commitment hearings. We pretty much do everything other than the murder cases.
- 825 Chair Ellis When you complete the merger and assuming the contract process works out, you will be the sole contract provider in the area?
- 830 R. Dall We will and our cases have been down over the last year. We really haven't considered bringing in new attorneys because the attorneys that we have now are more than enough to cover the caseload that we have. We anticipate, and I think in the draft report that I have gone over, Tim Thompson, the DA also anticipates that those cases will probably go up. We have never been under our contract amount in the however many contracts we have gone through now. We have always been over our case allotment. For this contract we are actually going to come in a little bit under what we originally contracted for. A lot of that had to do with our district attorney's office. I don't think there is any less crime in the La Grande area. Martin Birnbaum who was the district attorney, became ill and there was some transition while we were trying to get an appointment for a district attorney. For two or three months we just had assistant district attorneys who were basically in charge of the store. Mr. Thompson came in and then when he came in he ended up having some surgery. His jumping right in was kind of delayed a little bit. I think for this contract our numbers may be down but they will probably go up. We didn't want to add any new attorneys because right now I think we have sufficient attorneys to handle the caseload.
- 861 Chair Ellis What is the population? Is it pretty stable?
- 861 R. Dall It is. La Grande is not going to change much. I didn't go up there but when they wanted to put in a Wal-Mart people were complaining we were going to be just like Portland any day now. No, La Grande doesn't change. Statistically I think we have been at about 25,000 in our area for quite a long time and I don't think that is probably going to change much.
- 872 Chair Ellis What do you do in the area of training, CLEs, to be sure that everybody is being kept as current as they can be?
- 876 R. Dall We purchase a group ticket out of the consortium funds and any of the attorneys can use that anytime they want. We encourage people to not only meet their requirements but go above and beyond if they think it is necessary in the areas that they want to practice in. I think we are planning on continuing to do that. I don't use the ticket that much. I am also Justice of the Peace for Union County, Municipal Court Judge for the City of Union, so I go to a lot of their conferences which also gives me CLE credits in some areas. I don't necessarily use that as much as some of the others do, but I think the other attorneys have taken advantage of that.
- 893 Chair Ellis In some parts of the state, and particularly the lower population areas of the state, we have heard concerns about the graying of the defense bar. The lawyers that have been doing it are nearing the end of their career paths and there aren't that many new lawyers coming in. You look like you have quite a lot of tread left on your tires and it sounds like what you are saying is that the members of your consortium have both significant experience but also plenty of time left in their careers?
- 907 R. Dall The thing about La Grande and new attorneys is that people don't generally come to our area unless they have a reason to. There have been some attorneys who just say "I am tired of the city life and I am going to look for a country home somewhere and start a practice." But

generally speaking our area doesn't attract new lawyers who are just coming in and wanting to start practicing. We do have some young lawyers and if we ever run into conflict situations, where the court needs to go outside our contract, we have other attorneys in town who do take some conflict cases and over time there may be a need, especially if our caseload goes up. We don't want to be exclusive. We don't intend to be exclusive. We just want to make sure there is enough work for everybody, to make it somewhat profitable for everybody to live.

- 928 Chair Ellis Who is your contract analyst on our term?
- 931 R. Dall It used to be Laura Weeks and now it is Amy Jackson. They just made that switch not too long ago and my legal assistant and Amy have become very close as we try to learn the system.
- 940 Chair Ellis It is probably too soon to tell but I am trying to get a sense whether you have good communication with OPDS staff?
- 942 R. Dall Laura was great. When I came on board it was kind of being thrown right into this and trying to figure out what to do and how to make reports and how to do audits and report cases and everything else. Laura was great. I could email her at anytime. She gave me a lot of suggestions. Amy has been the same as far as I know. My legal assistant hasn't made any complaints at all about not getting good information from the state.
- 955 Chair Ellis Any thoughts you have on how we can do our job better?
- 958 R. Dall No. We have submitted our new proposal. It does try to take into account some things that are unique to our area, especially the travel issue. Enterprise can be a problem especially in the winter. It is very difficult to get up there. I have taken the position and I think the rest of our attorneys have taken the position that we will go up there as much as is really necessary.
- 968 Chair Ellis Didn't you really think that request for a private plane ...
- 969 R. Dall It would be nice. On the compensation issue I think we have been compensated less than even some of our counterparts in other counties, Umatilla or even Baker County, on a per case basis. We would like our numbers to reflect an equal value there. We do have some unique issues that other counties don't have such as the travel issue. Again, it is a three-hour trip back and forth and that is assuming it is not snowing at the time. If I have a five-minute plea hearing, I will call the court and make a request that I just phone. We do have a polycom system that we could actually use to put faces to it. To me that makes sense. [end of tape]

#### **TAPE 1; SIDE B**

- 001 R. Dall ... that is problematic because we are losing time. We are using our own personal vehicles and so in our contract we address that issue as well as compensation. No, I think we are just trying to get our new consortium up and running. We think we have good representation. We have all been doing this and are comfortable with the court and what they expect. I am hoping that we will continue to give good representation in the future.
- 008 Chair Ellis Any other questions? Thanks a lot. We appreciate it. We are at the 10:00 slot and if District Attorneys Gushwa and Thompson are here...
- 014 D. Gushwa My name is Dean Gushwa and I am the district attorney for Umatilla County. It has been my pleasure to serve since January. I was appointed by the governor. For those of you who thought the governor couldn't make good decisions, I take issue.
- 018 Chair Ellis You are not a man running for office are you? You can talk to us and not them.

- 019 D. Gushwa I'm not sure how many Umatilla County voters are here. I guess Ingrid had just told me in general that you guys wanted to know how things work out here from my perspective. Any issues in particular you would like me to start with?
- 021 Chair Ellis Why don't you describe a little bit how your own office is structured and then how you find the interaction with the defense community. One of the things we are interested in - and I will just tell you that we have had really good relationships with a lot of DAs around the state. I think seven or eight years ago maybe it wasn't like this, but I think maybe the experience we all went through in '03 when there was the huge budget shortfall was an epiphany for both the prosecution community and the defense community. We actually had several DAs appear and testify in favor of funding for the defense function both that year and '05 and this year, so we have moved from kind of a contentious relationship to a, I think, very professional relationship and good respect. We are interested in your thoughts. Whether the criminal justice system taken as a whole is working, how the defense lawyers are playing into that and whether the system is working in a productive, constructive way, and then we will go from there.
- 037 D. Gushwa Well, as far as my office is concerned, you may know I have eight deputy district attorneys and myself, so we have nine attorneys that are serving five judges. Four of those judges are primarily handling the criminal cases. One judge is in drug court, support enforcement, which we handle and I know IPD does as well. He handles all the civil. We are unique in that we have two courthouses. We have two judges over in Hermiston in a fancy new courthouse over there and we have three judges, two of whom are primarily doing criminal work here, so there is sort of a bifurcation in our county which was controversial with some but it is a fact that we are going to have to live with. My challenge when I took over was to see that courthouse open so we have been having to service four judges 30 miles away from each other.
- 047 Chair Ellis Had you been a deputy before?
- 048 D. Gushwa I had been a deputy since 1999. I took a thirteen-month hiatus where I was actually a defense attorney in private practice and did some family law. I came back to the side of right and good - I'm kidding - and then got the appointment about seven months later.
- 051 Chair Ellis So you stand for election in May?
- 052 D. Gushwa Actually the general would be in November but the primary would be in May. I came back and got the appointment and so the courthouse just opened up over there. The first challenge was setting up the procedures and processes over there that we use to attend the courts here. It is sort of a mirror operation. Part of the problem is the county didn't give me any more people or staff to do that. It is kind of the reverse merger effect. Usually when you merge you can get rid of replicated positions, but when you divide you actually have to add positions but my predecessor couldn't convince the commissioners of that. I did get one additional staff person. The first thing I worried about was congruency among my deputy district attorneys. I don't want somebody out there setting up their own fiefdom if you will. We need proportionality for negotiated pleas and for the way we handle justice and as you all know the deputies have to follow the policies and the guidelines of the DA. There has to be discretion, certainly, among the deputy district attorneys, but the broader policies have to be, I think, determined by the DA and we have to be able to communicate that. We have closed circuit hook up so I can visit with my deputies over in Hermiston on TV if need be. We also have weekly meetings where we are all together. To keep everybody on the same page is probably the biggest challenge and to do that I have them come here on Fridays. Sometimes we go over and it has been a learning experience system-wide. We have also had some startling turnover this year. One of our deputies died. Another one got cancer and then a married couple we had went over to the DOJ. The DOJ keeps swiping people from us.

- 075 Chair Ellis It is an outrage.
- 076 D. Gushwa It is and I hope you all can do something about that. I know that the defense bar has probably the same kind of challenge because they have the same mileage to rack up as we do. There is also the time element -a half hour out, actually it should be 45 minutes if you are not exceeding the speed limit, and 45 minutes back. That is an hour and a half out of your day right there. That is a little bit about my office and some of what we are looking at. I will first say as I told Ingrid when I met with her and John, I think Intermountain Public Defenders is doing a very good job and I don't just say that to make points with Doug. I think there is a collegial atmosphere, and like my deputies, a lot of them don't have 10 or 15 years of experience, but they still seem to be able to comport themselves professionally in the courts and they have a good relationship with our office. There was a time when I was here when everyone thought the DA's office was Darth Vader. We were in a vast conspiracy to deprive people of their civil rights, etc. That isn't true anymore.
- 092 Chair Ellis Be careful, there was an implication in what you just said.
- 093 D. Gushwa I do see that the attorneys there, and most of them are young, really do see themselves – some DAs in other counties and I call them true believers and I think that is a good thing because what they are looking for is to protect the rights of their clients and the constitutional rights of the client. I don't see any chicanery, if you will. In the past, not necessarily IPD attorneys, filed motions which really didn't have a lot of merit but were kind of like tinkering with the system or throwing a shoe into the gear works to see what happens. I don't see that. I see an earnest desire to use whatever ethical legal mechanisms they can to help their clients. If they send us a unique motion I really don't have a problem with that. I think it is good. I think that it shows they are being innovative I think that is a credit to them and their clients. In the past some other attorneys, not IPD attorneys, seemed to just want to waste time and get delay at any cost. I don't see that from IPD.
- 108 Chair Ellis When I read the report there were two parts of the report that raised - I want to express myself carefully here - policies of the DA's office that may be causing a lot of system costs on the defense side. We have great respect for the authority of your office. I am not here to challenge it but I wanted to raise it with you and maybe plant a seed that as you move into your job you might consider the ripple effect. One of those is a policy in an aggravated murder not to decide whether or not to seek the death penalty until after the guilt or innocence verdict, if I understand it. I just want to make sure I have my facts right when I raise that.
- 119 D. Gushwa That is close. I think that when we charge aggravated murder, certainly the death penalty is a potential sentence. Really that is up to the penalty phase jury if you look at the statute and my feeling is if you meet the elements of aggravated murder, and you are on trial for aggravated murder, we will not deprive the sentencing phase jury of the opportunity to bring a death sentence unless of course there is some large circumstance that sticks out. For instance, where there is a serious issue of whether someone may be mentally retarded. That is a sticky issue and it is all still sort of murky. There is a situation that I can envision where, after the guilt phase, the state might say to the court "We seek to relieve the jury of the death option." But short of that my reading of the statute is that that is one of the potential sentences.
- 132 Chair Ellis I am right that most DAs in the state don't do it that way, that most of them make a judgment based on the evidence, as they evaluate it, whether or not to seek the death penalty?
- 135 D. Gushwa Certainly there are factors that you have to look at. Future dangerousness, the four questions a penalty phase jury has to look at. I disagree that most DAs take an opposite view of mine in that I was just at the Advanced Institute for Prosecutors where this question came up. We had a whole morning on the death penalty and I actually raised that. I wanted to know what other prosecutors' ethical concerns were, if they had some doubt in their minds whether or not the

death penalty was appropriate. I think I said “seek the death penalty” and one of them corrected me and said that we don’t seek the death penalty, if you commit aggravated murder than that is a potential outcome and that is up to the jury. Actually, most of the prosecutors took a more hardcore approach than mine, in that if you committed a crime that constitutes aggravated murder, then brace yourself for the possible consequences and for most of them it is the default position. There was only one who sort of agreed with me that there might be, or at least told me that there might be, some question about whether or not you should tell the court before you enter the sentencing phase.

- 150 Chair Ellis Really? Because I did have the impression that the broader practice was for DAs to announce whether they would - and I not sure the word “seek” the death penalty is how they would phrase it. From the defense side there is obviously a significant incremental cost factor if that decision isn’t made until after the guilt or innocence phase because you have all of the things that you have to do if death penalty is a potential. I raise this question not to seek any change here but just to ask that as you go forward in your office you consider the cost implications of that policy. The other one that I thought I read in the report that had cost implications for the defense function is the timing of discovery. In some counties the DA has an open discovery right from the get go. Some are more guarded and the discovery comes later. To the extent it does come later, it raises the risk on the defense side that conflicts that aren’t apparent at the time of first appointment become apparent when the discovery is provided. That is another place where judgments you are making have a very big impact on the cost to the system as a whole, and the defense side in particular. I just again raise it as a suggestion that you keep that in mind as you make your own policy determinations.
- 175 D. Gushwa In December when it was still open as to who was going to get the appointment, we had this problem come up and my suggestion was that we provide discovery at arraignment and we have been doing that ever since, so 99.5 percent of the time.
- 178 Chair Ellis That is good to hear.
- 178 D. Gushwa I think Mr. Fisher would agree. Here is the process. We have discovery ready, we have bate stamp numbers – everyone know what a bate stamp is? The little numeric sequenced number at the bottom. We have that all prepared and at arraignment we hand that, along with the charging document, and if we can, and usually we do, a plea offer all at the same time. Then we have the defense attorney actually sign in our file, with his original signature or initials, that they received it so there is no dispute as to whether or not they have it. What they will do at arraignment is actually make sure there are actually 38 pages, if you will, and they will sign for the 38 pages. Certainly there is some follow-up discovery that they may have but we give them everything we have at the time, but they may want more. We will do investigation requests to attempt to get them, but by and large the policy is, and it is working as far as I know, discovery is given to you at arraignment and hopefully a plea offer as well.
- 191 Chair Ellis That is helpful. That sounds like good movement from some of the information that we are getting.
- 192 D. Gushwa The other thing I did in January was to ask our IT services downstairs, our computer guys, to help me achieve electronic discovery. Just briefly, this should save money for everyone. I would like all the agencies to be able to forward to me in an electronic format, a PDF format preferably, their police reports. We have a little pilot system and the Hermiston Police Department right now will send us assorted cases that way. What I would like to do then is, instead of going through the tedium of reproducing all that discovery, go ahead and have it set up where IPD or any defense attorney will be able to log onto our server with password protected entry, and they will be able to go into a file everyday for all the new discovery, all the new police reports. They would just click on their little file folder and all that day’s discovery will be there. They may have associated paper costs for printing but we charge them right now anyway and there might be a slight retrieval cost. There are thousands of

dollars, as you fellows and ladies know, for discovery. This should help reduce the expenses that you folks are paying. I know that is not the lion's share of what you pay but every little bit helps. It will also enable things to go more quickly, I believe, and save some work for me, to be truthful.

- 212 Chair Ellis Are there things that you see happening on the defense side that are costing you money that you think shouldn't have to be incurred? For example, are defense lawyers showing up for hearings on a timely and consistent basis?
- 216 D. Gushwa They are and one of the things they could do to really help the system is to forget about that pesky Fifth and Sixth Amendment. Oh, we are being recorded. I'm just kidding. I am all for the constitution really. I was a defense attorney. For court appearances? No. There are no chronic problems that I know of for people appearing for court appearances. Again, I have heard some echoes about people who would like to see mediation work a little better. I don't think that is an IPD problem so much, but I know that there have been times we would like to see mediation work out more than it has, but short of that I don't see any chronic problem with the defense bar.
- 227 Chair Ellis How do you feel about the competence level of the defense lawyers.
- 228 D. Gushwa I think they are competent. I don't find that there are any who are not. There have been in the past but they are now disbarred, the two that I could name for you, but this was years ago. No, they are certainly competent and I don't see that there is anyone who is represented where I feel that "Wow, this guy is in trouble." I don't feel that.
- 234 Chair Ellis How are you doing in terms of attracting lawyers to your staff? Is that working out all right?
- 235 D. Gushwa Better than I expected. Our county does not pay as well as most counties. I think we were 35th out of 36 and I think we have slipped to 36th.
- 236 Chair Ellis Within the DAs? I don't know what happened yesterday in Clatsop County.
- 239 D. Gushwa As far as attracting talented and qualified people we have been more successful than I thought we would be. Back in 1999 when I got hired they had had an ad out for years so I didn't feel that proud about being hired. We have had a lot of people apply and like this last position we had we had a lot of applications and did five interviews to come up with the one that we hired.
- 246 Chair Ellis That's good. Do you feel your communication at the "management level" I will call it, not the case level but the system-structure level, do you think that is pretty good with the defense?
- 249 D. Gushwa I think they could be better. I'll be honest. I would like to see even more communication in that regard system-wide. Some of that I know is happening through the courts where we will meet with the judges, for instance in the juvenile department, and Doug Fisher is really good about being there for them, but I would like to see for all contractors sit down and work some of this out.
- 256 Chair Ellis That is one of the things that we include on our criteria and we try hard to encourage it, particularly with the PDs. But the Executive Director of the PD is active in the community and you are working to communicate well with other components of the system.
- 261 D. Gushwa I think that is important and I would like to see more of it. Again, maybe I am too new at the job, but I think those kinds of communications are important. I think a lot of issues start out as small issues that can become bigger ones. We can solve that with a lot more communication. None of this should be personal. We should all be professional about it. I certainly hammer on my deputies that whether or not you think the defense attorney acted up last time or you can't stand him or he can't stand you, you can't use that, obviously. It is the

defendant that we have to look at as far as what we do for a plea offer or how this case is going to proceed and not the defense attorney. I am not saying I expect everybody to be best buddies and all bowl together. I suggested before and I wasn't kidding about events where deputy district attorneys get together with defense, if not on a social level at least quarterly for meetings or something. It should not be only the administrators but also the staff who should interact more in venues outside the court. I don't want to see polarization. We are a small community and we all run into each other. For the most part the younger attorneys when they run into each other downtown they don't get into fist fights or anything. There is some social interaction between them. It is not that way, I have heard, in other counties where they just want to spit on each other when they see each other downtown. We don't have that, but still there are always going to be some and I would like to see that not happen again. I think professionalism is important and I think the more civil we keep it amongst ourselves the more longevity we are going to have with deputies and public defenders. If you can't stand the people you have to work with, and whether you like it or not we do have to work with defense attorneys and defense attorneys do have to work with us, if you can't stand that group it leads to a loss of job satisfaction.

- 293 Chair Ellis Any other questions?
- 394 E. Welch I do. Talk to me a little bit about juvenile court in terms of what your office does there? What is happening there and what do you think of the detention reform undertaking?
- 398 D. Gushwa We have a dedicated juvenile prosecutor. She has been having to go into drug court a little bit right now but that will be curtailed as we bring other staff on board. Our juvenile prosecutor actually has her office in the Juvenile Services Division which is removed from our office and I believe we are the only county that does that. She works closely with Chuck Belford, Juvenile Services Director. We also do dependency cases as well as delinquency cases. I don't have numbers for you but I asked my first deputy who went in there, she was from Notre Dame, married to a Notre Dame guy - those were the two who went to DOJ. Well one of them went to DOJ and the other followed. Mental note: no more husband and wife teams. Kidding. I asked her to go there with a fresh set of eyes and take a look. I had her job shadow a juvenile prosecutor of some renown and then come back so that I could get some input from her as to what, if anything, needed to change in accordance with what I feel about juvenile. What I feel about juvenile services is I am all for reformation of the youth. I was kind of a wayward youth myself, but I am also for protection of the community. I think they go hand-in-hand. They are 50/50 in my mind and I think victim's rights apply just as much in juvenile as anywhere else. I don't know if that is true everywhere else in the state, but that is one of the things that I wanted to make sure was being addressed in juvenile services. My new juvenile deputy has an easier go of it, I think, because a lot of that groundwork was laid for her by the past deputy. What was your other question?
- 323 E. Welch Detention reform.
- 323 D. Gushwa Well, the last CJIS thing I saw had forcible rape as a six and you needed an eleven to be held. Now I understand that is being tweaked, yeah. I tell you what, Peter Toole, Crimes Victims United, writes me and asks me what I think of that and I wrote him back and told him "I don't." I recognize that we need a standardized approach to detention decision making because I think that if you did have some juvenile officer who, for instance, didn't like some youth because of whatever reason who might encourage the judge to hold him because that was just his opinion. That shouldn't play a huge role in the detention decision. I do like a uniform, and I won't say "cookie cutter," approach but I just think how things are weighted needs to be a little different. I understand they are working on that. I am interested in how other counties handle that so it is an issue that is fighting for attention and that I am looking at.
- 340 Chair Ellis Any other questions for District Attorney Gushwa? Thanks a lot. We appreciate it.

341 D. Gushwa Is this going to be transcribed and published?

342 Chair Ellis We are open to negotiations.

344 D. Gushwa Well this is serious business but it doesn't mean that we can't have some levity somewhere. Do they get questions? Good. If you guys have any follow up just let me know.

347 Chair Ellis Thanks. It has been suggested that we might take a short break because we are on a kind of tight time frame. It is 10:30 now so let's resume at 10:40.

[break]

359 Chair Ellis Thank you for joining us. Maybe you can tell us a little bit about yourself and your role here and any observations you have.

364 J. Wallace I am one of two judges located in the Hermiston courthouse which is the new facility that was built about a year ago.

367 Chair Ellis Is this the one they refer to as the palace?

367 J. Wallace Right. The Stafford Hansell Justice Center. Just a little bit of history: we were in a location in downtown Hermiston off main street and our court was located in a little mini mall next to a jewelry store and a used furniture store and a lawyer's office. It was very small and without a lot security. In March 2005 we had an arson fire that destroyed the building and then we had broken ground on the Stafford Hansell Center in January of that year and then we went into a temporary facility for about 10 months. We moved when they completed the building in March 2005. No, I'm sorry, 2006.

381 Chair Ellis Was there some insurance from the fire? I think we have learned in Marion County and here that the way to get a new courthouse is to have something really bad happen to the old one.

385 J. Wallace We moved into our new building, I think it was in March 2006, and there are now two courtrooms there. Judge Reynolds who was here in Pendleton now has his new courtroom in Hermiston. He is the presiding judge and then we also have a district attorney's office in Hermiston which is new - something that we didn't have before. We have community corrections located in that building. The sheriff's office has a location in that building. The County Planning Department and other county offices are also located in the building. It is just a wonderful building.

400 Chair Ellis What impact has having a two-courthouse structure had on the defense function?

401 J. Wallace Well, it has probably made it more challenging because there are two courtrooms that they have to service and the way we have distributed our caseload has lead to an increase in the number of filings in Hermiston because the way we do it is the police agency that initiates ...

407 Chair Ellis Is the initiating agency.

407 J. Wallace Then that determines where the cases are filed and Hermiston is a rapidly growing area in the county and as time goes on that will probably continue to happen. That will mean the number of cases will continue to grow there and that has been a challenge I'm sure for the public defender's office, both offices, to service that. In addition to Pendleton and Hermiston, Blue Mountain Defender's Office also handles Heppner because we are a two-county judicial district. That is located about 48 miles south of Hermiston, so there is that as well. It has impacted them in a lot of ways and, from a budget standpoint, none of them good. They have done a pretty good job of dealing with that.

- 421 Chair Ellis The district attorney made an observation that sounded right to me that often you hear of synergies when you combine operations. Well, the opposite is probably ...
- 424 J. Wallace Probably true and that has affected the DA's office as well.
- 425 Chair Ellis What can you tell us from your observation about the defense services that are available here?
- 427 J. Wallace Being in Hermiston, Judge Reynolds and I are the primary judges in Heppner as well. We go at least once a week to Heppner. We are dealing with both public defenders in Hermiston and then the Blue Mountain Defender's Office when we go to Morrow. They have the contract for Morrow County. In terms of the quality of the services I have been very happy with both providers because it seems like they have a group of dedicated attorneys, the younger attorneys as well as the more experienced attorneys, who do a good job. I have been very pleased with the quality of representation.
- 439 Chair Ellis Are they showing up on time and are there issues ...
- 440 J. Wallace No issues at all. For example, just to give you two examples, two of the younger attorneys that I deal with are Will Perkinson and Reid Kajikawa. Both of them are very good attorneys, conscientious, who really provide good representation to their clients.
- 447 Chair Ellis Frankly, it is good to hear younger attorneys are coming into the system. There are some parts of the state where that is quite a bit harder.
- 448 J. Wallace They have had other younger attorneys, for example, there is Conor Huseby who just left, unfortunately, and then Jason Wheelless who was here until about three months ago and who had been here for a while. It is a tough job being a younger attorney dealing with clients who are possibly not the most reasonable people sometimes to deal with and who can be intimidating. They do a good job of injecting realism into the situation and it really saves the court a lot of court time to have attorneys who work well with the DA's office and the clients to get a good result.
- 462 Chair Ellis Are you finding many situations where substitution is required after a period of time?
- 464 J. Wallace Only if they discover there is a conflict. We have had some, I would say fewer than five percent of the cases, where it is a personality conflict, a compatibility issue, and we generally look at those pretty closely because you are always going to have certain clients who are just difficult to please no matter what. They may want a new attorney just like that and they have to realize they don't get them just like that just because they want one.
- 473 Chair Ellis Any suggestion that you have how we can do our job better trying to make available quality defense services in the community?
- 477 J. Wallace That is difficult for me to answer because of the fact that the quality of representation that I have seen has been good. I am not familiar with the training that gets done within the office and outside the office, the external CLE training. I always think it would be good to having training similar to the baby DA school that the new DAs go to put on by the Department of Justice. I am not familiar if the defense bar has that type of structured training or not.
- 488 Chair Ellis OCDLA does a lot. I don't know if they have a specific program for new entry-level defense lawyers.
- 490 J. Wallace I guess to answer your question I really don't have any specific suggestions because I am dealing primarily with attorneys who seem to know their way around and do a pretty good job and I really have no complaints.

- 494 Chair Ellis Do you see the PCR cases from the inmates at the two prisons here?
- 496 J. Wallace Until about two years ago we did. What happened was the Department of Justice set up a special *pro tem* program so that now those cases are all heard by Plan B and *Pro Tem* judges sitting in Salem and the defendant and attorneys, everybody, appears by video. We are almost completely out of the PCR business now.
- 505 Chair Ellis Which you probably don't mind?
- 506 J. Wallace We don't really miss it that much. It is possible that we'll do them in the future, depending on funding, now that we have fifth judge. Part of the reason that we got the new position for the fifth judge was drug court, but it also lowered the per case level for the judges that are here. The system that they have now works well but in the future I can see us perhaps getting that back if the State Court Administrator's Office felt it might be better for us to do it locally here. It is a specialized area so if you don't deal with it all the time there is a learning curve, whereas, the Plan B judges who have been dealing with it can really streamline it and be efficient.
- 522 Chair Ellis Some of them probably enjoy coming out to the area too.
- 523 J. Wallace They do it all from Salem. For example, on the Court of Appeals media releases that come out every Wednesday it will list the counties where the case comes from. I will look on the list and see Umatilla County but it will be a PCR case and it was never heard here. It was a Umatilla County case heard in Salem.
- 529 Chair Ellis Right. Any other questions to Judge Wallace? Thank you.
- 530 J. Wallace Just a final thing I want to say is that I really do think that IPD and Blue Mountain Defenders are doing a good job of providing services. I don't have a lot of contact with other public defender offices in the state, but I have been very happy with the quality of work they provide.
- 537 Chair Ellis Thank you. Doug Fischer. Is he here? Do you want to share with us how things are going at IPD?
- 540 D. Fischer I don't know if any of you recall but back in April of 2000 I was invited to appear before the Commission as part of a panel discussing the problems ...
- 546 Chair Ellis This was when it was the Study Commission before the legislature created the current Commission.
- 547 D. Fischer I prepared for that appearance and was overshadowed by Martin Birnbaum who talked, and rightly so, given his insight and comments. My preparation for it included a description of Pendleton as a lively place with music in streets at night and constant partying - for four days a year during round up. The rest of the time you can pretty much roll up the sidewalks at 6:00. It is within that environment that we manage the public defenders office out here.
- 569 Chair Ellis How large is IPD now?
- 569 D. Fischer IPD is currently eight attorneys. There is total staff of fourteen with two investigators and four clerical staff.
- 572 Chair Ellis And you have a board that you report to?
- 573 D. Fischer Yes we do.

- 573 Chair Ellis Give me a little sense of who is on that board and what their background is?
- 574 D. Fischer The current board is two retired attorneys, an accountant and a retired judge.
- 578 Chair Ellis My sense from the report is that the board focuses on fiscal accountability but not doing much beyond that?
- 581 D. Fischer That is true. Our predecessor organization, Umatilla/Morrow Public Defender Services as I recall, came apart or disbanded under a cloud of financial mismanagement and when Martin Birnbaum, who began IPD, did so it was with the primary objective of financial accountability.
- 593 Chair Ellis So do you have an outside auditing firm?
- 594 D. Fischer They perform an annual audit and publish a report.
- 598 Chair Ellis What is your experience in being able to attract lawyers? Sometimes it is a buyer's market and sometimes it is not.
- 601 D. Fischer We haven't found the buyer's market at his point. Listening to Dean Gushwa describe their most recent effort at attracting new deputies and he described interviewing five people for what I think is two positions. We never had that experience. If we get two or three applicants to a vacancy we are doing well. I think history has certainly been that it takes from four to six months to fill a vacancy. It is a struggle.
- 619 Chair Ellis Are the applicants fresh out of law school or are they lawyers in the community thinking of making a move?
- 621 D. Fischer No, they are not lawyers in the community looking to make a move. We bring the attorneys into this community and I'm sure Craig will back me up on this that every member of the consortium is a former IPD attorney that was brought into this community. We don't have an excess of attorneys in the area.
- 633 Chair Ellis What is your training and supervision like?
- 635 D. Fischer It has been my training and supervision for the past twelve years.
- 637 Chair Ellis Not your own but within IPD? So in other words, how do you go about handling the training and supervision function?
- 639 D. Fischer Well if I understand you correctly, I supervise the attorneys as needed. We have had over the years a fairly consistent operating procedure and, with little modification, that has remained. As far as supervising attorneys, IPD is a relatively small organization. I am there everyday. I am interacting with everyone.
- 655 Chair Ellis What is the experience range of your lawyers? You said there were eight or so.
- 657 D. Fischer There are three of us currently with fifteen years experience in criminal defense work. The rest are all within a couple of years of law school.
- 665 Chair Ellis How can we do our job better from your standpoint, other than paying you more?
- 668 D. Fischer Let me add that certainly over the twelve years that I have been with IPD it has operated at the lower end, it not the absolute bottom end, of public defenders and to a certain extent that is

ameliorated by the lower cost of living in this rural environment. But at the same time we are attracting new attorneys into the area and ...

- 688 Chair Ellis And losing some of the older ones to private practice.
- 689 D. Fischer And losing some of the more experienced to private practice. The public defender contractors within OPDS should operate more as, I would say, a subgroup in order to pool training resources. I know Jim has a terrific program in his organization for bringing new attorneys up to speed. We don't have that kind of size, nor do we have the option of putting together CLEs and devoting those resources to bringing new attorneys up to speed. In any case, I would like to see the PDs work more as a whole and pool some of these resources and I think this Commission can find some motivation for that to happen.
- 720 Chair Ellis Is there a Criminal Justice Coordinating Council here, a formal structure for courts, DAs, Sheriff's, defenders to get together?
- 723 D. Fischer Well, there is the Local Public Safety Coordinating Council.
- 725 Chair Ellis Are you involved in that?
- 726 D. Fischer Yes.
- 726 Chair Ellis Has that been meaningful or not so much?
- 728 D. Fischer Well, I don't think it has been terribly significant. I think it is important to have a defense perspective within the group as they look at different issues, but they are not there to facilitate our existence or the way we practice. The Council has largely been involved in drug court the past three or four years and bringing that into being. It has been a real help in that regard.
- 743 Chair Ellis Other questions for Doug that you have?
- 744 E. Welch I do. I want to talk about juvenile court. Of your eight people how many of them work in the juvenile court?
- 750 D. Fischer All of them.
- 751 E. Welch Starting with the easy questions, in terms of the training issue, I assume that in what you just said that you were speaking generally about the need for training especially for those new to the practice.
- 759 D. Fischer Historically, in our juvenile court practice new attorneys coming into our area have been brought up to speed in juvenile court the same way they have in the criminal courts. That is through the advice and help of other attorneys in the office.
- 767 Chair Ellis Have you been part of the site review process? Has that come here or have you been on it?
- 769 D. Fischer I have been on both sides of it.
- 771 Chair Ellis How do you feel that process is working?
- 772 D. Fischer I would say being on the reviewing side of it was a little easier, but I think it is terrific and I think the development of best practices and guidelines from that review process has been an eye opener and very helpful.
- 782 Chair Ellis So you feel you are getting the benefit of the experience of others from around the state?

- 786 D. Fischer Absolutely. I was on the review committee for Crabtree and Rahmsdorff and it just floored me how similar some of the issues they were confronting were to ours.
- 796 E. Welch Judge Pahl talked about the fact that approximately fifty percent, round numbers, fifty percent - I don't know if you were already here when he was talking about the kids who come before the judge - have counsel. What is your perspective on that issue of counsel for juveniles charged with violating the law? Who is getting lawyers and who is not getting lawyers and how does that work?
- 809 D. Fischer The decision whether to ask for an attorney is made in consultation with the juvenile court and typically the juvenile counselor who is attending to that juvenile.
- 816 E. Welch Understood, but you must have some sense over all this time about how that it done. I'll just be straightforward about it. It strikes me as being kind of low that fifty percent of kids have lawyers.
- 820 D. Fischer I would agree.
- 821 E. Welch I'm just asking what you recognize or think is the reason for that. Is it a sense that there aren't enough lawyers to give each kid a lawyer or what?
- 826 D. Fischer No. They are not getting the lawyers because they are not asking for them. They are waiving their right to counsel before they get to court and they are not asking for them because they are not being encouraged on entry into the system to recognize the benefit of getting an attorney.
- 837 E. Welch Do you think that a twelve or thirteen year old child has the capacity to waive the right to counsel? I'll leave that as a rhetorical question. The other question that came up in the draft of the site report was about lawyers who are not seeing their clients in juvenile dependency cases when they represent kids. Do you have any comments on that?
- 848 D. Fischer It certainly has historically been an issue. When you end up with a child client on a dependency case, presumably at least, your interests are primarily aligned with DHS who is looking out for the children's best interest. DHS is mandated to make so many contacts with their charges and it has just always has been easy to let them take care of those children clients. The attorneys representing the children can argue on behalf of them and typically DHS at the same time, but I appreciate the concerns for maintaining contact with those children.
- 886 E. Welch It strikes me as kind of the icing on the cake to talk about having client contact. One of the questions I have, and it is not just for you but in general, what are the affirmative responsibilities of an attorney representing a child in a dependency case? What are they expected to do? Conceding that sometimes having contact with an infant or toddler is relatively token rather than substantive, what is it a lawyer appointed to represent a child is supposed to do other than show up for court hearings? Do you and your colleagues talk about the minimum expectations of what they are supposed to do to represent the client?
- 910 D. Fischer That issue is certainly becoming more of a pressing one in representing juveniles. I think it is becoming increasingly incumbent upon the attorney to make a decision independent of the other players, including DHS, about the best interests of the child, including the current caretaking situation with the child. We will certainly continue to emphasize that aspect in these DHS cases.
- 935 Chair Ellis I want to go back to your board, who selects the board?

938 D. Fischer The board was largely put together a number of years ago by an individual that I contacted to assist in helping to put together the board.

947 Chair Ellis Has there been any turnover?

950 D. Fischer There has been the retirement of one board member.

953 Chair Ellis When that occurred who picked the replacement?

956 D. Fischer I invited an individual to appear before the board and seek membership.

958 Chair Ellis And then the other board members elect their own successors?

964 D. Fischer They did elect at that time.

966 Chair Ellis This probably isn't the meeting to get into this in great detail but it does sound to me like you might want to take a look at your organic document and make much more use of the board than I think is happening. Boards in some of the other defender organizations play a role much broader than what you have described and among other things they can be a great face to the community. If you get into a controversy they can be a great cushion. But secondly, they ought to be the ones reviewing you, not the other way around, so that you are really in a structure that is community based. [end of tape]

**TAPE 2; SIDE A**

001 Chair Ellis ... has a lot of models that you can look to in that area.

003 D. Fischer I agree.

004 Chair Ellis Any other questions for Doug? Thanks.

005 D. Fischer Thank you and thank you for coming out to Pendleton. Toni Sloan is here and I know you are with the CRB and so I know you probably are too.

010 N. Paxton I am. Nancy Paxton.

011 Chair Ellis Why don't you two share the time however you want because I think you are obviously a dynamic duo here. Give us a little information about yourselves and the CRB and then let's talk about how the defense lawyers are working with the CRB.

015 T. Sloan I am the coordinator. I have Umatilla, Union, Baker, Wallowa and Morrow County, the whole eastern part. Nancy Paxton is on the Umatilla II Board so we see a lot of the attorneys from all of the different counties. One positive thing that I would like to say is that we do have a lot of attorney participation as far as attendance. We have I would say 75 percent attendance at all of our reviews. If they are not in attendance then they send a substitute or they write a letter or appear by phone. We definitely have the physical participation at our reviews. Just a couple of things and then chime in anytime you want. One concern I think that has been brought up a few times is the amount of contact that is occurring with the children and the youth. I don't know that it is occurring within the first 72 hours as it is somewhat stated that it should be and then really looking at the expressed wishes versus the best interest of the child. I think most of the time we are looking at the attorneys, what they think is the best interest, rather than the expressed wishes of the child. I don't know if that is from lack of contact with the youth or something else. One concern is not seeing the youth or the child in their foster placement and then stating that the placement is most appropriate even though there hasn't been contact in the placement. So I am really trying to encourage the attorneys to visit with the children in their foster placements so we can have a better idea

when we are saying what placement is the most appropriate, that we can really rely on the attorney's comments rather than just the statements from DHS. We are getting another eye in the foster home so we feel comfortable that it is the most appropriate placement. One thing we would also like to see is more children, I'm talking youth, probably over fourteen, attending the different reviews. I think it is important for their attorneys to express what a Citizen Review Board is or what the court hearing is so that they really understand that they are a piece of it and they are as much a part of it as someone else. Encouraging them to attend the different reviews would also help us with getting the expressed wishes of the youth rather than just the attorney's comments about what the youth is doing or what their wishes are. I think that kind of goes to keeping them reasonably informed of the whole situation, so they know that there is an upcoming CRB or court hearing. We had previously seen some possible conflicts but it looks like that has changed a little bit. I was seeing some concerns before of a mother's attorney and a child's attorney being on the same page or almost looking at the same situation where it was just looking at the mother's best interest rather than the child's.

- 057 Chair Ellis They weren't independent of each other?
- 058 T. Sloan Right. I have seen that improve where they are making statements on the child's...
- 059 Chair Ellis Is it two members of the consortium that seem to be not acting independently of each other?
- 060 T. Sloan Yes. That was a concern at one point brought ...
- 062 N. Paxton It is difficult to understand how they could possibly have been acting independently because clearly on the cases that we looked at they weren't, which was a concern to us.
- 063 Chair Ellis I did read in the report a concern about some consortia members sharing staff, sharing space, and that was, I thought, more of a confidentiality issue, but you are talking about an independence issue.
- 067 N. Paxton I believe so. I believe both. What you stated sir, and the welfare of the client for the child and the parents. When they are both out of the same office it is a little bit difficult to understand how the child ...
- 071 Chair Ellis I am concerned about it because if it is just the appearance problem that comes where you have shared space and shared staff, that is one thing. And I am not trying to say it is not an issue, but if there is a true sense that substantively they are collaborating and not acting independently that is a real problem. That is not what I think you are telling us.
- 076 N. Paxton I think we have seen a bit of that to be very honest with you. Let me preface it with I don't know if it is because they are so extremely busy or there just isn't enough time, but along those same lines a lawyer would... Here is a specific case. We had a child who was placed in (inaudible) in Portland and we were discussing that and the lawyer had no clue. We said "have you seen your client" and he said "No, I haven't seen her for six or seven months." "Are you going to?" "Yeah, I'll get right over there." He had no clue where she was and I don't know if that is in the best interest of the child or the parent and I don't know if being in the same offices is causing that to happen because they are so busy? I don't understand truly.
- 089 Chair Ellis Do you think we ought to see if there is a way to have, on a case like this where you have child and parent that same process, that you not have a lawyer for both child and parent from the same consortia. Should we try to have the PD for one and the consortia for the other.
- 092 N. Paxton Would that be possible?
- 093 T. Sloan I think originally that was the plan and I know for the most part BMD is taking the child and then one of their parents is going to IPD and then the other parent is, I think, staying with

BMD. I am not sure how to change that because we want everyone to be represented. I don't know how that would work. I have actually seen that improve. There were some concerns about it in the beginning. It seemed like there was a lot of cohesiveness with the child and say the mother's attorney, being on the same page on a consistent basis. I feel that has improved. I talked with Ms. Swenson and they have different practices going.

- 105 Chair Ellis Thank you for bringing that to our attention and we'll work on it.
- 106 T. Sloan I am really just talking for Umatilla County right now but we are fortunate where we do have the attendance. They are attending the reviews and court hearings, so we are very fortunate.
- 109 Chair Ellis That is a little inconsistent around the state I can tell you, so I am glad to hear that seems to be working.
- 111 T. Sloan I think our main concern is the amount of contact with the children. Really making sure that they are expressing their expressed wishes so we can feel more comfortable when we get a report that is truly how the child is feeling.
- 115 N. Paxton I think oftentimes just being a citizen on the review board and the risk of having a bomb on my front porch, there are so many times when we have asked the attorney have you seen your client within the last six months and "no" is probably the answer seventy-five percent of the time. We are looking out for those children. Our hands are tied and we have no recourse and I understand they are busy and heaven knows I don't know what they do, but when they are not seeing their clients and they don't even know where the children are located sometimes or what the current situation is, they do show up, they do. I give them credit for doing that and having the intelligence to be a lawyer but just as a citizen on the board I don't think they are prepared all the time.
- 127 E. Welch When you are inquiring of a lawyer about their contact, do you ask if they have had contact with the foster parents?
- 129 N. Paxton Toni does, yes.
- 130 E. Welch That is an important question. There is an argument that if a lawyer is in regular contact or in significant contact with the care provider of the child and is getting input about how kiddo is doing and how they are handling visitations and so forth that that is arguably a substitute for contact with the child. I am just curious if you are covering both sides of that?
- 137 T. Sloan On that question we do ask when the last time they met with their client was. In Union County I have some attorneys who are refusing to answer that. I am continuing to just document that in our report. They said it is privileged information. We are not looking for the substance of the contact but whether there was contact. We are just continuing to document those responses but that is occurring.
- 143 Chair Ellis Any other questions? Thank you both. Is Craig here? Hi Craig. How are you?
- 147 C. Childress The group is Blue Mountain Defenders and by way of history, I think Ingrid has covered most of it; we just started up a new contract two years ago.
- 152 Chair Ellis And you are up this year?
- 153 C. Childress That is correct and we put in our RFP according to the specs. As I outlined in my responses, we have eight attorneys that signed up with me to render indigent defense services. As Doug pointed out earlier, pretty much all of them I worked with in one of my former lives with Intermountain Public Defender. The relationship and contacts grew there. There are

exceptions too, but pretty much that is where the people came from in terms our list of attorneys in the consortium. We are all independent attorneys in private practice.

- 166 Chair Ellis We'll get to that issue. Maybe we should address it now. You heard the comments of the last two presenters who obviously do have a concern that some of your members, either in appearance or in fact, are not acting independently of one another when they are on opposite sides of the same case. Do you have a thought on that and what causes that?
- 171 C. Childress I do and I appreciate your raising it. I do want to say in that regard it is probably an appearance and also a view from their position or where they are sitting in the case. It isn't a reality and I understand it may be a perception held by a layman. I can understand the perception because Mr. Stephens and I office share. Mr. Stephens and I started the practice at the same time in the same office.
- 181 Chair Ellis Do you staff share also?
- 181 C. Childress Yes and she came from Intermountain Public Defender as well. Mr. Stephens and I are best friends and we worked together at the same time at Intermountain Public Defender as well. Even though the reality is that we are not partners or a law firm, the perception is "They are a firm" probably by a layman. I am sensitive to that perception but we took great pains to set up the office as an office-sharing situation and it was a business opportunity. In my business I don't do many retained cases at all. I just do these cases. Mr. Stephens has a family law practice that is building and he does advertising and bar service and gets an awful lot of bar referrals. We are a separate office and we maintain that separation. I do understand her view but it is not based, in my opinion, in reality. We are independent of each other. I formulate an opinion as a professional attorney not in consultation with Mr. Stephens, but through a review of the file and a discussion of the my facts and on a case by case basis as to what my opinion is going to be. Sometimes that is consistent with Mr. Stephens' position and sometimes it isn't. Many times it is different from DHS's or the district attorney's or CASA's or CRB or whoever. As far as I am concerned I operate on a little different criteria. There are legal standards and legal considerations that I take into account in formulating what direction I am going to go, whether it is expressed wishes or best interests and what the facts are of the case on a case by case basis. Oftentimes, our conclusions are very similar or consistent and sometimes we have mother and father. It's the same with them, although we are a little bit more aligned then.
- 224 Chair Ellis Let me say this is not a site review meeting. We are not here to critique. I wanted you to know that is not quite what our role is, but I think it is valuable for you to hear the comments. The other comment that I am sure you will take into account is this concern about client contact in the juvenile field. Let me move beyond these issues for a minute if I may.
- 231 C. Childress Do you want me to address that or move to another?
- 231 Chair Ellis I think move to another because I don't mean this to be a site review because that is a different process. What percent of the caseload is your consortium handling relative to the PD?
- 235 C. Childress To be honest with you I don't know the answer to that. It has diminished considerably over the last seven or eight months both in terms of the drug court but also in terms of charging by the DA and the rapid turnover in DAs. I don't know. Our contract numbers are misleading, because the original contract and proposal called for a certain mix of cases for a total number of I think around 2,600 for the two-year period. We are meeting the number but are way, way apart as far the mix. We started out appearing at arraignments and taking a certain court, taking fifty percent of custodial arraignments and taking fifty percent of Hermiston. Eventually this has all been weeded down and out. We don't get funded for drug court at all. I hope we get to talk about that because there have been some concerns that I saw on that and

I will get to that if that issue comes up, but we don't get funded for drug court at all. We are just a conflict provider for drug court, so it is a very small minority of the cases we get that are drug court eligible. They have to be a conflict for us to get them because we are not up to bat at arraignment nor are we there at drug court.

- 261 Chair Ellis How do you go about the case assignment issue? How is that handled?
- 262 C. Childress Every day we are notified of by the court of the cases that we get.
- 264 Chair Ellis Is it a rotation? Do you try to assign difficult cases to the more experienced or how do you do it?
- 267 C. Childress In my materials I address that obliquely in several ways because it wasn't directly called for. But essentially I meet with my attorneys on a weekly basis, monthly basis, quarterly and almost two or three times a week. We are always communicating about how things are going in terms of cases. "Do you need more? Are you getting what you want and are there any problems scheduling?" and that sort of thing. Each attorney on the list has made it very clear to me what they want and don't want. Some of that is restricted by geography. Some will say no to Hermiston because they are in Pendleton or Milton-Freewater. Some say no juvenile or no Measure 11 or misdemeanor. Some only want cases when we have multiple conflicts just to help out, that sort of thing. Some people are Measure 11 qualified and some aren't. From talking to the attorneys it has been established what they want and about how many they want.
- 284 Chair Ellis The appointments come to you and then you redirect them to the lawyers trying to match the cases with their interests?
- 286 C. Childress I do. When they come in we do the conflicts check. We look at the list and see what is happening. I take a very large proportion of them. Mr. Stephens takes a large portion of them. The other attorneys take what they have told me they want to take and what meets their practice needs and wishes.
- 294 Chair Ellis Your group is described to us as a consortium but I would have to say that it is a little different model than we have seen elsewhere and that is because you tend to dominate it.
- 297 C. Childress I do and I don't make any pretense of it. I organized it. I formed it and the people basically came to me and wanted to get on the list, and they weren't on the list with the prior provider for various reasons. I think Ingrid accurately described it. It is really kind of a small firm with satellite people assisting us in multiple conflicts.
- 311 Chair Ellis But you contract on a unit basis?
- 312 C. Childress We do.
- 313 Chair Ellis And you pay on a unit basis?
- 314 C. Childress They are given the same amount that we receive. Every week we meet, every month we meet and when we meet we not only talk about payment but we talk cases and if they are satisfied or not satisfied and how to address their concerns. If they have too many cases they want to be taken off, you know, "Don't send me any unless you are absolutely desperate," things of that nature we talk about and try to meet their needs.
- 324 Chair Ellis Up until now you have not had a board?
- 324 C. Childress That is correct. Still don't. That is proposed in 2008 so that is why I included that because I know it is important to the Commission.

- 327 Chair Ellis Assume that goes forward are you going to dominate the board?
- 328 C. Childress I assume so. The board consists of constituent attorneys and some outside people that have essentially been recommended by members and chosen by me as the executive director. I don't see any other way of doing it. If you have some ideas I would be happy to entertain them.
- 338 Chair Ellis Paul is probably the right person for you to talk to, but there are lots of consortia around the state that are structured differently than how you are described to us.
- 340 C. Childress I have seen some of them because I have reviewed some of your past reports, but I am not quite certain if we can structure one customized to our needs, in our community, that meets some of the theoretical needs that work in a larger population area, but I am more than willing to talk about why we don't do this and why we are doing it this way.
- 348 Chair Ellis Any thoughts you have how we can do our job better? Any comments you want to make on how you interact with OPDS staff? Anything in that area?
- 351 C. Childress I don't know what OPDS staff says about me, but I haven't had any problems. My primary contact has been Laura Weeks and she recently took a promotion or a reassignment and we got a new analyst. I really haven't had too much contact with the new analyst, Amy Jackson, but that is my source of contact.
- 361 Chair Ellis Any other questions for Craig?
- 362 C. Childress I did want to answer a couple of your questions. I wanted to answer at least one or two of yours because I know your reputation as an esteemed family court juvenile judge and you had a couple of questions for Doug. I am facing the same criticism as Mr. Fischer in terms of my representation. I am more than willing to answer from my point of view some of those questions as well.
- 368 E. Welch I think this issue about representing children in dependency cases is not an issue that is just a problem here. It is a problem everywhere and I think what I was trying to insinuate is that it is something that maybe everybody needs to look at. What is it you really expect and what is the system expecting? What do judges expect? What does every body expect that a lawyer for a small child is going to do? I don't think there is a right and a wrong answer. The question is something that hasn't gotten much attention. There has been a lot of emphasis on the ethical issue for the last 25 or 30 years. Is it unethical to disregard your client's wishes? Maybe we all should come up with something that gets at it in a practical way, that starts to address expectations.
- 383 C. Childress I agree and I am glad you mentioned that because there was a comment or an opinion, I don't know which, in an individual case that I had allegedly, or somebody had disregarded.... It certainly wasn't me because I take pains to review the case, talk to the foster parent and visit the children, not always within 72 hours, but definitely in every case and try to formulate an answer to not only expressed wishes but best interests so that I can represent the child. That takes some investigation and talking to the foster parent and sometimes going out. I appreciate the comment. It seems like a waste of time sometimes - I'm sure by many attorneys because we are attorneys - to go out to see a baby. All you are going to do is hear from DHS and the foster parent what is going on there. Frankly, in those cases I call the foster parents on the telephone and find out any medical needs, anything I should report. That is the standard question. Are there any issues not being met that I could report or advocate for. That sort of thing. Visitation with the parents is a big deal too. Is that going appropriately and are they making it? I worked for seven years as the court operations manager and deputy district attorney in Douglas County, and I can bring testimonials of the job I did there from Mr. Arneson, Mr. Cramer, Mr. Brenier, Mr. Tower, Mr. Hazarabedian

and David Terry of the job I did in Douglas County. I went to law school to be in juvenile law. That was my objective. That was my specialty. I felt some of the comments were just totally bizarre, made because there are reasons for whatever it is. I will say though that for all of the attorneys in my consortium, as well as myself, there is a requirement to belong and that is that they have a passion for the job and their client and a zeal for that. I think that all of the attorneys in my consortium have that. That is why we have no complaints by the judges in adult court, but we do have complaints from DHS because in that zeal, in that passion, sometimes we are probably too aggressive for a social worker or a DHS worker, or they don't understand why we are not asking a question or why we are asking a certain question about reasonable efforts or "Why did you remove that child?" When they get questioned some of them don't like that vigorous questioning or understand the reasons for it. They are all very well trained and well intended and most of them are doing an outstanding job. We have different criteria as lawyers than say a social worker or the district attorney's office in the case. That sometimes causes tension and I will say sometimes in my representation of the client and Mr. Stephens as well, we may get too aggressive in juvenile court for the liking of some and cause some hurt feelings. I do apologize for that.

449 Chair Ellis Thank you. We appreciate your time. I am going to take a couple of things a little out of order and I apologize to everyone here, but I have a plane and if I don't catch this one I'm here for a long time.

**Agenda Item No. 1 Approval of Minutes of PDSC's October 12, 2007 Meeting**

454 Chair Ellis I would like to ask if there are any additions or corrections to the minutes of the October 12 meeting, which is Attachment 1.

**MOTION:** Mike Greenfield moved to approve the minutes; Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

**Agenda Item No. 2 Approval of the Minutes of PDSC's August 10, 2007 Retreat**

460 Chair Ellis Similarly, we never did formally adopt the minutes that were made after the retreat, but they have taken on a life of their own and they are a pretty significant document going forward so I wanted to see if there are any additions or corrections to those minutes. This was the summary of the retreat, particularly our plans on funding allocation. The retreat occurred on August 9 and 10.

**MOTION:** Mike Greenfield moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

472 Chair Ellis I am going to turn the gavel over to Commissioner Stevens. She suggests those two and then you have the key performance measures and the monthly report. Thank you all for coming and I apologize for having to leave a little early.

490 J. Stevens So Ingrid suggests next we have Nina Kik.

492 N. Kik Well, I am a current employee with the Umatilla County Community Corrections. My current position at the moment is as the Umatilla County Drug Court Coordinator and I work in very close relations with the court system and the attorneys and the district attorney's office as well as probation. I guess I am here to talk a little bit about the process and the relationships that we have with the defense attorneys. The drug court program is new. We just got up and running in July of 2006, so we are involved in implementing new processes. Currently we admit people based on two different types of referrals - either on a new case in which they haven't yet been convicted or sentenced, or probation cases in which they are looking at the revocation process. Generally it takes about a month to get them into the program, depending on which kind of referral they are coming in on. Generally, the defense attorneys discuss it

with the district attorneys or refer potential clients to the district attorney's office. The DA basically says that they are drug court eligible or not. At that point then they go through the preliminary process where they go to their normal court proceedings and say that they are interested in the program. From there their attorneys fill out the correct paperwork - our petition to enter drug court - and the case is set out two weeks. That gives them time to discuss with their attorneys what the program is and where their cases are and that sort of thing. Then two weeks later they either voluntarily say "Yes, I want to accept this program" or "No, I want to decline." That is where I actually step in and do the whole intake process and determine on a different level if they are eligible based on more than just the criminal history of the individual. The program is for non-violent offenders. Just generally, drug offenses are overcrowding our court systems at a high rate, so what we try to do is to speed that process up a little bit. I could go in many different ways on this. The process generally runs fairly smooth with our public defender offices. There are pick-ups in the process. One of our concerns with the public defender's office is lack of the participation in our weekly staffing and Drug Court Steering Committees. In the committees we generally review our processes and revamp them if necessary. Plus, the defense attorneys have a big say in what can occur as well as the DA's office. We have had some change of policies as we speak and I feel that there are some defense attorneys that are trying to skip steps in our process. It is really discouraging because the process that we have set up works and it kind of confuses the whole system, the judge, me, probation and that sort of thing.

572 M. Greenfield

Do you circulate those policies for comment before you implement them?

572 N. Kik

Yes. But due to the lack of participation in our Steering Committees there are offices in the area that aren't aware of all of the processes and the changes and don't really participate in the decision making process, and so when it comes to the court's sessions they get very upset because we don't accept certain individuals in. Take, for instance, one example. We just implemented a policy where if a defendant voluntarily declines drug court on a certain case, he signs a declaration that drug court won't be a potential in the future regarding this certain case. The reason we have done this is because there have been a lot of people declining drug court and then they do whatever they have to do and come back and want to reapply for drug court on the same case. What we have done is we have basically eliminated that. If you decline on that case, we won't accept that case. Now if it is a new case coming in we will be considering it. One defense attorney's office was not very pleased with that process. However, they have not been actively participating in the decision making process and steering committees. Really it is the lack of communication right now that we have had with the defense attorneys. The two defense attorneys we work with are Intermountain Public Defenders and Blue Mountain Defenders. Intermountain Public Defender is very active in our program. They provide great services to our clients, the same as BMD. They are very passionate about their clients. They like to provide their clients with good services. It is just the matter of, like some of them said, are they really looking at the welfare of the client and really listening to what their wants and needs and expectations are. We have heard on multiple occasions from individuals saying that their attorneys have been advising them not to enter the program, that it is not a very good program. It is sets you up to fail; you have to plead out to your charges and you are just setting yourself up to fail. It is really discouraging to us as we try to run an effective program.

627 E. Welch

My understanding is at least one of the reasons why lawyers say that is because they are pretty much convinced their client isn't ready to stop using and that they are indeed going to fail. Is that a bad thing?

633 N. Kik

I agree with that but we work very closely with our individual clients and we provide them with services. If they are not ready to stop using I understand. One of our main things is that you have to be willing to do this. You have to be willing to work hard at it and you have to be serious and committed to making a big change in your life. If they are not ready then we are not disagreeing with the defense attorneys on that. It is a voluntary program. We are not

going to force anybody to enter it. However, if individuals are saying “I do need the treatment. I do need help. I want to stop” however they may be homeless or they may need residential treatment and the level of treatment that this program has to offer does not meet that level. I disagree with the attorneys on that. The reason being is we place people into our program and we seek out the residential programs. We allow them to enter residential treatment while being actively involved in the program. Once they exit residential treatment then they resume with drug court. Both sides are working with them. I am not going to set them up to fail because they need higher level of treatment. We are definitely going to seek that out.

663 E. Welch

What is your drop out rate or the kick out rate?

664 N. Kik

The kick out rate? We don't really have an opt out process at this point or withdrawal process. The steering committee is looking at developing one and implementing it. It is not a given thing yet. Termination, I would have to say, is about 15 percent. We terminated about twenty people so far and we are at forty-four, so a little under half. The main reason is generally because they are out committing new crimes. They are not necessarily relapsing, but they are still dealing, still stealing and generally that is at the beginning of the program. Sometimes we take on too high risk cases where it could be very controversial. However, I do know of cases where one of our judges has allowed them to withdraw their guilty plea and just placed them on probation instead of giving them six months in jail upon their termination. The judges, with their discretion, are able to work with that.

692 J. Stevens

Anything else?

693 E. Welch

Anything that you wanted us to ask you?

694 N. Kik

I have no idea. I was just asked to be here.

697 J. Stevens

Well, you did a good job. Ingrid, who is next?

702 I. Swenson

Anne Morrison and Victoria Moffett. Anne may have left.

706 A. Morrison

I guess I am here because I don't know what things you might want to discuss, so if you have questions that would be fine. My name is Anne Morrison and I am attorney over in La Grande. I have been out in eastern Oregon for seven years now. During the time I have been out here I have been a member of two, three different consortia, and I have had my own contracts to handle cases in Baker and Union/Wallowa County. I am a proposed member of the proposed new Union County contract and we have also put in a bid for a contract in Baker County this year. I have had some experience as an attorney member of the consortium and also as an administrator of several of the consortia that we have had.

724 V. Moffet

I am Victoria Moffett. I was originally up in Wallowa County. I came from Portland and went to work in Wallowa County. Martin Birnbaum of the Union/Wallowa Defense Consortium brought me in in 1999 or 2000 as the Wallowa County person to handle cases up there. I started with just misdemeanors and then gradually increased the types of cases. I take everything now. In 2004, I moved to Union County because the portion of my caseload that was Union County cases got to be great enough that I couldn't make the commute everyday. Wallowa County has work one day a week unless we have trials, and Union County is daily. I moved to Union County in '04. I am uniquely situated in that I am a member of both of the current consortia. I am a member of the men's consortium and a member of the women's consortium. There are currently three people in the men's, Rich, Kent and I, and then Janie, Anne and I are in the women's. There are five attorneys in Union County that do defense in Union and Wallowa Counties and then Alyssa Slater is in Wallowa County. She is in private practice and currently only does our drug court appearances for the Wallowa County drug court, although the proposal that I put together for the combined consortium for the next

biennium would cover the Early Disposition Program in Wallowa County and Alyssa said she would be willing to appear for that although she is not going to take court appointed cases. She doesn't want to do an indigent practice per se because she inherited the current DA's former private practice. Barnes had a couple of questions about services offered and concerns that we had. There are a couple of things that weren't brought today or in the report that are of concern to me. We have really limited resources out here, both for our clients and for ourselves. We have one certified interpreter. I have a Wallowa County client who is currently housed in Umatilla County jail because Wallowa's jail contract was for Umatilla County. That is changing as of this month. Our Wallowa County detainees should be becoming guests of Union County's jail which will make things easier. For the last several months when I have had a Measure 11 client in the Umatilla County jail it has necessitated my coming over here to meet with my client and only being able to do so when an interpreter is available and we have one interpreter. I have to try to fit my schedule around Ms. Young's and her primary duties are to the court. She does interpreting for mental commitment hearings, everything. It is averaging one afternoon every three weeks that I can have her time and she can meet me at the Umatilla County jail to meet with my client. We had a lapse or break in services as to what is available. If I want to meet with a client in Wallowa County or I want to do investigating in Wallowa County, we don't have an interpreter up there. I think Ms. Young went up with me for a Measure 11 sentencing last year and the court arranged for her to be able to go to Wallowa County to do a sentencing on a Hispanic client there. That is a scarce resource and the other is investigation. We have an investigator in Wallowa County. We don't have any that I utilize. I think there may be one in Union County and there is one in Baker County and there is one that I have used in the past in Malheur. It is very difficult. The one in Wallowa County does all of my cases for Wallowa and Union County unless he has a conflict. He also does all of my partner's cases. Janie, who is one of the members of the consortium, and I office share and he does all of her investigation as well. I know that he works for Kent Anderson. I don't know if he has ever worked for Anne or Rick, but in addition to that he works for attorneys in Pendleton and other communities, so his resources are spread pretty thin but we don't have anybody else that we can turn to. If I have an Hispanic witness pool, in essence, and I need someone with dual language skills I have to call Mike Padilla out of Ontario. I did that in one of my Measure 11 cases. I brought Mike Padilla over to meet with the migrant workers up in Cove who were witnesses to an alleged auto assault because he had the language skills. My current investigator doesn't. But there wasn't anybody else around who had dual language that could do the investigating and since I know I only have one interpreter I couldn't very well try to pair up Carla and Jim Keefer and have Carla interpret for the PI. It doesn't work that way. There are just not the resources. The other thing that had been brought up has been visiting with our clients. When Kip Roberson, who had been a member of our consortium, left earlier this year to go to the US Virgin Islands and become a US Attorney and defected, he left behind his client base and we inherited them and I inherited four juvenile clients from him that were teenagers. One is currently in the Dalles. One is in Corbett. One is in Salem and one has just been placed in Corvallis. He was in Heppner but he has been moved to Corvallis. I don't have the means to go on a road trip on a regular basis to go to see my clients, so I participate by phone at their IEP meetings or the staffing meetings. The DHS caseworker has to go and do a face to face every month anyway and they graciously invite me to do a ride along if it fits into my schedule. If it doesn't, most the foster group home placements will allow me to participate by phone. I had a juvenile delinquency client pending proceedings down in Kirkland which is down in Hines/Burns area. I made trips to Hines from La Grande in December and February which is not the best drive to make, but I made two trips down there to meet with my fifteen-year old in a juvenile sex abuse case simply because I needed the interaction and the alternative was that DHS - because it was dual custody, DHS and the juvenile department, - DHS would have gone and gotten him and picked him up and housed him at our local detention center here but he had already spent forty-five days in detention and I couldn't see putting him through that. My partner and his brother and I went down and met with him and we did two trips, but in the meantime we talked to them by phone and we relied a lot on our very active CASA in that case to go and meet with the boys and send them care packages with

CD players in them and stuff. It is difficult because of our remote location and because we don't have services for our juveniles here. We don't have group homes. We don't have treatment facilities. Our kids are farmed out across the state. I currently have a kid in detention here who is looking at a treatment program in Klamath Falls. It is not going to be feasible for me to get down there. It is not incorporated in our budget and I don't know the procedure but perhaps there is a policy where I can request mileage to get down and see him, but that is a day or two out of my life to go down and make my road trip to see all my clients. We do rely on telephone communication. We have video conferences available. The juvenile office has been pretty good about letting us go to their office and set up a conference call with the detention center to talk to court clients. It is not really confidential because you are in the juvenile office.

- 883 A. Morrison I would echo what Vicki is saying. In my experience it is not just an issue in delinquency cases but very much an issue in some of the more drawn out dependency cases as well. I have a number of clients who have essentially spent their lives in foster care and will age out in the system, but they are kids who have been placed at different foster homes and at treatment facilities throughout the state. I have represented kids from La Grande who have been in Pendleton, in Hood River, in the Multnomah County area or the Willamette Valley, or the coast or southern Oregon. I am not going to be getting in my car and driving eight hours to the coast to visit a child who has been placed there even if she has been there for three years. It causes a lot of difficulty in being able to represent your client well or to maintain some kind of rapport or trust with your client under those circumstances. I think part of the issue is that there is no compensation for those kinds of trips at this point.
- 909 E. Welch Ingrid doesn't agree with what you just said so you need to talk to her.
- 909 A. Morrison The alternative, I guess, would be phone calls and trying to stay in contact with clients by phone. If I am dealing with teenagers who are somewhat troubled and somewhat distrustful of the adults that they deal with and the system that they deal with, I never find that phone conversations are very productive in terms of me coming away from it feeling that I really have a sense what my kid needs or wants. That is a big problem since we don't have a lot of those resources locally.
- 922 V. Moffet I hate to come before you and complain about a problem without proposing a solution. With regard to the dependencies, I represented three kids who were taken into custody and placed with an aunt in Portland. DHS got a courtesy worker out of Multnomah County and then ultimately in Washington County where the aunt was located who took over the face to face visits and took over coordinating services because the kids were destined to be, and have now been adopted by that aunt. CASA got a courtesy worker to do it. We don't get that option. I don't get to share my duties with a courtesy attorney, but maybe there needs to be some sort of a mechanism in place. The case and jurisdiction remains in Union, but my kids were in Washington County for two years. I had one visit where I was able to go over there at Christmas time because I went to see my family and I was able to tie it in. Everything after that was telephone. I completely approved the placement and I am glad that the adoption has finally come to pass. Maybe a mechanism needs to be in place where if the children are out of the community for an extended period of time maybe we need the ability to appoint a courtesy, another attorney in that local community who would be able to have and facilitate the face to face interaction and the local CASA and teachers, more so than someone in our situation six hours away.
- 959 J. Stevens Going back to interpreters and investigators, is there not enough work to draw more people into it here?
- 962 V. Moffet We are too remote. You really have to want to be out here. I am not from here. None of us in our consortium are. Janie came from Clackamas and originally from England. Anne came from the Eugene area. Kent and Rick both came out because of marriages. I am from

Portland and I just wanted to practice in a small town and ended up in Joseph with a population of 1,200. You just move and you are drawn there because that is what you want to do. I think for interpreters, Carla is out there and she is married and she is settled, but we don't have anybody else. Maybe they don't know how to get trained. The other thing we have is that our town is a college town. EOU is there and we have had several cases over the past few years with the islanders that come here. We currently have a case with a client from Palau. We have had Micronesia. You end up using the AT & T operator at your office. [end of tape]

**TAPE 2; SIDE B**

- 001 V. Moffet Our community isn't as diverse, perhaps, as Umatilla County. We still have overflow. The drug trade still goes over the hill. That is what they call it. So we get the clients that get busted just past Meacham. My clientele comes from Walla Walla, Tri-Cities, and we need to be able to communicate with them and unfortunately there is only one interpreter at the moment that is available to us. In terms of what the agency or the organization can do, it could recruit people with those skills out here. We would go as far Tri-Cities if they wanted to drive and meet us here in Umatilla County.
- 009 J. Stevens Do you have questions?
- 009 A. Morrison One thing that I was going to say is that in the last year in our counties we have started appearing, the courts have started notifying attorneys to appear at shelter care hearings. Many of the attorneys have appeared at a number of them. I think it has been very beneficial because we see a number of DHS petitions that we would consider questionable. We have had several cases where they have been dismissed right there at that point. I find that very beneficial rather than to drag the whole family through weeks and months of proceedings before you get to the same point.
- 017 V. Moffet It has been great that they have done that. Anne and I just did one up in Wallowa County recently and we have done a couple in Union County. I do cases out of Baker County if the court appoints me. I happened to be there one day and they said "We are doing a shelter care this afternoon are you available to take one of the dads?" I said "Sure" and we actually disposed of it that day on an ICWA issue because the children were ICWA and we were able to get rid of it at that moment and get it back to the tribe and let the fathers handle it at that point. Having attorneys at the shelter hearing is helpful. Having our Early Disposition Program that Judge Mendiguren talked about is very helpful in resolving some of the penny ante type cases - the ones where you have a trespass with an ex-girlfriend, ex-boyfriend. If the DA makes an offer for violation treatment they would be silly not to take it.
- 026 J. Stevens Anything else?
- 026 E. Welch I'm curious about one thing. I don't know how many more people there are?
- 026 I. Swenson That is it.
- 028 E. Welch Talk about delinquency stuff a little bit. I don't know what the county seat in Union County is.
- 029 V. Moffet La Grande. La Grande is the county seat for Union County. Enterprise is the county seat for Wallowa County. The delinquency cases are a little bit difficult because they obviously run through the juvenile office and you get a lot of juvenile probation officers that are involved in it but technically they are to be prosecuted by the DAs. In our community sometimes - it is improving - but sometimes the cases are slow to get to the legal eyes of a DA, so you deal at preliminary stages, at shelter cares and detention hearings; and the paperwork and everything you are getting comes from the juvenile office and they are putting forth petitions that may or

may not be legally substantiated or justified and you are trying to talk to them, knowing that that is not who you should be talking to. You've really got to figure out which of the DAs is getting that case and deal with the DA directly. The juvenile department sees it from their perspective that this is a bad kid and this is the seventh petition. This is yet another MIP and he doesn't make it through treatment. You need to be talking to the DA saying "It doesn't really matter because you can't prove your elements. You need to give me something that I can work with."

- 043 A. Morrison It is very aggravating at that stage to be talking, whether it is DHS or whether it is the juvenile department. It can be very aggravating because you cannot necessarily have a conversation with them about the allegations they have don't support the charge alleged. That is very hard to do with a non-lawyer.
- 048 V. Moffet It has been improving with Tim Thompson being our new DA. He has tried to make a point of having his deputy DAs staff the cases and have DHS run the petitions by them, but we still occasionally get cases where no lawyer's eyes have looked at the documents before they were filed and you get rambling allegations in a petition, two-thirds of which is fluff and nonsense and isn't going to be a basis for a jurisdiction even if proven and you really just wonder what the issue is with this family. Let's figure out the basics and what services are needed and what are you trying to accomplish. It is improving but we're not there yet. We had a case that Janie and I did last year. We represented the brothers. That was a really long, drawn out case and we needed psychological evaluations. We didn't have anybody in town that does those. You have to farm those out. There is one psychologist here and another psychologist out of Ontario. There are two in Baker but DHS relies exclusively on them so your average defense attorney is not going to go there. There is one in Wallowa County. Being married to the DHS supervisor is not going to help your neutrality. We don't go to him for evals because he is married to the DHS supervisor.
- 063 A. Morrison There are several people that we use out in the Boise area but we go a distance.
- 064 V. Moffet I have used one from Portland. I had one in Bend because Janie had one brother who was evaluated by the one we always use so I had to farm out for one. I had to go to Bend and I had to have my kid transported from Hines to Bend and back in order to get the evaluation. We just don't have resources so we are having to reach farther afield to find them and then once you are anticipating an adjudication or disposition, you have to reach way out there to find solutions. We don't have treatment programs. We don't have any of those and only a few programs nearby, meaning Pendleton or Bend. We have Rimrock. We have a couple of things. Our kids may be not on their list or they don't qualify for some reason which is why I have a youth now, a young man who is 17, who is looking at going all the way to Klamath Falls to get treatment because he didn't qualify for anything between here and there. It is very difficult and the resources are limited.
- 076 J. Stevens That is a horrible drive.
- 077 V. Moffet It is and the other thing is trying to know the system well enough to know what resources there are. If you are in Portland you know what the resources are in Portland. If you are in Salem you know those. If you are in La Grande there aren't any. There aren't any in La Grande so you have to try and know where everything else is and that is a very difficult thing to do. We rely, oddly enough, on OYA's website which is fabulous. It has a list of all of their sponsored programs and the eligibility requirements, so we go far afield for experts whether it be for an interpreter or anything else and for resources for our clients in terms of counseling, in terms of therapeutic foster homes, all of it. There is nothing here.
- 083 E. Welch Quite challenging.
- 084 A. Morrison It is.

- 086 J. Stevens Well you wanted a small town.
- 088 V. Moffet I did. When I wanted a small town I was going to be an estate lawyer. It someone said I was going to be a litigator I would have thought differently, but at this point I am stuck.
- 090 J. Stevens Thank you very much.
- 098 I. Swenson We can postpone these other agenda items to December. It won't be a busy month and we have no deadlines.
- 102 J. Stevens Looks like we are about done. Thank you all very much.

Meeting was adjourned.

# Attachment 2

**OPDS's Draft Report to the Public Defense Services Commission  
on Service Delivery in Judicial District No. 6  
Umatilla and Morrow Counties  
(December 13, 2007)**

**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. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Washington, 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 conditions of Umatilla and Morrow Counties' public defense system undertaken in preparation for the PDSC's public meeting in Pendleton on November 7, 2007 and a summary of the testimony provided at that hearing. The final version of this report will contain PDSC's service delivery plan for Judicial District No. 6.

**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 such as this, 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. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and the criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole criminal and juvenile contractor in Benton County. Another site visit is planned for Columbia County in December of 2007.

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 has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and developed a statewide Service Delivery Plan for juvenile representation.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in these 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.<sup>1</sup> 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” 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

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<sup>1</sup> 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).

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 task of addressing performance issues with operational implications.

### Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of

the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. 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 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.<sup>2</sup> 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 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

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<sup>2</sup> Spangenberg and Beeman, *supra* note 2, at 36.

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.<sup>3</sup> 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 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.

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<sup>3</sup> Id.

Consortia offer the advantage of access to experienced attorneys who prefer the independence and flexibility associated with practicing law in a consortium in which they still represent public defense clients 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, in post-conviction relief 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.

### **OPDS's Preliminary Investigation in Judicial District No. 6**

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 this.

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.

On November 7, 2007 from 9:00 a.m. to 1:00 p.m., PDSC held a public meeting in Room 316 of the Umatilla County Courthouse in Pendleton, Oregon. The purpose of that meeting will be to (a) consider the results of OPDS's investigation in the district as reported in the preliminary draft report, (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 6.

This draft report is intended to provide a framework to guide the Commission's discussions about the condition of the public defense system and services in the district, and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the district's delivery system. The initial draft was intended to offer guidance to PDSC's invited guests at its November 7, 2007 meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving Judicial District No. 6's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice systems in these two counties is 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 Judicial District No. 6.

### **OPDS's Findings in Judicial District No. 6**

Judicial District No. 6 is comprised of Umatilla and Morrow Counties. There are three courthouses in the district, two in Umatilla County (Pendleton and Hermiston) and one in Morrow County (Heppner).

There are five judicial positions in the district, increased from four in 2006.<sup>4</sup> Judge Garry Reynolds is the presiding Judge. He and Judge Jeffrey Wallace are assigned to the courthouse in Hermiston.

Judge Daniel Hill and former District Attorney and now Judge Christopher Brauer are assigned to Pendleton, as is the family court judge, Judge Ronald Pahl, who also serves as the drug court judge in Pendleton. (Judge Reynolds serves as the drug court judge in Hermiston.)

The judges are assigned to cover the court in Heppner on a rotating basis.

Hermiston is approximately thirty miles from Pendleton and Heppner is approximately seventy. A map of the region is included as Exhibit A.

The Umatilla County Jail houses prisoners from both counties.

#### **Umatilla County**

The population of Umatilla County in 2006 was 72,190. Funding for county services has been relatively stable in recent years. The county is served by twelve separate law enforcement agencies.

Since the completion of a new courthouse in Hermiston all categories of cases, including murder cases, are being assigned to the Hermiston court if they arise in the western area of the county. Because this is the area in which most of the growth in the county is occurring it is expected that the caseload handled by the Hermiston court will continue to grow.

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<sup>4</sup> In an effort to describe the workload in the district, it was reported by the Judicial Department that there were 1,516.8 cases of all types including violations filed per each judicial position during the period of January 1 to June 30, 2007. There were 697.8 cases per judicial position if violations are excluded. The statewide average without violations for this period was 1,008. During the same period one felony and 4 misdemeanors were tried in Morrow County and 27 felonies and 41 misdemeanors in Umatilla.)

## Procedure in criminal cases

In criminal cases, each judge maintains his own docket and whichever judge presides over the arraignment schedules all future appearances for his own courtroom. Attorneys are present for arraignments. (Both the attorney and the defendant are at the jail during in-custody arraignments, while the judge and the district attorney are in the courtroom; all are in the courtroom for out-of-custody arraignments.)

A pretrial conference is scheduled in every case for approximately six to eight weeks after arraignment in order to track progress in the case, determine whether discovery has been provided, schedule motions, etc. Except for custody cases, a trial date is set only if the attorneys indicate that the case will be going to trial. A trial readiness appearance is calendared three to five days before trial.

With respect to the quality of representation being provided in criminal matters by PDSC's two contractors in the area Judge Reynolds said that the attorneys for both contractors work hard at what they are doing and, despite having to cover cases in multiple courts, they are providing good services.

## The District Attorney

Dean Gushwa is the District Attorney of Umatilla County. He currently has five deputies but is recruiting for several more. His office must staff both the Hermiston and Pendleton Courts five days a week. Despite short staffing, this office continues to prosecute some types of offenses, such as failures to appear and drug residue cases, which some district attorneys have chosen not to pursue when resources are scarce. In addition, Mr. Gushwa said that his office pursues the death penalty in every case in which the grounds for charging aggravated murder are present and does not decide whether it will actually seek a death sentence until all the evidence has been presented in court.<sup>5</sup> As of October 30, 2007, there were 7 aggravated murder cases pending in Umatilla County (out of a total of 48 statewide).

## Drug court

Umatilla County operates a drug court in both Hermiston and Pendleton. Each meets once a week. The first graduation ceremony occurred in the late summer of 2007. As of September, 2007, the program had 44 participants, half of whom were women. The program has a maximum capacity of sixty. The program works with medium and high risk offenders, including those charged as repeat property offenders, and provides extensive support for participants, including

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<sup>5</sup> This approach can be very costly for PDSC since every client must be provided full ABA-compliant representation throughout the pretrial and trial proceedings even though the state may ultimately determine that it will not be asking for a death sentence.

anger management counseling and job skills training, as well as drug treatment. The drug court reportedly has very few Hispanic clients. Staff believes this is because many of the Hispanic defendants are one-time offenders and conditional discharge is often a better option for them.<sup>6</sup>

The program just received a Bureau of Justice Assistance grant to expand coverage to clients in the Milton Freewater area, to add an on site GED program and a mental health treatment component, and to fund research to assess the impact of the program.

The District Attorney believes the drug court is working and attributes the declining number of misdemeanor offenses to the intervention of the drug court.

Doug Fischer, the administrator of the Intermountain Public Defender Office, has been an active participant in the development and operation of the court and sits on its steering committee. One attorney is assigned to staff the court and represent all of the clients who participate.

Attached as Exhibit B is a document describing the court and its operation.

Some attorneys with the Blue Mountain Defender consortium are reported to discourage clients from participating in drug court. The consortium administrator, Craig Childress, explained that, although the program might be appropriate for some clients it is not appropriate for clients who are likely to fail since applicants are required to plead guilty to all outstanding charges as a condition for admission to the program,<sup>7</sup> and may not withdraw their pleas even if found ineligible for the program.

While program rules require applicants to waive indictment and stipulate to laboratory reports, clients are not required to plead guilty to any charges until they are accepted into the program. They are then required to plead to all counts in the information. Other pending charges may be brought into drug court, but if the client wants them included, he or she must also plead guilty to all charges in those cases. If the client successfully completes drug court, all of the charges are dismissed. If the client does not successfully complete the program, the court proceeds to sentencing on all counts. If an applicant is not accepted for drug court, he or she is still entitled to a trial on the charges alleged in the

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<sup>6</sup> For non-citizen clients, even a conditional discharge may be treated as a “conviction” of a drug offense by the federal government, which can lead to exclusion and/or deportation from the United States. District attorney diversions, on the other hand, may not be considered convictions for this purpose.

<sup>7</sup> The Umatilla County drug court model may be unusual in this regard. Attorneys in other counties report that plea discussion and negotiation is often part of the process of admission to drug court. If a guilty plea is required, in some counties it may be to a single charge. In counties that do not require guilty pleas, the defendant is instead generally required to stipulate to the admission of certain evidence.

information but is bound by the stipulation relating to the laboratory findings.<sup>8</sup> Program representatives say that they work hard to keep clients in the program, that relapses are understood to be a part of treatment and that if clients are honest with them, they will do everything they can to help them succeed.

### Juvenile cases

Judge Ronald Pahl is the family court judge. All juvenile proceedings in the county are held in the Pendleton courthouse.

The district attorney's office assigns a deputy full time to the juvenile department; this deputy files all the petitions in dependency cases and represents the state in delinquency proceedings as well. A secretary in the juvenile department prepares subpoenas, summonses, and other documents in dependency cases.

### Procedure in dependency cases

Initial appearances in juvenile matters occur in the afternoon, as needed, which is approximately one to two days per week. About a year ago, Judge Pahl, working with the contract firms and DHS, instituted the practice of having attorneys appear at shelter hearings.<sup>9</sup> A mediation session is scheduled in every case approximately forty-five days after the initial shelter hearing. The county was able to fund this program when support from the Juvenile Court Improvement Project ended in 2005. Approximately half of all dependency cases were formerly being resolved at mediation. One representative of the state indicated recently, however, that the program may be in jeopardy because some attorneys decline to participate.<sup>10</sup>

Occasionally, attorneys do not become aware of conflicts until the mediation session. Substitution of new counsel at this stage can significantly delay the proceedings.

The court conducts reviews in dependency cases annually. The Citizen Review Board reviews cases every six months.

The CASA coordinator reported that as of September there were eighteen active CASAs working with eighty children in foster care. CASAs are not appointed until in Umatilla County until approximately thirty days after shelter hearing.

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<sup>8</sup> During 2008 the Commission will review drug court operations around the state, focusing on the role of counsel in each county and will consider whether it should issue guidelines for participation of public defense attorneys in this specific type of early disposition program.

<sup>9</sup> This practice has largely resolved a problem brought to OPDS's attention in the past, of some attorneys not meeting with their clients prior to the mediation session.

<sup>10</sup> Two attorneys associated with the Blue Mountain Defender consortium were identified as being unwilling to permit their clients to participate.

### Comments on representation in juvenile dependency cases

One juvenile system participant said that she is concerned that many attorneys are not meeting with their child clients regularly, or sometimes at all. She could name only two attorneys who visit their child clients regularly, one at IPD and one at BMD. The attorney who represents children in most of the dependency cases does not appear to have contact with them, although it was reported that in the past month he has made efforts to do so.

One juvenile system representative said that although attorneys regularly attend CRB hearings or send representatives, most of them do not participate. They take notes but do not provide any information to the board. They appear not to have information about child clients, and, if they have it about parents, are not providing it. There are two attorneys, one from each contract provider, who are always prepared and make effective presentations on behalf of their clients. If they cannot attend they normally send detailed information in writing.

Judge Pahl said that in cases subject to the Indian Child Welfare Act it might be helpful to provide some training to the attorneys about how to use the act to their clients' advantage.

Additional comments regarding quality of representation are set forth below with respect to each of the contractors.

### Procedure in delinquency cases

Attorneys are present for shelter hearings in delinquency cases. They are appointed in only about half of the cases, however, with the other half waiving counsel and generally resolving their cases proposed by the juvenile department at the initial hearing. The juvenile department reports that it diverts most first time offenders out of the court system.

The juvenile department in Umatilla County has six probation counselors, one assigned to intake and one to sex offender supervision. The other four are field officers. A representative of the department said that they maintain good working relationships with defense attorneys, although the district attorney's office does not permit them to talk directly to defense attorneys about their cases. There are few juvenile delinquency trials; the department representative indicated that only about five cases had been tried in the previous year.<sup>11</sup> Motions are filed only occasionally.

The local detention facility has 24 beds; only 15 are currently staffed and 11 or 12 of these are generally rented to other counties. The region recently received a Casey Foundation Juvenile Detention Alternative Initiative (JDAI) grant. Judge

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<sup>11</sup> OPDS received only three requests for non-routine expense approvals in juvenile delinquency cases from Umatilla County in the one year period beginning October 1, 2006.

Pahl and Chuck Belford, the director of the juvenile department, attend national JDAI meetings. Members of the defense bar have also been active participants. Umatilla County is also seeking to become a model court site through the National College of Juvenile and Family Court Judges. Judge Pahl noted that there are few local resources available for adjudicated youth. They often use resources in Spokane, Yakima and Bend. There is a multi-treatment center in Umatilla County but it is not appropriate for all.

With respect to minority youth in the county, one juvenile system representative said that one of the local police agencies sites minority youth in disproportionate numbers. It is hoped that this practice can be addressed through the JDAI.

There is a significant population of non English-speaking Hispanic youth, especially in the West end of the county. The juvenile department has one Spanish speaking juvenile court counselor but treatment resources are scarce for this population.

#### Comments on representation in delinquency cases

The director of the juvenile department said that there might be a need for more attorneys to handle delinquency cases. Attorneys sometimes come from Union County to take cases that cannot be handled by the local attorneys but this can result in delay due to scheduling issues and travel time for these lawyers. He also said that caseloads may be too high or lawyers may be devoting too much of their time to other cases. Some attorneys are not meeting with their clients in a timely way<sup>12</sup> and don't appear to be able to give priority to their juvenile cases.

Judge Pahl said that he would like to see attorneys do more research on dispositional alternatives and present a plan in each case.

#### Public Defense Providers

##### Intermountain Public Defender<sup>13</sup>

Intermountain Public Defender (IPD) is a private non-profit corporation that contracts with PDSC for 100% of its legal services. The IPD office is located in downtown Pendleton, two blocks from the courthouse. The office was founded in 1994 and currently has eight full time attorneys, including its Executive Director, Doug Fischer. The office employs both clerical and investigative staff. It contracts to handle all case types except for aggravated murder and post-conviction relief cases. Under the current contract IPD has agreed to handle

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<sup>12</sup> One local attorney said that the juvenile department needs to improve its communication with defense attorneys. Attorneys aren't always notified when their clients are taken into custody or when there are other important developments in the case.

<sup>13</sup> A copy of IPD's response to OPDS's questionnaire for public defense offices is attached as Exhibit C.

4,944 cases over the two-year period ending December 31, 2007. IPD is paid \$1,000 per month for representing clients in drug court and also receives a stipend for travel expenses. In the past IPD was paid \$357 per case, regardless of case type. A change to a rate structure based on the value of different types of cases resulted in a revenue increase under the 2005-2007 contract. In the past IPD has reported that 89% of contract funds were expended for salaries and benefits, and only 11% for overhead. The office provides health insurance and funds a pension program (10%) for all employees and pays bar dues and NACDL and OCDLA membership for the attorneys.

The office has a four-member board of directors, two of whom are attorneys in private practice, one is a retired judge and one is an accountant. The board's primary function has been to insure financial accountability. An auditor reviews monthly bank statements and performs an annual audit. The Board meets annually to review the audit results and at such other times as needed.

IPD adopted a written personnel policy manual in 2005. It has no formal performance evaluation process, however. IPD reports that performance evaluation is an on-going process at IPD. Management receives input from judges, court staff, the district attorney and others. Concerns are evaluated and discussed with the individual in question. On rare occasions employees have been encouraged to seek other employment.

Despite having hired a number of new employees over the last several years, IPD does not appear to have a formal orientation, training or mentoring program, other than its "open door" policy under which new staff are encouraged and expected to seek advice from more experienced staff. IPD does fund fifteen hours of CLE credits for each attorney every year. IPD also maintains a library and provides access to online legal research tools to its attorneys.

#### IPD case management

IPD attorneys appear at criminal arraignments. Discovery is not always available at this appearance. In most cases, an investigator makes initial contact with in-custody clients within 24 hours of appointment. Upon receipt of discovery, clerical staff reviews the police reports and checks for potential conflicts. The attorney then receives the file. If no conflict is found, a letter, including both an appointment time and the next court date is then sent to the client. If withdrawal is appropriate, a motion is filed immediately.

Cases are assigned on a case-weighted basis in order to balance the workload among the attorneys and give each of them cases consistent with their experience.

IPD covers drug court in Pendleton and shares coverage of the Hermiston drug court with Blue Mountain Defenders.

## Comments on quality of representation by IPD

While many people interviewed for this report had very positive things to say about IPD's "turn around" and about the good work it does on many cases, about its training of new attorneys, about its preparation in criminal cases and aggressive representation of clients, and about the representation it provides in the special courts, it also appears that IPD may have some significant quality issues to address.

All of the following concerns were mentioned by one or more of the persons interviewed for this report: clients continue to complain that they are not able to reach their attorneys,<sup>14</sup> especially juvenile court clients;<sup>15</sup> juvenile system representatives say that most IPD attorneys appear but do not participate in Citizen Review Board hearings, and that some attorneys have no contact at all with child clients.<sup>16</sup> Another juvenile system representative said that one IPD attorney, who is not a bad attorney, can be very difficult to reach, even on urgent matters affecting his clients, and failed to see one of his clients for six months following his appointment.

Some of these commentators believed that quality problems were probably related to workload and that the attorneys often appear to be "swamped."

## Blue Mountain Defenders

The Blue Mountain Defender consortium (BMD) was founded in 2005, succeeding to a caseload previously assigned to the Umatilla/Morrow Defense Consortium. The administrator of the BMD consortium is Craig Childress. There are eight other attorneys identified in the 2005-2007 contract as being included in the consortium.

BMD contracted with PDSC for the two-year period ending December 31, 2007 to handle a mixed caseload of 2600 cases. The consortium's case mix is similar to that of IPD, except that BMD does not receive appointments in murder cases.

BMD did not provide a description of its current operating structure other than to say that for the last two years it has operated as a small public defense firm with

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<sup>14</sup> One former IPD attorneys said that the court requires clients to contact their attorneys regularly and, since IPD does not have voicemail, people may be trying to contact them after hours without success.

<sup>15</sup> One juvenile system representative suggested that IPD attorneys meet with their clients immediately after the shelter hearing to schedule an appointment with them rather than trying to contact them later by phone or letter.

<sup>16</sup> This has been a common concern in many parts of the state. OPDS recently sent to its contractors a statement outlining OPDS's expectation with respect to representation of children. A copy of this statement is attached as Exhibit D.

subcontracting lawyers taking a few selected case types according to individual members' needs and limitations. It appears that Mr. Childress and another consortium member, Dan Stephens, devote almost 100% of their time to public defense cases and consider themselves to be the sole members of BMD. Other attorneys associated with the consortium are considered "outside attorneys" and are reported to devote between 20 and 80% of their time to public defense cases. It is not clear whether this distribution is based on the preferences of all concerned. Mr. Childress has acted as the administrator of the consortium and OPDS's contact has been exclusively with him.

BMD has drafted a proposed set of bylaws that would become operative if it were awarded a contract beginning in 2008. Under the bylaws, there would be a board of three to seven directors, including five members of the consortium. A retired Oregon State Police officer and a community activist are being considered for appointment to the board as lay members. The consortium administrator would serve on the board for an initial three-year term although the bylaws also indicate that his term as an officer would be for five years and would permit him to be removed only for cause.<sup>17</sup> Other members would be subject to removal by a vote of two thirds of the directors then in office.

Currently, the consortium administrator and his staff person receive 5% of the total monthly payment to the consortium for their administrative duties.<sup>18</sup>

The administrator submitted written responses to questions regarding the structure and operation of the consortium. A copy of this document, along with the proposed bylaws is attached as Exhibit E.

OPDS received many positive comments about BMD. The judges praised the general level of representation provided by BMD attorneys and the level of experience they bring to their work. Court staff is appreciative of the consortium's management of its cases.

Two consortium attorneys were identified as being particularly skilled trial lawyers and two were noted to provide superior representation in juvenile court cases although neither of the latter appeared to be assigned many juvenile cases.

Concerns were expressed by a number of people about the practice of the consortium administrator and the other attorney who works in the same office<sup>19</sup>

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<sup>17</sup> Mr. Childress explained that because he gave up other employment to plan and organize the consortium, his role as executive director is preserved under the proposed bylaws for at least three years.

<sup>18</sup> It is not clear whether the 5% is in addition to or includes the \$7,500 line item for administration in the PDSC contract with BMD.

<sup>19</sup> A number of the justice system representatives who were interviewed expressed concern about at least the appearance of impropriety when attorneys representing co-defendants or other parties to a single proceeding share office space, and in some cases, have common law office staff. It is undoubtedly a struggle in small communities for lawyers to find affordable office space

appearing to take the same position on nearly all of the cases in which both are involved, even when their clients' interests appear to be very different.

Concern was also expressed by a number of juvenile system representatives about Mr. Childress assigning to himself most of the child clients in juvenile dependency cases. One child advocate said he did a "pretty good job," but others reported that he sometimes does not know the names or ages of the children he represents, generally sits through trials without making an opening or closing statement on behalf of his child client or asking any questions of the witnesses, and that until very recently he failed to meet with child clients, including adolescents who were capable of considered judgment.

One observer said that Mr. Childress and the other attorney in the BMD office are extremely disrespectful to DHS representatives in the courtroom, at CRB reviews and during mediation sessions. This observer said that the behavior of these attorneys is not just unusually adversarial. In her opinion it is unprofessional and works to the detriment of some clients.

#### Hourly paid attorneys

Some attorneys in the area expressed an interest in handling public defense cases on an hourly basis but it is rare that there is a need to appoint a non-contract attorney. These attorneys do not want to participate in the current consortium, however. In addition, a court representative said that there are capable attorneys in the area who could do excellent work in public defense cases but they are not available to the court for appointment because they are not part of the consortium.

### **Morrow County**

The population of Morrow County in 2006 was 12,125. Funding for county services has been less stable in recent years in Morrow County than in Umatilla. There are some economic development projects underway that may improve the economy. Ground will soon be broken on a speedway in Boardman and a new ethanol plant has recently been completed.

There are two law enforcement agencies in the county, the Morrow County Sheriff's Office and the Boardman Police Department.

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and consortia members in a number of counties share space and often some office equipment. The sharing of staff creates the greatest risk for jeopardizing the confidentiality and secrets of public defense clients among attorneys who represent parties with opposing interests in the same or related proceedings. Ethics Opinion 2005-50 indicates that staff in such circumstances should not open mail, receive telephone calls or review client information in any case in which two attorneys represent parties with opposing interests. Mr. Childress provided OPDS with a detailed description of the staffing at his office and the steps that he and Mr. Stephens have taken to protect client confidences. As of January of 2008 Mr. Stephens plans to relocate his office to Hermiston.

Elizabeth Ballard is the district attorney. She has been in office for approximately a year and served as a deputy district attorney for three years before becoming the district attorney. She currently has no deputies.

Criminal cases<sup>20</sup> are scheduled in Morrow County every Thursday and sometimes on Friday although the court hears primarily civil matters when it is in session on Fridays. It can be difficult to conduct trials with so little court time available.

BMD attorneys handle almost all of the cases in Morrow County and have assigned a single attorney to cover most of these matters. This attorney appears in person for criminal arraignments and other matters on Thursdays. On other days she appears by video connections. The round trip distance between Pendleton and Heppner is 144 miles.

Both Judge Reynolds and District Attorney Ballard indicated that the BMD attorney who handles most of the cases in their county does a very competent job. She is generally prepared, is in good communication with the court and the state, and provides vigorous representation to her clients.

Juvenile matters are heard in the county court in Morrow County and, consequently, public defense providers are paid by the county, not OPDS.

### **OPDS's Recommendations for Further Inquiry at PDSC's November 7, 2007 Meeting in Pendleton**

In light of the information which came to its attention during interviews with representatives of the juvenile and criminal justice systems in Judicial District No. 6, OPDS recommended that the Commission focus its inquiries and discussion at the November 7 meeting in Pendleton on the following topics.

#### **Structural Issues**

The number and types of providers in Judicial District No. 6 appear to be appropriate ones. The public defender's office is the principal provider and does much of the training of new defenders in the area. It offers leadership in other areas, including participating in the planning and operation of special courts such as the drug courts. Doug Fischer serves on the Local Public Safety Coordinating Council and meets regularly with judges and the district attorney to keep abreast of developments and to monitor the quality of the work IPD lawyers are doing.

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<sup>20</sup> A total of 350 credits were claimed by BMD for the period of January 1, 2006 through September 30, 2007.

A well managed consortium is often the best alternative provider in an area the size of Judicial District 6. It can add members as needed and provide members with flexibility in terms of the amount of time they are able to devote to public defense representation.

There may be structural issues within each of these particular providers, however, that need to be addressed. Both face significant challenges as they adjust to the increased proportion of the caseload that is now assigned to the Hermiston court. One of the judges said that both providers probably need additional attorneys to staff the two courthouses.

Within IPD, greater stability is needed so that the office does not have to devote significant amounts of time and resources to recruiting and training new attorneys. The budget priorities developed by the Commission at its August retreat can be used in the current contract negotiations to help IPD identify retention strategies. Other issues that need to be addressed include creating a more formal training process for new and experienced lawyers. While the current “open door” method of training attorneys may be working in criminal cases, there are significant issues regarding the quality of representation provided in juvenile cases. It may be that even experienced attorneys are not well trained in this area of the law. If additional resources are needed to provide such training this too could be discussed in contract negotiations. Please see the further discussion of this issue below.

BMD appears to be managing the consortium’s workload to the court’s satisfaction. It is just beginning, however, to work on internal structural issues. Fortunately, there are excellent models in the state for the effective organization of consortia. Among the major issues that need to be addressed are the roles of the consortium administrator and the other members in the design and operation of the consortium. If the administrator distributes the cases, do the members receive appropriate shares of the caseload and the opportunity to handle cases of interest to them? What should be the criteria for admission? How will the consortium monitor the quality of members’ work? How will it address underperformance? Are there qualified attorneys in the area who should be recruited to become members of the consortium? As OPDS applies the Commission’s budget priorities in this contract cycle, how can it best ensure the stability of the organizations it is funding? Can it assist BMD to address some of its structural issues? Is a two-year contract appropriate before essential structural issues are resolved or should the current contract be extended for period of time to allow for resolution of these issues?

Comments about representation provided by BMD attorneys indicate that some of its lawyers excel in trial work, others in juvenile representation. How can these highly skilled consortium members share their expertise with others? What kinds of training, coaching, mentoring can the consortium provide to its members?

### Representation in Juvenile Cases

In both delinquency and dependency cases, juvenile system representatives noted significant deficits in the representation provided by attorneys at both IPD and BDS, although as noted in the draft report there are attorneys in both groups who do excellent work. OPDS believes the training tools are available in Oregon for lawyers in all parts of the state who seek to provide high quality representation in juvenile cases. There are frequent CLE events, some offered without cost, that focus on juvenile representation. There are websites and list serves. A bi-monthly newsletter is sent to all OPDS contractors, which is devoted exclusively to developments in juvenile law and practice. OPDS's general counsel is available to work with providers to help them identify their particular training needs and possible training options. OPDS will also be talking directly with contractors in current contract negotiations about how they plan to comply with client contact and representation standards outlined in the "Role of Counsel for Children."

### Drug Courts

In Umatilla County it appears that at least some members of the defense bar believe that most clients eligible for the drug court would not be well served by participation in the program. In 2008 the Commission should review drug court models from around the state and the role of defense counsel in those courts. Based on its review, the Commission may wish to establish guidelines for counsel in these cases.

### **Summary of Testimony at November 7, 2007 Meeting**

Judge Ronald Pahl's courtroom is located in the courthouse in Pendleton. He is the juvenile and family law judge. He also handles civil cases. He said that there is a "pretty good group" of attorneys handling juvenile cases. He recently implemented a policy requiring attorneys to be present for initial appearances in juvenile cases and believes the new process is working well. Occasionally it is difficult to find enough attorneys for all of the parties, especially on short notice. He encourages attorneys to meet with child clients and believes there has been some improvement in that regard. In some cases Judge Pahl has seen an attorney for a child appear to be intimidated by an attorney for a parent into not advocating the child's position. One area in which attorneys may need additional training is in the law applicable to Indian Child Welfare Act cases. In delinquency cases only about half of the youth who come before the court request court-appointed counsel. The others, sometimes with input from their parents, waive counsel. Umatilla County is one of the Casey foundation's juvenile detention alternative initiative sites. The defense lawyers have been skeptical about the benefits of the initiative for their clients but that may be because they have not yet received any training. There has not really be an overcrowding issue at the county detention facility but the records kept by the project will be useful in

identifying trends and whether there is minority overrepresentation. Judge Pahl is also the drug court judge. The Pendleton drug court had a graduation recently. It is a great program. It has a fifty percent success rate but that is good. The county also has conditional discharge and diversion options. With respect to the requirements for admission to the drug court program, Judge Pahl can understand that when an attorney believes that a case has been overcharged that they would be reluctant to recommend a guilty plea to their clients since the fifty percent that don't succeed end up with a conviction. The Hispanic population of the county is approximately fifteen percent although it is closer to fifty percent in some areas. Judge Pahl does not believe there are any Hispanic attorneys in the area. There are Native American attorneys who practice in the tribal court and occasionally appear in the county courts.

Umatilla County District Attorney Dean Gushwa was appointed by the governor in January of 2007. He was a deputy district attorney in the office for thirteen years and also worked briefly as a defense attorney in private practice. He has eight deputies who prosecute cases in four courtrooms in two separate courthouses. It takes forty-five minutes to travel from one courthouse to the other. The county did not provide any additional staff for the office when the new courthouse opened in Hermiston. He has tried to create uniform policies for both facilities and meets weekly with all of the deputies. There needs to be proportionality in negotiated pleas and the handling of cases. One deputy is assigned to juvenile court and is located at the juvenile department. She handles both dependency and delinquency cases. His office has experienced significant turnover this year, losing four of its deputies, but there have been more applicants for open positions lately. IPD is doing a very good job and maintains a very collegial atmosphere among its attorneys. The attorneys comport themselves professionally and have good working relationships with his office. In the past some non-IPD lawyers filed frivolous motions but IPD lawyers do not. They use whatever ethical legal mechanisms they can, however, to help their clients. In death penalty cases, Mr. Gushwa believes that if the conduct meets the elements for aggravated murder, the sentencing jury should be the body which decides whether a death sentence will be imposed, not the district attorney, unless there is a very unusual circumstance such as mental retardation. Mr. Gushwa said he believed that other district attorneys take an even stricter view. Since he took office he has made it his policy to provide discovery to the defense at the time of arraignment. He would like to be able to provide it electronically in the future.

Judge Jeffrey Wallace is assigned to the Hermiston courthouse, which opened in March of 2006 after the previous structure was destroyed by fire. With more cases now being heard there the defense attorneys have to do more traveling. Because the western part of the county is growing more rapidly than the eastern portion it is expected that number of cases assigned to Hermiston will continue to grow. Blue Mountain Defenders also handles cases in Heppner, the county seat for Morrow County, which is located forty-eight miles south of Hermiston. Judge

Wallace has been very happy with both IPD and Blue Mountain Defenders. They are dedicated lawyers who do a good job. He is pleased with the quality of representation they provide. Post conviction relief cases filed by inmates at the two prisons in Umatilla County are generally heard by senior and *pro tem* judges in Salem.

Doug Fischer, the director of IPD, described the board of directors that oversees his office. He said that IPD continues to have difficulty recruiting and retaining attorneys. All of the members of the BMD consortium were initially recruited and trained by IPD. Three attorneys have fifteen years or more of experience. The others all graduated from law school within the last couple of years. Training is provided to new attorneys by Mr. Fischer and other experienced attorneys. He would like to see public defense providers pool their resources and create training programs for new attorneys. While attorneys in the past believed that when they represented children in dependency cases they could just adopt the position taken by DHS, that approach is changing. It is now becoming the expectation that counsel in these cases will make an independent decision about the interests of the child.

Toni Sloan and Nancy Paxton with the Citizen Review Board said that while attorney attendance at CRB hearings is very good, the attorneys often appear not to have met with their child clients prior to the hearing. They generally express what they believe to be in the child's best interest, although they may have no independent information upon which to base this belief. They do not generally inform the board what the child's wishes are. More children, especially those who are fourteen or older, should be encouraged to attend the reviews and express their own preferences. They are also concerned that attorneys for children may sometimes align themselves with the position taken by a parent's attorney even though it is not in the child's best interest. In most cases IPD is appointed for one of the parents and BMD is appointed for the child and any other parent.

Craig Childress, the administrator of the BMD said that he organized the consortium. It operates like a small firm with some "satellite" attorneys available in conflict cases. There are a total of eight members of the consortium. Mr. Childress and Dan Stephens share office space and handle most of the cases. In setting up the office they created the necessary safeguards to protect clients from conflicts and breaches of confidentiality. If they take similar positions on behalf of their individual clients it is because each of them has determined that such a position is in the client's best interest. Cases are assigned within the consortium according to criteria established by the members specifying the type and number of cases each of them wished to handle. The attorneys meet regularly and discuss their caseloads. The attorney handling a case receives the full amount of compensation that the consortium is paid by OPDS. BMD is proposing to create a board of directors in 2008. Mr. Childress also volunteered to respond to questions that Commissioner Welch had posed to Mr. Fischer.

Commissioner Welch said it might be appropriate for the larger juvenile court community to discuss the role of counsel for children. Mr. Childress agreed and said that he does visit with child clients and explores both the expressed wishes and the best interest of his client and conducts his own investigation. He said he went to law school to become a juvenile attorney and worked for seven years in Douglas County before coming to Umatilla County. He and all the members of the BMD consortium have passion for their work. Not all lay people understand the role of attorneys and the need to question witnesses and sometimes take an aggressive stance in a case.

Nina Kik is the Umatilla County Drug Court Coordinator. She described the creation of the drug court, the eligibility criteria, and the process for screening applications and admitting clients. While Mr. Fischer was involved in the planning committee for the drug court she would like to see other defense attorneys participating in the decisions that are being made about the policies of the court. Some attorneys discourage clients from entering the program. She acknowledged that some were likely to fail (twenty of the forty-four who had entered the program had been terminated from the program) but said that the program tries to meet the needs of the individual clients, including those who require in-patient treatment.

### **Service Delivery Plan for Judicial District 6**

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

# Attachment 3

**OPDS's Draft Report to the Public Defense Services Commission  
on Service Delivery in Judicial District No. 10  
Union and Wallowa Counties  
(December 13, 2007)**

**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. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Washington, 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 conditions of Union and Wallowa Counties' public defense system undertaken in preparation for the PDSC's public meeting in Pendleton on November 7, 2007 and a summary of the testimony provided at that hearing. The final version of this report will contain PDSC's service delivery plan for Judicial District No. 10.

**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 such as this, 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. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and the criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole criminal and juvenile contractor in Benton County. Another site visit is planned for Columbia County in December of 2007.

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 has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and developed a statewide Service Delivery Plan for juvenile representation.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in these 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.<sup>1</sup> 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” 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

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<sup>1</sup> 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).

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 task of addressing performance issues with operational implications.

### Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of

the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. 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 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.<sup>2</sup> 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 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

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<sup>2</sup> Spangenberg and Beeman, *supra* note 2, at 36.

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.<sup>3</sup> 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 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.

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<sup>3</sup> Id.

Consortia offer the advantage of access to experienced attorneys who prefer the independence and flexibility associated with practicing law in a consortium in which they still represent public defense clients 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, in post-conviction relief 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.

### **OPDS's Preliminary Investigation in Judicial District No. 10**

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 this.

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.

On November 7, 2007 from 9:00 a.m. to 1:00 p.m., PDSC held a public meeting in Room 316 of the Umatilla County Courthouse in Pendleton, Oregon. The purpose of that meeting was to (a) consider the results of OPDS's investigation in the district as reported in the preliminary draft report, (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 10.

This draft report is intended to provide a framework to guide the Commission's discussions about the condition of the public defense system and services in the district, and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the district's delivery system. The initial draft was intended to offer guidance to PDSC's invited guests at its November 7, 2007 meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving Judicial District No. 10's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice systems in these two counties is 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 Judicial District No. 10.

## **OPDS's Findings in Judicial District No. 10**

### **Circuit Court**

Judicial District No. 10 is comprised of Union and Wallowa Counties. There are two courthouses in the district, one in La Grande and one in Enterprise. The distance between the two courts is 65 miles and the travel time, in good weather, is approximately 1½ hours.

There are two judges in the Tenth Judicial District,<sup>4</sup> Presiding Judge Phillip Mendiguren and Judge Russell West. Both have courtrooms in the Union County Courthouse and both hear cases at the Wallowa County Courthouse as well.

### **Public Defense Providers**

There are currently two consortia which provide representation in criminal and juvenile cases in the Tenth Judicial District – the Union/Wallowa Indigent Defense Consortium (UWIDC) - “the men’s consortium” - and the Union/Wallowa Women’s Consortium (UWWC). The men’s consortium includes five attorneys (two of whom are women) and handles all case types except murder and aggravated murder. It contracted to provide representation in a total of 1,470 cases over the two year period ending December 31, 2007. In addition it received \$1,000 per month to cover drug court and \$1,000 a month to cover the early disposition program.

The women’s consortium is comprised of three attorneys, one of whom is also a part of the men’s consortium. It contracted for a mixed caseload of 384 cases for the two-year period ending December 31, 2007.

All of the attorneys are experienced and handle all case types under the two contracts. They all practice in both counties and many of them also appear in cases in neighboring counties when needed. The court sometimes requests that

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<sup>4</sup> In an effort to describe the workload in the district, it was reported by the Judicial Department that there were 1,395 cases of all types including violations filed per each judicial position during the period of January 1 to June 30, 2007. There were 649 cases per judicial position if violations are excluded. The statewide average without violations for this period was 1,008. During the same period one felony and 3 misdemeanors were tried in Wallowa County, and 12 felonies and 20 misdemeanors in Union.)

a particular attorney be assigned to a case based on the attorney's special expertise.

For the next contract cycle, both groups have discussed publicly their intention to form a single consortium that includes all of the current members. Differences between consortium members in the past caused the attorneys to reorganize periodically. Those currently working under contract believe they can be more effective and efficient as a single consortium. Rick Dall has been the administrator of the men's consortium and is expected to be the administrator of the joint consortium if the contract proposal is approved by the Commission.

### **Union County**

The population of Union County in 2006 was 25,110. La Grande is the county seat. Union County has not experienced the kind of dramatic shifts in general fund dollars available for county services that other rural counties in Oregon have.

Union County District Attorney Timothy Thompson was appointed to his position in October of 2006. Prior to that appointment he had worked as a deputy district attorney in Josephine County for a number of years and at the Department of Justice for eight years. He currently has two deputies although the office previously had three and may add a third in the future. The County just received a grant for a half-time prosecutor to specialize in domestic violence cases. The three-county region of Union, Baker and Wallowa received a five-year grant for \$250,000 per year.

Mr. Thompson said that criminal filings are down in Union County but he believes they will increase as soon as the cases currently in the system have been cleared and he recommends that the Commission not see this temporary reduction as a long-term development.

Mr. Thompson said that all of the members of both consortia are competent and experienced and he hopes that PDSC will take the necessary steps to allow these attorneys to continue handling public defense cases. He said that Rick Dall is well suited to the administrator role.

### **Criminal Cases**

In criminal cases, attorneys are present for arraignments. Out of custody arraignments occur on Tuesdays. The district attorney selects some cases for early plea offers. Mr. Dall, the contract administrator meets with the defendants in these "rocket docket" cases and discusses the district attorney's offer with them. If a defendant decides to accept the offer he or she generally waives

counsel and proceeds to entry of plea and sentencing<sup>5</sup>. Those who are uncertain can have additional time to consider the offer. Offers are extended in approximately 95% of misdemeanor cases and only occasionally in felony cases.

Cases that don't settle at arraignment are set for pretrial conferences. Only those cases that are not resolved at the pretrial conference are set for trial.

The judges reported that there is an active motion practice in the county

### Drug court

There has been a drug court in Union County for seven years. The court meets weekly. As of mid-September the drug court had graduated 35 clients, terminated 16, and was currently serving 19. The District Attorney would like to see the number increased to 40. The program is currently open to applicants charged with drug possession but not manufacture. It is also open to clients charged with property offenses. Mr. Dall is the attorney who represents defendants at drug court hearings. In Union County, (unlike Umatilla County, for example), applicants for drug court generally negotiate with the District Attorney over which charge or charges will be admitted and discharged upon successful completion of drug court.<sup>6</sup> No plea or stipulation is required in order to apply for admission to the program.

### Comments on the criminal system

The District Attorney has been meeting with the judges on a regular basis to discuss procedure in criminal cases. Last month the defense bar was included in the meeting. One of the issues that Mr. Thompson believes should be addressed at a future meeting is the number of many mandatory appearances in criminal cases. Written pleas are accepted in misdemeanor cases but parties are required to appear in person in felony cases and the District Attorney believes there may not need to be as many appearances as are currently scheduled.

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<sup>5</sup> A copy of PDSC's Guidelines for Participation of Public Defense Attorneys in Early Disposition Programs is attached as Exhibit A. The guidelines contemplate that counsel will establish an attorney/client relationship with the defendant in an early disposition proceeding and that the court will allow the attorney to continue the matter, if necessary, to perform an investigation before advising the defendant how to proceed. It is not clear whether the Union County EDP includes legal representation in this sense.

<sup>6</sup> The PDSC will be reviewing the representation of drug court clients at one of its monthly meetings in 2008.

### Comments on the quality of representation in criminal cases

It was reported that there was a period when attorneys were doing most of their own investigation. They now appear to be hiring investigators more often.<sup>7</sup>

One court representative said that defense attorneys don't always assess their cases early enough in the process.<sup>8</sup> While the attorneys generally do a good job for their clients, one attorney is sometimes not prepared to proceed.

The court said it would be beneficial to their clients if attorneys were able to get them involved in treatment before sentencing or at least come to court with a plan for the client. These issues will also be discussed at the next monthly meeting of the court, the district attorney and the defense bar.

### Juvenile Cases

Juvenile cases are heard by both of the Circuit Court judges. Court staff tries to ensure that each case is consistently assigned to the same judge.

### Delinquency cases

The juvenile director estimated that attorneys are appointed in approximately 70% of the delinquency cases in Union County. In the remaining 30% the youth generally make an admission without requesting counsel. The court regularly schedules reviews in juvenile delinquency cases and appoints the same attorney who represented the youth in the original case upon request.

The county expects to open a juvenile drug court in the near future.

### Comments on quality of representation in delinquency cases

The juvenile director said that the lawyers in Union County seem to be in good contact with their juvenile clients. He said it is unusual for delinquency cases to go to trial. Defense attorneys have not often challenged their client's competency but youth under twelve are rarely prosecuted in the county. He also said that private attorneys seem to obtain psychological evaluations of their clients in sex offense cases more often than public defense attorneys.

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<sup>7</sup> OPDS's records confirm that Union County attorneys are requesting approval for investigation expenses on a regular basis.

<sup>8</sup> This representative also said that the district attorney's office doesn't always make offers in a timely manner.

### Dependency cases

DHS files its own petitions in Union County with assistance from the district attorney's office, which appears in all dependency cases.

The court has recently begun appointing attorneys at the initial shelter hearing in dependency cases. Some attorneys are concerned about their ability to be prepared for these hearings since they generally receive less than complete discovery.

### Comments on quality of representation in dependency cases

One local juvenile system representative said that the general quality of representation provided by consortia attorneys is good. They attend Citizen Review Board hearings as well as court reviews and present useful information. There is one attorney who does not appear to be meeting with her child clients, however. A second attorney is reported regularly raise issues involving legal technicalities that do not appear to be in his client's interest.

## **Wallowa County**

Wallowa County had a population of 7,140 in 2006.

Both criminal court and juvenile court proceedings are held on Wednesdays in Enterprise, including drug courts for adults and juveniles. Pleas and pretrials in adult criminal cases are heard at 10:00 a.m. and juvenile cases at 2:00 p.m. In addition, one of the judges sits in Enterprise four to five days per month to hear trials. Each of the consortium attorneys appears in Enterprise at least once a month. Attorneys are required to be in court and are not permitted to participate from remote locations. Appearances in misdemeanor cases (in which clients are not required to be present), however, may be handled in writing.

Wallowa County prisoners are currently held in the Umatilla County Jail in Pendleton. As of November 15<sup>th</sup>, however, they will be held in the Union County Jail in La Grande, facilitating contact between consortia attorneys and their clients.

In-custody criminal arraignments are conducted via video connection with the judge in his chambers in La Grande, the District attorney at the courthouse in Enterprise, and the defendant at the jail. Defense attorneys are not present for arraignments because appointment of counsel does not occur until a request is made at arraignment. The attorney is notified promptly, by fax, of the appointment. A release hearing can be scheduled as soon as the following judicial day.

With respect to shelter hearings in dependency cases, because they generally have up to twenty-four hours notice the attorneys are generally able to be present in the courtroom with the parents, DHS and the District Attorney. The judge ordinarily appears by video connection from his chambers in La Grande. The District Attorney's office is appearing in all juvenile dependency cases at this time.

Mona Williams, the District Attorney for Union County, took office in January of 2007. She had no prosecutorial experience at the time. She said that the county budget is stretched tight. The sheriff's office is short-handed and her office could use another deputy or at least an investigator. The loss of timber revenue has had a big impact on the county. The last mill in the area closed recently and there was only a one-year extension of funding under the Secure Rural Schools and Community Self Determination Act.

Ms. Williams said that the number of criminal filings had increased somewhat in the past year, although the number of methamphetamine cases declined during the same period.

She indicated that both defense consortia appear to be good advocates for their clients and are willing to try cases. She had a lot of trials when she first took office; presumably because the defense attorneys were testing her. There is not a lot of motion practice in the county, however.

### **OPDS's Recommendations for Further Inquiry at PDSC's November 7, 2007 Meeting in Pendleton**

In light of the information which came to its attention during interviews with representatives of the juvenile and criminal justice systems in the Tenth Judicial District, OPDS recommended that Commission members focus their inquiries and discussion at the November 7 meeting in Pendleton on the following topics.

#### **Structural Issues**

While the consortium model may work the best for attorneys practicing in Eastern Oregon Counties, it should be possible for the consortium to become a more stable organization, even if the membership may change from time to time.

Instead of restructuring periodically, the attorneys currently providing service in the area should be able to create an organizational structure that can meet their needs, the needs of their clients, and the needs of the court and OPDS over time. The Quality Assurance Task Force's list of best practices for public defense providers was given to Mr. Dall to consider when the new consortium is formed.<sup>9</sup>

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<sup>9</sup> A copy of the list is attached as Exhibit B.

## Retention of Attorneys

Most of the persons interviewed expressed appreciation for the quality of representation being provided by the experienced attorneys currently handling cases in the Tenth Judicial District. They asked that sufficient support be given to these attorneys to permit them to continue to do the job. It would probably be very difficult to replace any of these attorneys with attorneys having similar levels of experience. In addition, the lawyers are required to travel relatively long distances, sometimes in severe weather conditions, to meet with their clients and attend court hearings. The Commission's funding priorities established at its August retreat<sup>10</sup> should be applied by OPDS in its contract negotiations with this group of lawyers to make it possible for them to continue to represent public defense clients and attract additional attorneys as needed.

## Quality of Representation Issues

While the quality of representation provided in the district is generally regarded as very good, there are certainly some issues that need to be addressed. If lawyers are not meeting with their child clients, plans need to be made for them to do so.<sup>11</sup> If attorneys are coming to court unprepared, this information needs to be provided to the consortium administrator, and the consortium needs to have in place procedures for addressing issues of attorney underperformance, as well as the other policies and procedures outlined in the list of best practices.

## **Summary of Testimony at November 7, 2007 Meeting**

Judge Phillip Mendiguren, the presiding judge in Judicial District No. 10, discussed how both the two judges in the district and the defense attorneys must spend a significant amount of their time traveling between courts. He described the operation of the "rocket docket" in Union County, the drug courts in both counties and the recent addition of a juvenile drug court in Union County. He described a recent encounter with a drug court graduate which made him realize how worthwhile the time and effort invested in drug courts can be. He said that if he became aware that an attorney was not performing adequately he would notify Rick Dall, the new consortium administrator. But quality is a product of adequate compensation. Conflicts do arise between attorneys and their clients but when communication breaks down a motion for substitution is almost always granted. It is difficult for the court to rule on some of these motions because the attorneys do not provide any information about the substance of the conflict, which they say they cannot ethically reveal. On legal issues attorneys can be trusted to cite appropriate legal authorities.

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<sup>10</sup> A copy of the minutes of the Commission retreat are attached as Exhibit C.

<sup>11</sup> All OPDS contractors recently received a statement from OPDS regarding its understanding of the role of counsel for children. The statement is attached as Exhibit D. OPDS is asking each contract applicant to describe its plan for meeting these expectations if it is not already doing so.

Rick Dall described the history of the two public defense consortia in the district and their proposal in this contract cycle to form a single consortium - the Grand Ronde Defenders - comprised of all six members of the existing consortia. The group has already arranged with an independent attorney to handle drug court cases in Enterprise so that consortium members do not have to make that weekly appearance. In addition, this attorney has agreed to cover arraignments for consortium attorneys. The group intends to create a board of directors and a more structured organization that will have the capacity to remove members, if necessary, who are not performing adequately. Cases are currently distributed among members on a rotation basis although a single attorney will generally be assigned to all of the pending cases for a particular defendant. All of the member attorneys are qualified to handle all of the case types that the group contracts to handle. Caseloads have been down in Union County in the past year although both the district attorney and the defense lawyers expect that they will increase now that the new district attorney has been appointed. Under the circumstances, there has been no need for additional defense lawyers. Mr. Dall noted that attorneys in the consortium receive lower rates of compensation than attorneys in neighboring counties even though they do more traveling.

Anne Morrison and Victoria Moffet described their own backgrounds and the formation of the "women's consortium." Ms. Moffet has been a member of both consortia. They discussed in detail the difficulties involved in trying to visit with clients who may be located in distant parts of the state because of the lack of local treatment and placement services, about the lack of defense resources such as investigators, interpreters and mental health evaluators. They suggested that OPDS recruit investigators to the area and consider whether it would be possible to assign a "courtesy" attorney to juvenile clients who are located in distant areas, much like the "courtesy workers" assigned by DHS. Both attorneys noted that the court's recent decision to appoint counsel at shelter hearings has had a significant impact. Some cases proceed no further than the shelter hearing when it becomes clear that there are no jurisdictional grounds. Ms. Moffet also said that the early disposition program is resolving some of the minor cases to the benefit of clients. She said that it has been difficult to communicate with the district attorney's office in juvenile delinquency cases and that the juvenile department staff has not been adequately trained to draft petitions or determine whether the requisite elements of an offense are present before filing a petition. District Attorney Tim Thompson is working to improve this process.

### **A Service Delivery Plan for Judicial District 10**

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

# Attachment 4

## PUBLIC DEFENSE SERVICES COMMISSION

### The Executive Director's Biennial Report to the Oregon Legislative Assembly (July 1, 2005 – June 30, 2007)

#### Introduction

**Mission:** In July of 2003 the Public Defense Services Commission (PDSC) assumed full responsibility for overseeing and administering Oregon's public defense system which 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 people facing involuntary commitment due to concerns regarding their mental health are entitled to representation by court-appointed counsel. Attorneys were appointed in more than 179,000 cases in Oregon in FYE 2006.

As all members of Oregon's public safety system realized after the cuts to Oregon's public defense budget in 2003 prevented timely prosecution in thousands of criminal cases, the State cannot prosecute crime and hold offenders accountable, cannot protect children and families, and cannot involuntarily commit those in need of commitment unless it provides constitutionally mandated public defense services to individuals facing such consequences.<sup>1</sup>

**Representation in Trial and Appellate Proceedings:** The PDSC must ensure the provision of effective assistance of court-appointed counsel in both the trial and appellate courts. PDSC delivers these services in most criminal appeals directly through state-employed lawyers in its appellate division (the Legal Services Division), and in all other cases through private contractors, whose contracts with PDSC are negotiated and managed by its Contract and Business Services Division, or through attorneys and other providers who are approved by PDSC and paid on an hourly basis.

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<sup>1</sup> In addition to providing constitutionally mandated services, Oregon's public defense attorneys also contribute directly to public safety by, for example, advocating for effective criminal sanctions that assist clients in addressing the issues which brought them to the attention of the criminal justice system, for family placements when possible in juvenile dependency cases, and for dispositions in juvenile delinquency cases that promote the reduction of crime and delinquency.

**PDSC Achievements: 2003-2005:** During the 2003-05 biennium, PDSC (1) led the public defense system through the aftermath of a fiscal and public safety crisis caused by the special session cuts in the public defense budget, (2) reorganized the structure of the state's public defense system, (3) developed new administrative operations with a new office and management team, and (4) implemented statewide initiatives to improve the quality and cost-efficiency of public defense services, including (a) new methods of selecting and training public defense attorneys in its Legal Services Division, (b) a comprehensive "service delivery planning process" for the evaluation and improvement or reorganization of local service delivery systems in counties throughout the state, and (c) a contractor site-visit process involving teams of volunteer public defense lawyers and managers to evaluate the operations and performance of PDSC's public defense contractors across the state and to identify best practices in public defense law office management.

**2005-2007:** Because of these earlier accomplishments and initiatives, 2005-07 was the biennium when PDSC fully realized its potential as an effective statewide administrator of an integrated state public defense system.

PDSC is now well along in its comprehensive review of the structure and operation of Oregon's public defense system and its evaluation of public defense providers. A significant portion of the state's public defense delivery system has been reviewed, evaluated and, in some instances, reorganized. PDSC will continue these processes in support of its effort to provide quality, cost-efficient legal services throughout the state.

PDSC's Contract and Business Services Division is a highly effective administrator of the contract system and manager of PDSC's internal operations.

PDSC's Legal Services Division has made significant strides in its effort to provide high quality legal representation to its appellate clients, to become a model law office and working partner with the appellate courts and the Department of Justice in the orderly administration of the appellate process, and to serve as a resource for other public defense providers in the state.

Through these efforts, the commission now has the knowledge and capacity to provide the Legislature with accurate and reliable information about the condition and needs of Oregon's public defense system and about the level of funding necessary to ensure the continued operation of a system that is essential to the state's justice system and to the safety of all Oregonians.

### **I. A brief Description of PDSC's Organization and Operations**

The Public Defense Services Commission is a seven-member commission that serves as the board of directors for Oregon's public defense system, providing policy direction and oversight for the administration of the system.<sup>2</sup> Members of the commission are appointed by the Chief Justice, who serves as an ex officio, non-voting member. Two of the commission's seven members must be non-attorneys and one member must be a

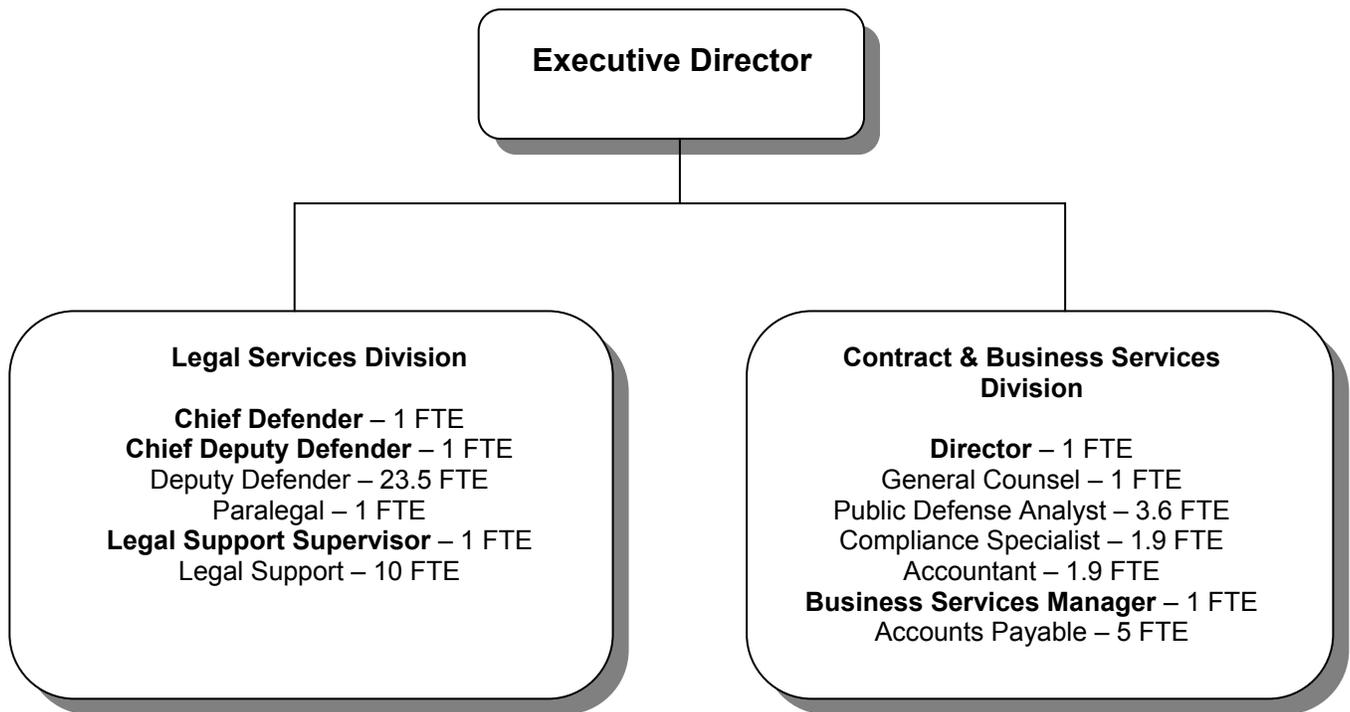
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<sup>2</sup> See generally ORS 151.216 et seq.

former prosecutor. Another member must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state.<sup>3</sup>

The commission established the Office of Public Defense Services as its administrative agency and appointed an executive director. Ingrid Swenson is the current executive director of the agency.

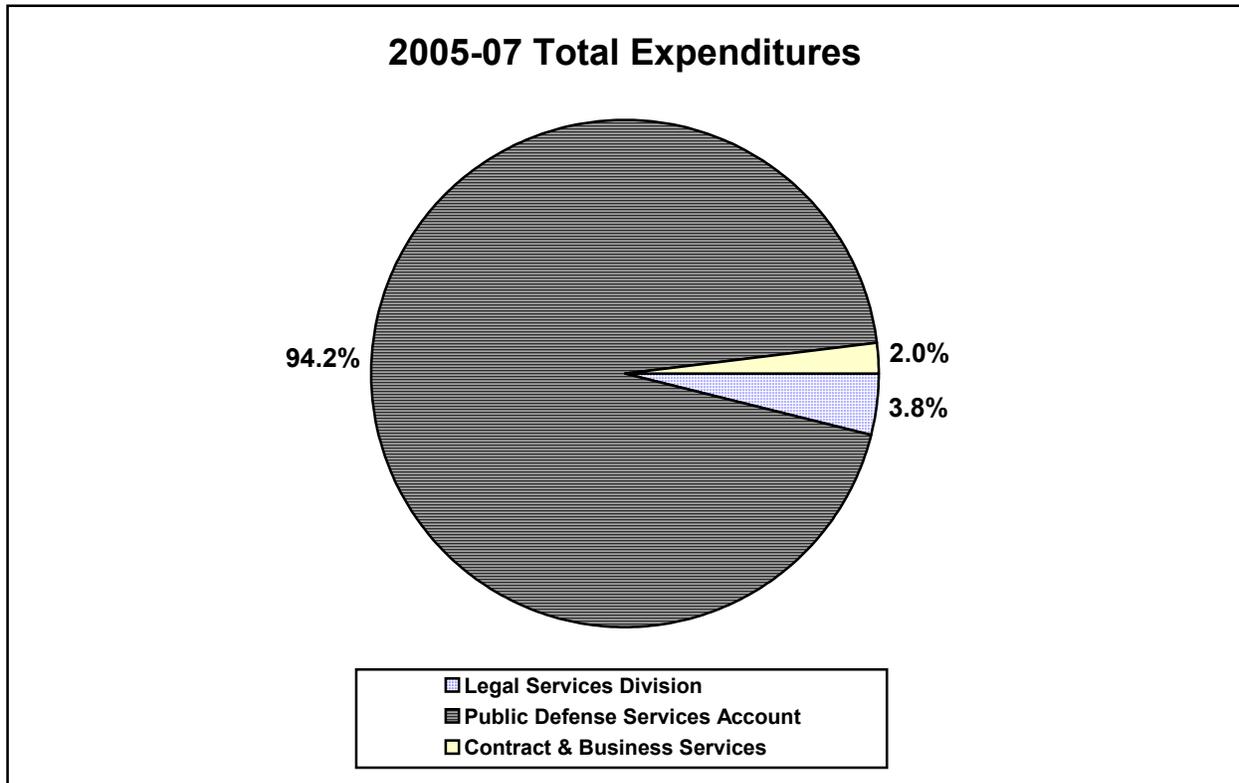
As the Organizational Chart for 2005-2007 below indicates, the Office of Public Defense Services is comprised of two divisions: the Legal Services Division (LSD), which provides direct legal representation in criminal appeals; and the Contract and Business Services Division (CBS), which administers the Public Defense Services Account which funds representation and related services in all criminal, juvenile, and civil commitment cases at the trial and appellate levels except for the criminal appeals assigned to the Legal Services Division. CBS negotiates with private contractors for these services and pays the bills. In addition, it manages the office and business functions of the two divisions.



Peter Gartlan is the Chief Defender and the manager of LSD, and Kathryn Aylward is the manager of the CBS division.

<sup>3</sup> The current members of PDSC are listed in Appendix A.

The chart below sets forth the 2005-2007 funding allocations for the two divisions and for the Public Defense Services Account which is the fund from which private contractors, hourly rate attorneys and other private service providers are paid.



## II. PDSC's Challenges and Accomplishments in 2005-2007

### ***A. Ensuring accountability through strategic planning and performance measurement.***

#### 1. PDSC's mission, plan, policies and performance measures

PDSC's mission is to ensure the cost-efficient delivery of quality public defense services in Oregon. To carry out that mission, the commission adopted a comprehensive Strategic Plan for 2005-2007<sup>4</sup> that articulates its long-term vision and values for the state's public defense system and commits PDSC to a set of specific goals and strategies. To ensure that all of the strategies in PDSC's Strategic Plan are fully implemented, the commission directed its management team to integrate the plan into the agency's day-to-day operations and use it as the basis for a performance-based employee evaluation system.

<sup>4</sup> Now revised for 2007-2009. A copy of the revised plan is attached as Appendix B.

PDSC's Strategic Plan recognizes the commission's need to hold itself accountable to the public and the Legislature through performance measures. PDSC is a results-based organization with employees and managers who establish performance standards and outcome-based benchmarks and who implement those measures and day-to-day best practices and hold themselves accountable through regular performance evaluations.

PDSC has also adopted personnel policies and procedures that call for regular evaluations of every PDSC employee using standards developed by the agency's employees and linked to the commission's mission, goals, strategies and performance measures and to each employee's annual work plan. Performance and not simply seniority is the key to an employee's advancement and promotion at PDSC.

Finally, PDSC developed performance measures<sup>5</sup> that track the key outcomes and outputs of its two divisions. Its appellate division, which will ultimately include 39 appellate lawyers, has adopted performance measures that track its appellate caseload and measure its progress in ensuring the delivery of quality, cost-efficient public defense services in Oregon's appellate courts. The commission's Contract and Business Services Division has developed performance measures that track the extent to which the division's internal operations promote timely and accurate approval and payment of public defense costs and, thus, effectively support the cost-efficient delivery of legal services. Even the PDSC itself, as a board of directors for the agency, will measure its performance under a new measure adopted by the 2007 legislature.

## 2. Managing the appellate caseload

For a number of years both the Legal Services Division and the Department of Justice have had a backlog of cases awaiting briefing. The Legal Services Division considers a case to be in the backlog if the opening brief has not been filed within 210 days of the date that the transcript is final or "settled." After making significant progress on the elimination of its backlog from earlier biennia, as measured by Key Performance Measure 1, the Legal Services Division experienced a 27% increase in the number of criminal appeals in 2005-2007. This increase was attributable almost entirely to the United States Supreme Court decision in *Blakely v. Washington* which directly and dramatically affected Oregon's sentencing guideline system.

OPDS identified significant inefficiencies associated with untimely appeals, including the need to prepare and submit motions to the court to postpone the due date for opening briefs and the need to respond to an ever-increasing client base regarding client

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<sup>5</sup> Key Performance Measure 1 tracks the number of cases in the Legal Services Division's backlog; Key Performance Measure 2 tracks the percentage of fee statements reduced due to incorrect billing; Key Performance Measure 3 measures the percentage of fee statements processed within 10 business days; and Key Performance Measure 4 measures the percentage of non-routine expense requests reviewed within 5 business days. As reported to the 2007 Legislative Assembly targets were exceeded in the three latter categories, but there was a substantial increase in the appellate backlog tracked by Key Performance Measure 1.

inquiries about the status of their cases. The division estimated that it could eliminate the need to prepare approximately 3,500 separate documents (motions and correspondence) per year if briefs were filed in a timely manner.

In order to improve the quality of its work and make progress on its backlog, the appellate division created results-based attorney work plans and regular performance evaluations. Attorneys were working well beyond the limits recommended by national standards,<sup>6</sup> with a per attorney annual caseload of 48.5 cases. In 2007, the Legislative Assembly approved a new appellate mandated caseload adjustment and the addition of eight full-time equivalent positions that aligned the division with Department of Justice caseload growth projections.<sup>7</sup> This should permit the agency to eliminate its backlog by the end of the 2007-2009 biennium and begin to reduce the 210-day period to a more reasonable time period for filing the opening brief.

In addition, the Legislature approved funds for a four-attorney juvenile appellate section in the division to establish consistency and quality standards in juvenile appellate representation.

### 3. Efficiencies achieved by the Contract and Business Services Division

In addition to negotiating over 90 contracts for provision of legal services, the Contract and Business Services Division manages the non-routine expense authorization process that was formerly overseen by judges in the 27 individual judicial districts. The agency has created a peer-review process which has helped to clarify which expenses are truly “reasonable and necessary” as required by ORS 135.055. It is important to process these requests promptly so that necessary services, such as investigation, can be undertaken promptly before evidence dissipates or witnesses become unavailable. PDSC’s Key Performance Measure 4 measures the percentage of non-routine expense requests reviewed within 5 business days. In 2005-2007 the agency far exceeded its targets by processing 94-95% of the requests within the targeted 5-day period.

In 2004, CBS created and continues to administer a complaint system to address concerns regarding the quality of representation. The agency works closely with the Oregon State Bar to monitor the performance of attorneys handling court-appointed cases.

CBS has five accounts payable staff who process the operating bills for both LSD and CBS as well as all fee statements submitted for payment from the Public Defense Services Account. Over 20,000 payments are reviewed and processed per year. The

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<sup>6</sup> The American Council of Chief Defenders recently issued a Statement on Caseloads and Workloads that endorsed the 1980 National Legal Aid and Defender Association standard of 25 non-capital cases per year.

<sup>7</sup>The 2007 Legislative Assembly directed a number of agencies, including PDSC, to develop a process for determining mandated caseload adjustments in public safety-related agencies.

agency's guideline rates paid to public defense providers are well below the rates many service providers normally charge. By assuring prompt and reliable payment in accordance with the agency's Key Performance Measure 3, the agency finds that providers are more willing to work at the below market rates paid by PDSC. In late 2004, an agency employee developed a technological improvement that eliminated the need for duplicate data entry. Not only did this speed the processing of bills but it also eliminated the chance of error in the transfer of information between accounting systems. In addition, the agency uses three levels of review to ensure accuracy of fee statements. Key Performance Measure 2 tracks the percentage of fee statements reduced due to incorrect billing.

When CBS (formerly the Judicial Department's Indigent Defense Services Division) merged with LSD (formerly the State Public Defender's Office) in July 2003, CBS division staff brought with them a wealth of expertise in database development and document management. At the time of the merger, the Legal Services Division was using a custom database developed by an outside vendor. There was no in-house support and the database had not been updated or modified in years. In addition, both divisions have now reduced the costs associated with document production and postage through the use of email to transmit attorney correspondence and expense authorizations and the agency will continue to expand and automate these procedures. CBS also devised more efficient methods for printing the appellate division's briefs and developed protocols for electronic storage of billing and contract files.

Data compiled for key performance measures led the management team of PDSC to reassess how resources were being deployed between the two divisions. CBS was exceeding targets related to expense request and payment processing while LSD continued to battle its backlog of cases. In the fall of 2006 the agency began to centralize all administrative functions for the agency within CBS in order to allow the Legal Services Division staff to focus exclusively on case-related work. The agency expects to see a significant reduction in the appellate backlog as a result of this change and the addition of eight new staff positions.

***B. Improving the quality and cost-efficiency of PDSC's contract legal services.***

Although Oregon's non-death penalty trial level public defense caseload increased 47% since FYE 1995 requiring significant increases in appropriations to the Public Defense Services Account, real income for contractors and hourly rate attorneys continued to decline in 2005-2007<sup>8</sup> since funding for that biennium covered caseload increases but not an increase in the hourly rate (which had remained unchanged since 1991) or an

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<sup>8</sup> In past biennia the legislature funded mandated caseload costs using the standard Department of Administrative Services inflationary adjustment instead of the personal services adjustment. Those adjustments were not adequate to cover the increased cost of services, which are largely personal services, rendered by OPDS contractors. As a result contractors were forced to accept more cases in order to meet rising health care and other personnel costs that were beyond their ability to control until they reached a point at which caseloads on average exceeded national standards by approximately 30%.

increase in case rates for the great majority of PDSC's contractors),<sup>9</sup> PDSC's mission nevertheless required that it continue to pursue improvements in the quality of services provided.

### 1. PDSC's service delivery planning process

One of the agency's principal quality and cost-efficiency initiatives is the commission's service delivery planning process. This process which began in 2003 includes holding public meetings in every region of 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 commission's service delivery review 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. PDSC has completed investigations and evaluations of the local public defense systems in Benton, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam, Sherman, Clatsop, Washington and Wheeler Counties. These counties represent 67 percent of Oregon's public defense caseload. As part of this process, the commission developed Service Delivery Plans in each of those counties to improve the structure and operation of their local public defense systems and the quality of the legal services provided by those systems.

In addition, in 2005-2007 the commission reviewed the delivery of services in juvenile cases and in death penalty cases.

As a result of its investigation in juvenile cases, as well as the findings of two previous task forces of the Oregon State Bar on indigent defense services, PDSC undertook a number of initiatives to improve the quality and consistency of juvenile defense services across the state. PDSC worked closely with a group of legislators<sup>10</sup> who introduced SB 411 in the 2007 session. This measure would have provided additional compensation and reduced caseloads for attorneys in juvenile dependency cases. Unfortunately, this measure was not successful. PDSC supports the work of the Juvenile Law Training Academy Workgroup which sponsors an annual comprehensive training for juvenile lawyers. The new juvenile appellate section at LSD is expected to become a resource center for juvenile lawyers at the trial level once its staff is selected and trained. PDSC

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<sup>9</sup> In the 2007 legislature, the Co-Chair's budget included an appropriate inflationary adjustment that will prevent contractors from continuing to fall further behind. This is a significant improvement over previous biennia.

<sup>10</sup> The "gang of four" legislators who proposed a series of measures to address issues related to children in foster care was comprised of Senator Kate Brown, Senator Jeff Kruse, Representative Wayne Krieger and Representative Mike Schaufler.

is considering other measures to improve the quality of representation in juvenile cases, including possible certification of attorneys specializing in the practice of juvenile law.

After its review of the delivery of services in death penalty cases,<sup>11</sup> PDSC approved implementation of the American Bar Association's Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, which impose exacting standards on both the agency and its contractors in death penalty cases.

## 2. PDSC's Contractor Advisory Group

PDSC established a Contractor Advisory Group in 2003 to provide input and assistance to the commission's executive director on a wide range of matters, including attorney qualification standards, early disposition programs, reform of post-conviction relief, regional training, improving the contracting system and legal developments affecting public defense. PDSC recognizes the importance of close collaboration with its contractors to ensure that Oregon's public defense contracting system delivers quality legal services cost-efficiently. While the commission must maintain an arm's-length relationship with its public defense contractors in the course of negotiating and administering their contracts, the commission must also take into account the day-to-day professional demands and business needs facing contractors across the state.

## 3. PDSC's contractor site visit process

A subcommittee of the Contractor Advisory Group, the Quality Assurance Task Force, assisted PDSC in developing a systematic process to review the organization, management and quality of services delivered by the commission's contractors. This contractor 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 all relevant stakeholders in a 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 deliberations among the site visit team's members, the team prepares a report to the contractor's director and PDSC's executive director outlining its observations and recommendations.

In addition to improving operations of the contractors subject to the site visits, the process is designed to improve the operations of other public defense contractors in Oregon by identifying best practices for managing and delivering public defense services and by sharing that information with other contractors across the state.<sup>12</sup>

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<sup>11</sup> The PDSC's report and plan for the Delivery of Services in Death Penalty Cases are on the agency's website: [www.opds.state.or.us](http://www.opds.state.or.us).

<sup>12</sup> The list of those best practices is attached as Appendix C.

Examples of best practices include regular and systematic evaluations of the contractors' attorneys and managers, independent boards of directors with relevant business and management expertise, and financial management practices that conform to applicable accounting standards. The site visit process provides the basis for the agency's Key Performance Measure 5 which measures the percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their service, which are identified by PDSC's site visit process.

As a result of PDSC's contractor site visit process, experienced public defense lawyers and managers as of the end of the 2005-2007 biennium had evaluated the operations and services of public defense contractors in Deschutes, Douglas, Clackamas, Lane, Linn, Lincoln, Jackson, Morrow, Multnomah, Umatilla, and Washington Counties. These contractors represent 54 percent of Oregon's public defense caseload.

### ***C. Funding Issues and the Development of Accurate, Reliable Caseload Projections.***

The 2005 Legislative Assembly approved a total budget of \$176,246,017 for PDSC in 2005-2007. As the biennium progressed, it became obvious that certain types of expenses (for criminal appeals, death penalty cases and certain categories of cost) were increasing at rates that would not permit the agency to meet its obligations without additional resources. Based on actual expenditures during the first 12 months of the 2005-07 biennium, projected expenditures for the biennium exceeded the funds in the commission's budget by \$7.9 million. As a result PDSC sought and received additional funds from the Emergency Board and the 2007 Legislative Assembly for the 2005-2007 biennium

Although some cost factors will continue to be beyond the agency's ability to predict, PDSC has developed the capacity to provide the Legislative Assembly with more accurate and reliable information about the demand for and cost of public defense services in Oregon. With the benefit of this information the Legislative Assembly will be better able in the future to avoid the kind of shortfall in public defense funding that led to the public safety crisis in 2003 and the need for a supplemental appropriation in 2007.<sup>13</sup>

PDSC determined that the caseload model, that had been used for decades to project future public defense expenditures and develop the state's public defense budget, was deeply flawed and had to be replaced.<sup>14</sup> PDSC has always had the capacity to project caseloads with a high degree of accuracy; however the traditional caseload model for

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<sup>13</sup> As noted above, that crisis, which resulted from special session legislative cuts in the state's public defense budget, caused interruptions in the delivery of public defense services and the prosecution of thousands of criminal cases throughout the state and created a threat to the public safety of all Oregonians.

<sup>14</sup> PDSC's "Attachment to Emergency Board Letter" dated August 18, 2006, which describes the flaws in the "caseload model" in more detail, is attached in Appendix D.

projecting the demand for and cost of public defense services underestimated necessary funding levels because (a) contrary to the assumption underlying the caseload model, the number of criminal appeals funded from PDSC's budget did not remain proportional to the trial-level criminal caseload, (b) protracted litigation and appeals in death penalty cases from previous biennia continued to require funding from the current biennium; and (c) some categories of costs, such as increases in professional fees for necessary forensic experts and mileage expenses, as well as a rapidly increasing need for interpreters, increased well beyond the state's standard 2.4% inflationary adjustment provided in PDSC's 2005-2007 budget.

By replacing the caseload model with a projection system that accounts for these dynamics, the commission was able to present the Legislative Assembly with a more accurate and reliable budget proposal for the 2007-2009 biennium.

PDSC can also now provide the Legislative Assembly with accurate estimates of the demand for and cost of public defense services that will arise as a result of laws creating new crimes or increasing criminal penalties. For example, House Bill 3511 or Jessica's Law, which was enacted during a Special Session of the legislature in 2006, increases the mandatory minimum sentence from 100 months to 300 months (the equivalent of a murder sentence) for adult offenders sentenced for certain sex and kidnapping offenses involving a victim under the age of 12. PDSC heard testimony at its public meetings that Jessica's Law cases are much more complex than murder cases due to the fact that these cases often include allegations of multiple incidents or multiple victims; that defendants are more likely to go to trial; that there will be a greater reliance on psychological evidence; and that they are more difficult to settle before trial even when settlement may be the most appropriate option for a defendant under the circumstances of the case. The commission submitted a fiscal impact statement indicating that the cost of defense representation in these cases would likely fall between the cost of murder cases and three times the cost of other Measure 11 cases.

Based on its investigations and evaluations across the state, PDSC advised the Legislative Assembly during its budget hearings in the 2007 session that the supply of qualified attorneys willing to deliver public defense services in Oregon was no longer sufficient to meet the state's demand for those services – at least at the rates of compensation the commission was able to pay during the 2005-2007 biennium. For example, since 1991, PDSC's guideline rate for hourly paid attorneys in non-death penalty cases had been \$40 per hour. As a result, it had become increasingly difficult to find qualified attorneys willing to handle public defense cases. In counties where there are a limited number of qualified attorneys, PDSC had been forced to approve rates in excess of the \$40 per hour guideline rate for Measure 11 and murder cases. Without such rate increases, the commission would have been increasingly unable to provide qualified counsel for serious criminal cases and, without defense counsel, these cases cannot be prosecuted.

In the course of its investigations, evaluations and administration of contracts during the 2005-07 biennium, PDSC found that increasing numbers of qualified attorneys were

unwilling to handle any public defense cases at prevailing rates of compensation. Without additional funds in PDSC's budget to increase these rates, the commission expected to face critical shortfalls in the supply of public defense attorneys during the 2007-09 biennium, particularly in less populous areas of the state where the supply of lawyers is already limited.

During the 2007 legislative session, PDSC was partially successful in its effort to obtain additional funding for public defense for the 2007-2009 biennium.

Only a portion of PDSC's policy packages were approved but, in recognition of the important need to address some structural issues in the PDSC budget, the Co-Chairs of Ways and Means amended the essential budget level to include an inflationary factor more accurately predictive of the increased costs of providing legal services and aligned PDSC's appellate division budget with that of the Department of Justice by adding an essential budget level adjustment for appellate caseload growth. In addition the Co-Chairs approved an additional \$0.8 million to raise the hourly rate for the first time in sixteen years from \$40 to \$45 for non death penalty cases and from \$55 to \$60 for death penalty cases. At the conclusion of the PDSC budget presentation many members of the Public Safety Subcommittee expressed concern about the underfunding of public defense and the challenges that PDSC will face in the next biennium in trying to retain an adequate supply of contractors and hourly rate attorneys. Subcommittee members committed a total of \$1.9 million in subcommittee discretionary funds to supplement the PDSC budget. PDSC was directed to use half of the supplemental appropriation to establish a four-attorney juvenile appellate section within the Legal Services Division. PDSC has directed that the balance of those funds be used to maintain essential services throughout the state. In some areas of the state that will mean compensating attorneys for mileage when they are needed to provide services in other parts of the state. In other parts of the state it will mean increasing compensation for attorneys in some offices in order to permit them to retain a sufficient supply of experienced lawyers to manage the caseload and, in still others it will mean paying for the use of paralegals to perform functions that lawyers would otherwise need to perform. such as attending some Citizen Review Board hearings in juvenile dependency cases.

Despite the increase, as PDSC reported to the Public Safety Subcommittee in its budget hearings, a budget shortfall may occur during the 2007-2009 biennium. PDSC believes that it will have to increase its hourly rates beyond \$45 and \$60 to attract an adequate number of attorneys to handle cases in some areas of the state and for some categories of cases. In addition, it anticipates difficulty negotiating contracts for certain case-types, such as death penalty post conviction relief cases, without significant increases in rates. While PDSC sought funding that would have allowed it to increase compensation to full-time public defenders in an amount that would have given them parity with district attorneys in their counties, the PDSC budget provided funding to get them only one sixth of the way to parity, assuming that the commission determined that funds should be allocated for that purpose.

PDSC met in August to identify budget priorities for the 2007-2009 biennium and approved an increase in the hourly rates for attorneys and investigators.<sup>15</sup> It also approved a 3.1% inflationary adjustment for all of its contractors and directed the Contract and Business Services Division to use the balance of the additional funds allocated by the 2007 Legislature to maintain the capacity of the public defense system and improve the quality of the services provided.<sup>16</sup> The strategies needed to maintain the system's capacity will involve careful analysis of the individual needs of contractors struggling with an inability to attract and retain qualified attorneys. In some areas rate disparities with prosecutor offices may account for the drain in attorneys, in others overwhelming caseloads may be causing experienced attorneys to seek other opportunities. CBS will work with its providers to identify and address these issues in its contract negotiations for contracts beginning in January 2008.

PDSC will of course take all cost-saving measures possible and will seek to fulfill its statutory obligations within its approved budget. But, if all external factors remain the same and the demand for and cost of public defense services increase as anticipated, PDSC will need to request additional funds either from the Emergency Board or from the 2008 Legislative Assembly.

### **Conclusion**

Building on PDSC's accomplishments and initiatives since assuming full responsibility for administering Oregon's public defense system, and using its Key Performance Measures as a guide,<sup>17</sup> 2005-2007 was the biennium when the commission realized its potential as the effective statewide administrator of an integrated public defense system. PDSC can now assure the Legislature that the structure and operation of Oregon's public defense system continues to be reviewed, evaluated and, when necessary, reorganized, and that the system will be continuously subject to the commission's quality assurance processes in order to ensure the quality and cost-efficiency of public defense services in the state. In addition, the commission now has the knowledge and capacity to provide the Legislative Assembly with reliable information about the demand for and cost of public defense services and about the level of funding necessary to ensure the continuing operation of a state public defense system, which is essential to the effectiveness of Oregon's justice system and the safety of all Oregonians.

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<sup>15</sup> Attorney hourly rates were increased from \$40 and \$55 to \$45 and \$60 as indicated. Rates for investigators were increased from \$25 and \$34 to \$28 and \$39 per hour. The commission became aware during its hearings on death penalty representation that there is an inadequate supply of mitigation investigators in Oregon since these investigators are able to work in the federal system or in other states at rates nearly double those paid in Oregon. The additional \$5 per hour may or may not be adequate to address this shortage.

<sup>16</sup> PDSC was directed by the 2007 Legislative Assembly to review its key performance measures. Maintaining the capacity of the system and improving the quality of representation are critical functions of the agency that must be addressed in any meaningful measures.

<sup>17</sup> PDSC will be adding to and amending its performance measures during the legislative interim.

The PDSC looks forward to meeting the challenges and providing the leadership and direction essential to a healthy, effective, cost-efficient public defense system in Oregon.

## **PUBLIC DEFENSE SERVICES COMMISSION**

### **MEMBERS**

Barnes H. Ellis, Chair  
Partner, Stoel Rives LLP

Shaun S. McCrea, Vice-Chair  
Partner, McCrea PC

Chief Justice Paul J. De Muniz, Ex-Officio Permanent Member

Henry H. Lazenby, Jr.  
Lazenby & Associates

John R. Potter  
Executive Director, Oregon Criminal Defense Lawyers Association

Janet C. Stevens  
Co-Editor, Bend Bulletin

Michael R. Greenfield  
Management Consultant

# Attachment 5

# **PUBLIC DEFENSE SERVICES COMMISSION**

## **The Executive Director's Annual Report (December 2007)**

### Introduction

2007 was a year of transition for the Public Defense Services Commission (PDSC) and for its administrative agency, the Office of Public Defense Services (OPDS). A new executive director had been appointed in September of 2006 after the resignation of the agency's initial director to accept another position. Fortunately, the agency's mission and direction had been securely established and achievement of many of the goals and strategies outlined in PDSC's 2005-2007 strategic plan permitted the agency to identify new goals and strategies in its 2007-2009 plan.<sup>1</sup>

It was also a year of growth for the agency. The 2007 Legislature approved a budget for PDSC which allowed it to increase the hourly rates for attorneys and investigators for the first time in sixteen years and permitted it to make long overdue adjustments to case rates for contractors. In addition, twelve new positions were approved in the Legal Services Division and significant reorganization of that division and of OPDS administrative operations were necessary to make the most effective use of those positions.

The Commission lost one of its original members when Commissioner Jim Brown resigned, but gained a new member, Commissioner Elizabeth Welch, who brings to the commission many years of experience as a Circuit Court judge and as the Chief Family Law judge in Multnomah County, as well her experience as a former deputy district attorney.

This report summarizes the major challenges and accomplishments of PDSC in 2007.

### PDSC's Challenges and Accomplishments in 2007

#### 1. Obtaining a Budget for 2007-2009

Prior to the beginning of the 2007 Legislative Session, meetings were held with the Governor's staff and a number of key legislators regarding the PDSC budget request for 2007-2009.

The 2007 session was convened on January 8, 2007 and adjourned on June 28, 2007. On March 20, 2007, OPDS made a presentation to the Natural Resources Subcommittee of the Joint Ways and Means Committee in support of

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<sup>1</sup> A copy of PDSC's Strategic Plan for 2007-2009 is attached as Exhibit A.

supplemental funding for the 2005-2007 biennium,<sup>2</sup> which PDSC had requested from the 2005 –2007 Emergency Board.

On January 24, 2007 after an introduction by Chief Justice Paul J. De Muniz, PDSC chair Barnes Ellis opened the agency's initial presentation to the Public Safety Subcommittee on its 2007-2009 budget request. The Chief Justice, Chair Ellis and OPDS Executive Director Ingrid Swenson described the history of public defense funding in Oregon, the structure of OPDS, the clients served by the office and some of the quality and cost efficiency initiatives undertaken by PDSC (described in detail later in this report). The Subcommittee was also advised that in later budget hearings it would hear why a new caseload projection model was needed and why OPDS could well experience a shortage of contractors available to handle the caseload in the next biennium unless a mandated caseload adjustment were approved and at least some portion of the agency's policy packages were funded.<sup>3</sup>

The chair and the members<sup>4</sup> of the Public Safety Subcommittee were knowledgeable, concerned, and attentive to the testimony and information provided. Many of the members had significant legislative experience and knowledge of criminal justice issues. They clearly understood the role of public defense in the public safety system and the need to fund it adequately for the benefit of the entire system.

After the initial budget presentation in January, PDSC returned to the Public Safety Subcommittee for a three-day detailed presentation on April 23 – 25. The first day involved discussion of trial level representation, the second day appellate representation, and the third day the operation of OPDS. On each day the presenters addressed key performance measures, quality and efficiency initiatives and policy option packages related to the function under review. Invited testimony concluded the presentations on each of the three days. On the first day the subcommittee heard about the number and types of cases handled at the trial level, who provides representation in these cases and what the key budget drivers are for trial level representation, namely, caseload growth and declining real income for contractors and hourly rate attorneys. The subcommittee was informed that the entire system was in jeopardy with the pending retirement of the generation of attorneys who had built the system, with

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<sup>2</sup> The Emergency Board allocated a total of \$6,871,375 from the Emergency Fund in September and December 2006. An additional \$1,057,517 was deferred to the 2007 legislative session and appropriated to PDSC in May of 2007 as part of Senate Bill 5545.

<sup>3</sup> PDSC's policy option packages would have brought public defender salaries in line with district attorney salaries, would have increased the rate for hourly paid attorneys and investigators, would have brought appellate attorney compensation rates in line with their Department of Justice counterparts and would have established a juvenile dependency appellate unit and a post-conviction unit in its Legal Services Division.

<sup>4</sup> Rep. Chip Shields chaired the subcommittee; Sen. Ben Westlund served as the Vice Chair. Other members were Senators Kate Brown, Ginny Burdick, David Nelson and Jackie Winters and Representatives Jeff Barker, Kevin Cameron, Bruce Hanna and Nancy Nathanson.

caseloads significantly exceeding national standards and with contract offices unable to attract and retain a sufficient number of attorneys to manage their caseloads. The subcommittee was advised that, while the under-funding of the defense function had been chronic and could not be addressed in a single session of the legislature, a substantial “down payment” was needed in 2007 in order to keep the system viable. The subcommittee then heard from Washington County District Attorney Bob Hermann about the critical role played by public defense providers and the importance of having skilled, experienced attorneys to do the work. Public defense contractor Gordon Mallon described the challenges of attempting to attract defense attorneys to remote areas of the state and his concern that he might not be able to continue handling public defense cases at existing rates of compensation. Professor Stephen Kanter talked about the importance of quality representation to the promotion of justice in the state, and the need for all components of the system to be adequately funded. Maren Furlong, an attorney with the Crabtree & Rahmsdorff public defender office in Bend, Oregon, told subcommittee members about the passion she has for her work, about the large debt she carries for her law school education, and about the high cost of living in Deschutes County. She explained that she could only do this work because she and her husband and children resided with her parents.

On the second day of the subcommittee presentation, the work of the Legal Services Division was described, including how an appeal is filed, how the assigned attorney reviews the case for viable issues and decides whether or not to file a merit brief. The agency’s backlog of cases awaiting briefing was discussed and its efforts to reduce the backlog in compliance with OPDS’s Key Performance Measure No. 1. The subcommittee was advised that the agency’s budget proposal included an essential budget level mandated caseload adjustment for its appellate caseload that, if approved, would allow the division to keep pace with caseload growth in the same way the Department of Justice has. It was also noted that despite the fact that LSD and DOJ attorneys do essentially the same work, LSD attorneys’ salaries would have to be increased by 21 to 34% in order for them to be comparable to the salaries of their DOJ counterparts. Appellate cases not handled by LSD, and a policy package proposal to create a juvenile dependency appellate section were also described to the subcommittee. Finally, the post conviction relief process was outlined and a policy option package that would have created a post conviction relief unit at OPDS was described. At the conclusion of this presentation, the subcommittee heard additional testimony from invited witnesses. Chief Judge David Brewer of the Oregon Court of Appeals described the quality of representation and administration provided by the Legal Services Division and the need for a juvenile appellate section. Patrick Birmingham, an attorney in private practice in Portland, discussed the cost of doing business for criminal defense attorneys and the inadequacy of compensation being provided to public defense attorneys. John Connors, the Director of the Multnomah County office of the Metropolitan Public Defender, Inc. described the difficulty his office has had in retaining

qualified attorneys when the office cannot compete with salaries paid by the district attorney's office and when caseloads are unreasonably high.

On the final day of the hearings, the subcommittee was informed about the contracting process and about contractors' indications in the prior cycle that they would not be able to continue providing services for another two-year period without a significant increase in compensation. Non-routine expenses were also discussed, including the process for reviewing requests for such funds.

The agency's quality assurance efforts were described in detail and additional witnesses testified. Brandon Mayfield talked about the critical role of counsel, Multnomah County District Attorney Michael Schrunck spoke about the benefits to the public safety system of adequately compensated defenders and Jack Morris and Angel Lopez discussed the challenges faced by contract providers attempting to compete with private firms for skilled attorneys when PDSC's case rates are barely sufficient to cover the overhead of the firm.

At the work session on PDSC's budget almost every member of the subcommittee noted the need for increased funding and expressed the hope that adequate funds would be made available in future sessions, if not the 2007 session. The subcommittee chair was successful in persuading the co-chairs to add \$856,302 to their budget amount in order to increase the hourly rates for attorneys to \$45 and \$60 and to get public defenders one sixth of the way to parity with their district attorney counterparts.

In addition, in a separate budget bill, subcommittee members appropriated an additional \$1.9 million in subcommittee funds to public defense, \$958,926 of which was directed at the creation of a juvenile appellate section within LSD.

OPDS's budget presentation was the result of extensive consultation within OPDS, with OPDS's contractors, with the Oregon Criminal Defense Lawyers Association, with representatives of the Oregon State Bar and with numerous legislators.

It is certainly hoped that OPDS can continue to work closely with legislators and others to make certain that the following principles are not lost on future legislatures:

1. Public defense is a key component of the public safety system.
2. Public defense providers cannot perform their constitutionally mandated function without adequate compensation.
3. Excessive caseloads must be reduced if public defense clients are to be properly served.
4. PDSC is a performance based agency that can be relied upon to provide high quality, cost effective services.

## 2. Major Achievements by OPDS's Contract and Business Services Division

(a) Working with the Chief Judge of the Court of Appeals and with a committee he established to improve appellate practice in juvenile dependency cases, Kathryn Aylward, the Director of CBS, designed a process for having OPDS prepare and file the notice of appeal in juvenile dependency cases. In the past, the notice of appeal was not always filed within the statutory time frame due to confusion about who would be appointed to handle the appeal and whether the appellate lawyer or the trial lawyer would file the notice.

(b) OPDS continued to integrate the functions of its two divisions and created an Operations Manager position to manage the facility, equipment and supplies. The creation of this position will eliminate the need for each division to manage its portion of the facility independently and will free up some of the Division Director's time, allowing her to direct her attention to other critical functions. The Operations Manager supervises a staff of two receptionists/office specialists. One of these staff members is located at the main level entry to the office and greets the public as well as answers the phone. It is no longer necessary for someone conducting business with the agency to ring a bell and follow written instructions in order to have contact with OPDS staff. The current receptionist is bi-lingual in English and Spanish.

The employee who handles the agency's accounting function also serves as the human resources manager and the office safety coordinator. She works closely with the staff of both divisions.

(c) After lengthy negotiations with the owner of the building in which both of its divisions are located, OPDS was able to acquire sufficient new space to house the twelve additional positions approved by the legislature. The agency now occupies all of the first and second floors and a small portion of the basement area. A remodel of the first floor area allowed for the creation of a staff lunchroom. Previously, neither division had an area suitable for use as a lunchroom. With a common room accessible to staff in both divisions it is hoped that they will have more opportunity to interact.

(d) After PDSC's 2007-09 budget received final legislative approval, the Commission met in August of 2007 for its annual retreat and identified budget priorities for contracts beginning in January of 2008. Thereafter CBS staff prepared and issued a request for proposals based on the Commission's funding priorities. With the two goals of sustaining Oregon's public defense system in the long term and assuring the availability of quality providers for the next biennium, CBS will be

recommending that the Commission approve over 90 separate contracts. These recommended contracts represent OPDS's best effort to meet its statutory obligation to maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice. Efforts were made in all cases to address the needs that had been identified in the course of the Commission's structural reviews.

- (e) Business Service Manager, Lorrie Railey, and CBS staff continued to receive very positive reviews by PDSC's contractors and providers for timely, courteous service. The division met and exceeded Key Performance Measures relating to its responsibilities.

### 3. Major Achievements of OPDS's Legal Services Division

- (a) Addressing the Appellate Backlog. Despite the huge influx of cases after the Blakely and Crawford decisions, LSD is on target to eliminate its backlog as currently defined (opening brief filed no later than 210 days after settlement of the appellate record) within the next few months. Should it accomplish this long-sought goal, it could then reduce the 210-day period to a more reasonable time such as 180 days. Lessons learned from Blakely and Crawford about methods for efficiently processing a large number of appeals with similar issues are helping the division accommodate another influx of appeals after its successes in State v. Ice and State v. Raney.
- (b) LSD has undergone a major reorganization in order to integrate new positions approved by the Legislature in its criminal appellate section and to create a juvenile appellate section. The division's Chief Defender, Peter Gartlan, and Chief Deputy, Rebecca Duncan, had created an ambitious agenda for improving the functioning of the division but were needed on too many fronts to accomplish all of their objectives. Important goals, such as updating the attorney manual and instituting a measurement tool for gauging appellate workloads had to be postponed in order to meet the demands of the caseload and provide training for new staff members. Both of these highly regarded appellate lawyers were also unable to devote an adequate portion of their time to direct representation of clients. With the reorganization, the division has two additional chief deputies who will assume a portion of the administrative responsibilities. The creation of more senior attorney positions will provide additional support and supervision for the work of the attorneys. LSD was able to hire new attorneys from a pool of exceptionally well-qualified candidates, reflecting the growing esteem in which the work of the division is held in the criminal justice community. As part of the reorganization, an attorney has been

assigned to update the webpage and organize continuing legal education seminars as part of an ongoing effort to provide high quality training to its own attorneys and additional support to the trial bar. The division has also begun assigning more than one attorney to represent appellants in death penalty cases as recommended by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and in conformity with the Commission's Legal Representation Plan in Death Penalty Cases.

- (c) Creation of a New Juvenile Appellate Section. After integrating the new attorneys into its criminal appellate section, LSD is now ready to establish its juvenile appellate section. It is hoped that the new section will begin accepting cases early in 2008.
- (d) Legislative Measures. LSD proposed and received legislative approval of three measures. One made it clear that if a defendant had been found qualified for court-appointed counsel at the trial level, a subsequent finding of eligibility was not necessary in order to prepare a transcript of the proceedings at public expense for use in the appeal. The second measure clarified the law with respect to the time for filing a petition for post-conviction relief when a petition for certiorari has been filed. The third streamlined the parole appeal process by eliminating the requirement that an additional motion -- the motion for leave to proceed -- be litigated before an opening brief could be filed.

#### 4. Structural and Quality Improvement Initiatives

- (a) In 2007, the Commission reviewed the delivery of public defense services in three separate geographic areas and met in seven different locations throughout the state. It reviewed service delivery in Washington, Coos, Curry, Umatilla, Morrow, Union and Wallowa Counties.

It received testimony from judges, prosecutors, defense contractors and others regarding the challenges faced by public defense providers in various areas of the state. This information helped Commission members identify budget priorities that could help to address some of the critical needs of the public defense system.

The Commission also reviewed delivery of services in death penalty cases and, after hearing testimony from a law professor, two of the judges who regularly hear these cases, a Department of Justice representative and four attorneys who represent clients in these cases, the Commission approved adoption of a Legal Representation Plan for Death Penalty Cases and the creation of a death penalty resource

attorney position to address concerns raised at the hearings and to bring Oregon into compliance with the Guidelines issued by the American Bar Association.

- (b) During 2007, Quality Assurance Task Force site teams reviewed the quality of representation provided in four contract offices, the Metropolitan Public Defender Office in Portland, the Benton County Legal Defense Corporation in Corvallis, the Independent Defenders, Inc. in Clackamas County, and the Columbia County Consortium in St. Helens. Fourteen attorneys and other professionals from around the state volunteered to serve on these site teams coordinated by OPDS's General Counsel, Paul Levy. With the completion of these reviews, OPDS has now reviewed 29 of 63 providers who cover approximately 56 percent of the statewide caseload.
- (c) In December of 2007 OPDS undertook its first statewide survey of judges, prosecutors and other local juvenile and criminal court system representatives regarding the quality of representation being provided by OPDS's contractors. It is hoped that the results of this survey will allow OPDS to establish a baseline from which to measure the impact of policy and funding changes on the quality of representation statewide.

#### 5. Consultation and Collaboration within OPDS, with Providers and Others

- (a) The Executive Director meets regularly with the group of managers whom she has asked to serve on the agency's management team. In order to prepare a draft of the 2007-2009 PDSC Strategic Plan, the group participated in a retreat facilitated by Geoff Guilfooy who remains committed to supporting public defense with his organizational and management training skills. In addition to discussing the strategic plan the management team also prepared an initial draft of a revised organizational chart and outlined a manager evaluation process. The management team continues to discuss all important agency decisions.
- (b) The management team has now completed its first series of management evaluations using the process outlined at its earlier retreat. The first step in the process was to survey OPDS staff on job satisfaction and the performance of management. The survey results provided valuable information for the team member evaluations. In addition, the job satisfaction portion of the staff survey identified some critical issues to be addressed by management, primarily related to improving communication within the agency. As a result, the Executive Director will be scheduling quarterly meetings with staff to make sure that important information and decisions are shared with all and to

permit staff more opportunities for informal interaction. More frequent email updates from management will also be used to keep OPDS staff better informed about events and developments important to the office and to public defense. CBS already holds regular staff meetings and LSD will be initiating monthly staff meetings in the near future.

- (c) OPDS continues to receive invaluable input from contractors through a number of advisory groups and task forces. The Contractor Advisory Group, the Quality Assurance Task Force and the Death Penalty Peer Panel continue to meet on a regular basis. Other work groups have been convened to tackle particular problems or provide advice on specific issues. There are currently two such groups meeting. One is helping to craft a proposal to the Commission on a loan repayment assistance program and another is reviewing caseload and workload studies in order to determine whether to recommend a statewide workload analysis to the Commission.
- (d) Members of OPDS's management team and other staff members participate in many committees and workgroups in the criminal and juvenile justice systems.

### Conclusion

2007 was a year of change at OPDS. It was also a year of significant accomplishment. PDSC has a budget in place for the next biennium that will allow OPDS to better manage its appellate caseload and permit private providers to address some of their longstanding needs. Both divisions have been pursuing their individual and shared missions and have made significant progress. The Commission and OPDS continued their structural and quality reviews, and both PDSC's contractors and OPDS's staff continued to contribute their expertise and advice on policy issues affecting public defense in Oregon.

# Exhibit A

# Public Defense Services Commission's Strategic Plan for 2007-09

August 10, 2007

## ***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 a (a) visionary 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***

Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible and with support sufficient 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 Oregon and national standards of justice. PDSC strives to provide direct and contract legal services that meet prevailing standards of professional competence and promote the sound administration of justice in Oregon, while seeking opportunities for its capable and diverse employees and contractors to experience fulfilling careers and engagements in public defense service.
- **Cost-Efficiency** - PDSC is a responsible steward of taxpayer dollars and constantly seeks the most cost-efficient methods to deliver and administer

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 board of directors 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: 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; and the Contracts and Business Services Division (CBS), which administers the state's public defense contracting and payment systems and manages the operations of OPDS. Each division is headed by a chief operating officer—the Chief Defender at AD and the Contracts and Business Services Director at CBS—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. Accordingly, 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.

ORS 151.216 also 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 PDSC's representatives  OPDS's employees will:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- engage in open, rational and fair dealing with regard to all legal, contracting, and business services;
- address all requests for information and inquiries in a timely, professional, and courteous manner;
- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability.

## **Legislative Advocacy**

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

- providing information in response to requests from legislators or legislative staff;
- advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services in a manner consistent with the state and federal constitutions and state and national standards of justice and (b) the continuing availability of competent and dedicated public defense counsel; and
- informing legislators of (a) the fiscal impact on the public defense system of proposed legislation relevant to public defense and (b) any potential constitutional or other problems that might occur as the result of the enactment or implementation of such 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 jeopardize 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 2007-09**

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

***Strategy 1: In cooperation with the courts, criminal and juvenile justice agencies and state and local law enforcement authorities, and in collaboration with the Oregon State Bar, public defense attorneys and PDSC's contractors across the state, make budget presentations to the Legislative Assembly that communicate the need for adequate funding of public defense in the 2009-11 biennium and beyond.***

- A. PDSC's informational and budget presentations before the 2005 Legislative Assembly emphasized two points: (1) Oregon's criminal and juvenile justice systems are made up of separate but interrelated

functions that are performed by interdependent agencies, including courts, prosecutors, police, corrections and public defenders. Legislators were advised of the importance of balanced funding for these functions and agencies (e.g., cuts to public defense budgets prevent police, prosecutors and corrections officials from carrying out their law enforcement functions); and (2) Reductions in PDSC's budget would have had their greatest impact on public safety in rural areas of the state, where the supply of attorneys was already extremely limited and the impact on public safety of further cutbacks in legal services would therefore have been most pronounced.

- B. PDSC's presentations to the 2007 Legislative Assembly included discussion of the critical role of public defense in the public safety system but emphasized the urgent need to increase funding for public defense in order to prevent the imminent loss of key providers. Members of the Public Safety Subcommittee of the Joint Ways and Means Committee were advised that the caseload statewide continued to increase, that real income for contractors and hourly rate attorneys continued to decline, and that, increasingly, attorneys were refusing to take public defense cases and contractors were reporting that recruitment and retention of public defense attorneys were at record lows. At its final budget presentation before the Public Safety Subcommittee in May, 2007, PDSC presented testimony in support of adequate funding for public defense from justice officials across the state, including the Chief Justice, the Chief Judge of the Court of Appeals, two district attorneys, the Oregon State Bar, the Eugene Chief of Police, a law professor, a number of PDSC's providers and contract administrators and others, all of whom spoke either about the importance to public safety of adequate funding for public defense or the worsening circumstances of public defense providers and the potential loss of their services. OPDS received the help and support of the Oregon State Bar in clarifying its message and in advocating for adequate funding throughout the 2007 legislative session.

***Strategy 2: Develop interim strategy for continuing to build legislative support for adequate funding and notify legislative leadership of need for supplemental appropriation.***

- A. OPDS will work with public defense attorneys, district attorneys, the courts and OCDLA to create a strategy for providing key legislators with the opportunity to observe the work of public defense lawyers, district attorneys and judges in their local court systems and to become aware of the limits on the ability of the court and advocates to perform key functions without adequate resources.

- B. OPDS will work with the group of legislators that sponsored SB 411 in the 2007 session to seek legislation requiring adequate compensation and manageable caseloads for attorneys in juvenile cases.
- C. OPDS's Executive Director will meet with legislators throughout the interim to keep them informed of the work of public defense providers and the need for adequate funding of public defense.
- D. OPDS will closely monitor caseload growth and any increases in contract or hourly rates in order to be able to advise legislative leadership as early as possible of any need for supplemental funding from the Emergency Board or from the legislature during the 2008 session.

***Strategy 3: Develop a budget proposal for 2009-11 that builds on PDSC's six-year plan to ensure the long-term stability of the public defense system by addressing the three main challenges faced by the agency: (1) the need to attract and retain a well qualified group of public defense providers; (2) the need to improve the quality of representation, especially in juvenile and post-conviction relief cases; and (3) the need to reduce high caseloads.***

- A. In the 2007 Legislature, PDSC sought increases in the hourly rate for attorneys and investigators and the salaries of not-for-profit public defenders. A small increase in the hourly rate for attorneys was approved. PDSC also sought funding for a juvenile appellate unit and a post-conviction relief trial unit. The juvenile appellate unit was approved, and an additional eight new positions were provided to the Appellate Division. A policy package that would have provided for parity between Appellate Division attorneys and their Department of Justice counterparts, however, was not approved. In establishing its legislative priorities for 2009-11, PDSC will consider whether to seek funding for the unfunded portions of its 2007-09 policy packages.
- B. In addition, in 2009-11 PDSC will need to seek funding to permit it to reduce public defense caseloads to the levels recommended in national standards, as required by ORS 151.216. Testimony on SB 411 in the Senate Judiciary Committee during the 2007 session highlighted the need to reduce the caseloads of attorneys in juvenile dependency proceedings to permit those attorneys to provide higher quality representation. The committee was advised that significant overall savings could be realized in the cost of maintaining children in non-relative foster care if they and their parents received such representation in dependency proceedings. Caseloads in all categories of cases currently exceed recommended limits.

**Strategy 4: Develop and refine Performance Measurements that assure the Legislative Assembly that PDSC is managing state funds devoted to public defense cost-effectively.**

- A. PDSC presented its initial draft performance measures to the Joint Legislative Audit Committee (JLAC) in August 2004. The Committee directed PDSC to appear before the Joint Committee on the Judiciary in October and present additional draft performance measures for contract services to that committee for further input. These new draft measures were approved by the Joint Judiciary Committee at its October 2004 meeting. PDSC submitted its new and revised performance measures to JLAC in December 2004 and gained that Committee's final approval. However, PDSC assured JLAC that it would continue to develop and refine its performance measures.
- B. The 2007 Legislative Assembly approved PDSC's existing measures and added two new measures, one assessing customer satisfaction and the other, recommended for all boards and commissions, measuring best practices met by PDSC. In addition it recommended that PDSC review all of its measures during the interim and add "realistic but aggressive" targets.

Results of the strategies for obtaining an adequate budget for the 2007-2009 biennium: The Chief Justice's requested 2007-09 budget for PDSC was \$232.4 million which included an essential budget level of \$201.9 million and \$30.5 million in policy packages. The Governor's recommended budget for PDSC was \$212.7 million. The Chairs of the Joint Ways and Means Committee proposed the same funding level recommended by the Governor. In May, the Co-Chairs proposed that an additional \$0.9 million be added to PDSC's budget to increase the attorney hourly rates from \$40 and \$55 to \$45 and \$60. Public Safety Subcommittee members proposed, and the legislature ultimately endorsed, an additional \$1.9 million, for a total appropriation of \$215,489,928. Despite the fact that they were approving a budget level that was substantially higher than PDSC's essential budget level, almost all of the members of the subcommittee expressed concern about the adequacy of the recommended amount to address the needs of public defense providers.

*In a positive development for the Appellate Division, which appeared to reflect confidence in PDSC and its Appellate Division by legislative leadership, an essential budget level adjustment for caseload growth added eight new attorney positions to the division for representation in criminal appeals and four new attorney positions for representation in juvenile dependency/termination appeals. The additions represented a 50% increase in attorney positions for the division.*

## **Goal II: Assure the Quality of Public Defense Services.**

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

- A. OPDS's Quality Assurance Task Force established a site visit process in 2004 to monitor, evaluate and improve the management and operations of public defense contractors throughout the state. The first three visits in 2004, the four visits in 2005, the four visits in 2006 and the three visits thus far in 2007 have focused on larger providers or counties in which quality concerns have come to OPDS's attention. These site visits involve teams of experienced public defense attorneys and managers who volunteer two to three days of their time to conduct the visits to (1) survey relevant conditions in the contractor's local justice system, (2) interview criminal and juvenile justice stakeholders regarding the performance of the contractor, (3) interview the contractor's management and staff about the office's operations and (4) report to the manager of the office and OPDS's Executive Director and the Director of the Contract and Business Services Division on their findings and recommendations for improvements.
- B. Without disclosing the contents of individual site visit reports, PDSC's Executive Director or General Counsel reports to the Commission periodically on the general problems, accomplishments and best practices identified by the site visits. Progress on the adoption of best practices, such as systematic employee evaluations, active boards of directors or advisory boards with outside members and state-of-the-art case management and accounting practices, forms the basis for one of PDSC's performance measures of the public defense contracting system.
- C. OPDS and the Quality Assurance Task Force have agreed to complete four or five site visits during each year of the 2007-09 biennium. By the end of the calendar year 2007, 28 contractors with approximately 57 percent of the state's public defense caseload will have been visited and evaluated. OPDS measures the progress of this critical quality assurance process with Performance Measures 6 and 7.
- D. Reports of the Oregon State Bar's indigent defense task forces identified the need to improve the quality of juvenile defense services across the state. The quality of defense representation in juvenile cases is critical to the health and safety of Oregon's communities. The commission undertook a review of the delivery of services in juvenile dependency cases in the Spring and Summer of 2006. It concluded that (1) adequate state funding for public defense is essential to improving the quality of legal services in juvenile dependency cases in order to (a)

retain and recruit qualified attorneys and (b) reduce the excessive dependency caseloads of currently qualified attorneys; (2) increases in public defense funding for juvenile dependency cases must be accompanied by new or expanded specialty training programs; and (3) in accordance with OPDS's proposals to the Dependency Appeals Work Group, PDSC should propose a Budget Policy Package to the 2007 legislature that funds additional specialist appellate attorneys at OPDS's Legal Services Division to handle dependency appeals more efficiently and effectively.

A legislatively sponsored workgroup arrived at similar conclusions in the legislative interim and sponsored SB 411 during the 2007 session. SB 411 would have significantly increased compensation and decreased caseloads for juvenile dependency attorneys. Unfortunately, SB 411 was not funded. As noted above, however, the Legislature did approve the addition of four Appellate Division attorney positions for juvenile dependency/termination appeals. Among legislators who supported this addition there was an expectation that OPDS would use the new positions to improve the quality of representation at both the trial and appellate levels. One of the positions could be designated as a "resource attorney" position similar to the death penalty resource attorney position approved by the Commission in February of 2007.

In addition, in 2004 OPDS, in conjunction with other public and private organizations, formed a work group to (1) develop a juvenile law training curriculum, and (2) sponsor periodic trainings to supplement the training opportunities available from other CLE sponsors. The juvenile law training academy will present its third annual CLE event in October of 2007. For the first time this event will be directed at new attorneys for the state as well as for parents' and children's advocates.

The National Association of Counsel for Children has developed a juvenile attorney certification procedure that requires attorneys who wish to be certified as specialists in juvenile dependency practice to complete a curriculum and pass an examination. A number of state bar associations have permitted attorneys in their jurisdictions to be certified as specialists if they meet NACC standards. OPDS will explore with the Juvenile Section of the bar and any other interested groups or individuals, the possibility of creating a certification program in Oregon.

- E. 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 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 will prepare motions addressing legal issues common to most death penalty cases, will maintain a library and list serve for the benefit of death penalty attorneys, will create a list of experts and a brief bank, will be available to consult in cases, will coordinate training, and will perform other functions of assistance to counsel in death penalty cases.

- F. 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. OPDS conferred with its Contractor Advisory Group and 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 budget for 2005-07 to support a four-lawyer division of OPDS that specializes in PCR cases at the trial and appellate level. The package was not funded in 2005, nor was it funded in 2007 after PDSC again approved including it in its budget proposal. In the meantime, a number of steps have been taken in an effort to improve representation, 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 has approved the creation of a task force to establish performance standards for post-conviction relief cases, as it has done for criminal, juvenile and civil commitment cases. OPDS will participate in this work group and hope to create a product that can serve as a guide to good practice. If the Appellate Division is able 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 as part of a service delivery review of PCR representation whether to move some of the attorney positions in the criminal appellate section to a new PCR division or section.
- G. Over a period of approximately a year OPDS developed and PDSC has now 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 new court-appointment process in Lane County, the operation of the Appellate Division's appellate panel, and best practices from across the country.

- H. PDSC has established a formal complaint policy to permit OPDS to address complaints from clients and other interested parties about the quality and cost 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 the confidentiality of privileged information.

***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.***

- A. Following OPDS's investigation and review of the public defense services and service delivery systems in a county or judicial district, which includes input from public defense contractors and criminal and juvenile justice stakeholders and public safety officials in the county or district, PDSC will develop a "service delivery plan" for the locale. A service delivery plan (1) takes into account local conditions, practices and resources unique to the county or district, (2) outlines the structure and mission of the local delivery system and the roles and responsibilities of PDSC's local contractors, (3) proposes changes to improve the operation of the local 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 local service providers.
- B. PDSC's service delivery plans encourage practices and procedures in a county or judicial district that promote (1) technical assistance and administrative support for contractors in the area, (2) specialized training for local 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 legislative relations in the county or district.
- C. PDSC plans to visit the following counties during the remainder of 2007:

- 1) Coos and Curry Counties. In July of 2007, OPDS began its investigation of the conditions in Judicial District No. 15 in Coos and Curry Counties in preparation for PDSC's public hearing in Coos Bay in August.
- 2) Umatilla, Morrow, Union and Wallowa counties. Before the November 8th Commission meeting in Pendleton, OPDS will investigate the condition of the service delivery systems in Umatilla and Morrow Counties (Judicial District No. 6) and Union and Wallowa Counties (Judicial District No. 10). This service delivery planning process will give the Commission an opportunity to consider strategies to encourage the entry of new lawyers into public defense practice and the retention of experienced ones in rural counties with small urban centers. It will also allow the Commission to familiarize itself with the challenges faced by attorneys who practice regularly in multiple counties and courts.
- 3) In combination with completion of its service delivery plans in Benton, Lane, Lincoln and Linn Counties in 2004, in Multnomah, Marion, Yamhill and Klamath Counties in 2005, in Clatsop, Gilliam, Hood River, Sherman, Wasco and Wheeler Counties in 2006, and Washington County in early 2007, completion of the foregoing three plans will mean that, by the end of 2007, PDSC will have investigated and undertaken improvements in local public defense service delivery systems involving 35 public defense contractors who handle 73 percent of the state's public defense caseload. In addition PDSC will have investigated and undertaken improvements in two statewide areas of practice – juvenile dependency and delinquency cases and death penalty cases. In 2007-09 the Commission will be asked to review delivery of services in post-conviction relief and civil commitment/PSRB cases.

***Strategy 3: Encourage 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. The Executive Director will urge public defense contractors that don't already have them to establish boards of directors or advisory boards.
- B. OPDS plans to include a segment on boards of directors and advisory boards in its 2007 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: Explore and test the feasibility of incentives for the delivery of legal services in areas of the state with shortages of qualified public defense attorneys.***

- A. During its 2003 Retreat, PDSC identified a number of policies and practices to encourage public defense attorneys to practice in areas of the state experiencing a shortage of public defense services. Among the strategies which may be made available are the following:
  - 1) Identify and actively recruit defense attorneys in the offices of current contractors, who have approximately three to five years of experience and are interested in establishing law practices in underserved areas of the state;
  - 2) As a primary incentive, offer these attorneys four-year contracts with guaranteed caseloads, supplemented by appellate and PCR cases if necessary;
  - 3) Advocate for state and federal measures that provide for, or use public defense funds to provide for, the forgiveness of student loans and housing allowances as additional incentives;
  - 4) Recruit interested law students and, in cooperation with larger contractors' offices, provide apprenticeship training upon graduation, in exchange for a commitment to practice in underserved areas;
  - 5) Offer technical and administrative support for new offices in these areas; and
  - 6) Provide technical support through OPDS's Appellate Division.
- B. OPDS will continue to explore these and other incentives for public defense attorneys to practice in underserved areas of the state, and will evaluate the feasibility of such incentives when a particular need for additional services arises. OPDS should consider pilot projects or programs to establish incentives in Lincoln County, pursuant to the Commission's service Delivery Plan for that county, and in Clatsop County as indicated in the service delivery plan approved by the Commission in December of 2006, and, depending upon the findings of OPDS's investigation and the Commission's service delivery plan for

those counties, potentially in Coos, Curry, Umatilla, Morrow, Union and Wallowa Counties.

***Strategy 5: Continue efforts to improve the quality of AD's legal services and reduce the backlog of AD's appellate cases.***

- A. AD will implement new attorney caseload and performance standards and will publish new manuals governing the office practices and procedures of AD's management, attorneys, and support staff by June 2008.
- B. AD, with its eight new criminal appellate positions, will enhance its efforts to manage its caseload and measure its progress in accordance with Performance Measure 1.
- C. OPDS will upgrade and improve AD's databases.
- D. AD has undertaken a training program to improve the skills and efficiency of its secretaries and to standardize secretarial office practices, which will be completed by June 2008.

***Strategy 6: Establish a New Appellate Section to Handle Appeals in Juvenile Dependency and Termination Cases.***

- A. AD will create a new section that will handle juvenile appeals. Recruitment for the four attorneys to staff the section will occur in August and September of 2007 with the section to be in place and accepting appointments by October 2007.
- B. The juvenile appellate section (JAS) will also serve as a resource center for juvenile dependency lawyers at the trial level. JAS 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 7: Expand AD's capacity to support PDSC's contractors and the state's public defense system.***

- A. OPDS is enhancing its website, using the technical expertise of CBS and the legal expertise and research capacity of AD's appellate lawyers. The website should be fully updated and should include a periodic appellate case analysis by June 2008. AD will continue to submit articles to the OCDLA newsletter on a regular basis and will make its attorneys available for CLE presentations.

- B. By December 2007 AD will assume responsibility for (1) advising contractors on the legal merits and strategies of potential mandamus actions, (2) developing a collection of expert witness transcripts to assist public defense attorneys preparing for trial.

**Goal III: Strengthen the PDSC's Contracting Process.**

***Strategy 1: Develop a systematic process to evaluate the legal competency and ability of public defense providers prior to the time that PDSC's contracts are negotiated or renewed.***

- A. OPDS will develop a systematic process to ensure that professional judgments are made with regard to the legal competency and abilities of candidates for PDSC's contracts before those contracts are negotiated or renewed. OPDS advised the Public Safety Subcommittee of the Joint Ways and Means Committee in its budget hearings that it would be developing an instrument that could be used to survey judges, district attorneys and other juvenile and criminal justice system representatives regarding the quality of representation provided by public defense contractors and hourly rate attorneys. Survey results may be used in combination with other information about a contractor's performance to assess legal competency.
- B. PDSC will need to identify alternative legal counsel in the event that it determines available attorneys in a county or region are incapable of delivering legal services at a level of quality and cost-efficiency acceptable to the Commission.

***Strategy 2: Continue to improve the effectiveness and cost-efficiency of OPDS's administration of the contracting system.***

- A. In 2005 CBS adopted a new, secure and reliable method to send non-routine expense authorizations and denials by e-mail.
- B. By March 2008 OPDS will propose to PDSC (1) revisions in its current Confidentiality Policy to more clearly protect confidential communications involved in the administration of non-routine expenses and complaints concerning attorneys and (2) 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. OPDS will continue to measure its progress in improving the administration of the contracting system through application of

Performance Measures 2-5. (or amended measures with “realistic but aggressive” targets as recommended by the legislature).

**Goal IV: Strengthen Working Relationships with Public Defense Contractors.**

***Strategy 1: Continue to hold PDSC’s monthly meetings in various counties and regions across the state.***

***Strategy 2: Continue to meet and confer regularly with the Contractors Advisory Group.***

***Strategy 3: Administer CBS’s “customer satisfaction” survey of contractors in 2007 and 2008 to obtain feedback on how PDSC’s contracting processes and services are being administered.***

**Goal V: Continue to Strengthen the Management of OPDS.**

***Strategy 1: Refine and maintain OPDS’s performance-based employee evaluation system.***

***Strategy 2: Complete the Personnel Policy Manual and an employee handbook to set forth office policies and practices.***

***Strategy 3: Refine agency performance measures for direct and contract legal services.***

***Strategy 4: Continue to integrate relevant functions and operations of AD and CBS and exploit the benefits of their combined experience and expertise.***

**Goal VI: Respond to the Requests and Directives of the Oregon Legislature in a Timely and Effective Manner.**

***Strategy 1: PDSC will implement the two new performance measures required by the Legislature and will review and refine its existing measures.***

***Strategy 2: PDSC’s Executive Director will submit a biennial report as required by ORS 151.219 to the Legislature after the PDSC retreat in August of 2007.***

***Strategy 3: PDSC will participate as directed by the Legislature in an interim work group to establish a process to determine mandated caseload adjustments, including a forecast of caseload growth, for all public safety agencies.***

***Strategy 4: PDSC will continue to participate in a work group of public safety agencies which is seeking to identify a shared performance measure for all such agencies.***

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

***Strategy 1: Implement the recommendations of the Diversity Task Force to improve the recruitment of minority attorneys and staff and to increase the cultural competence of the state's public defense workforce by: (a) establishing a statewide directory of job openings in public defense offices across the state, (b) supporting proposed federal legislation that would create a loan forgiveness fund and considering the commitment of PDSC funds to the creation of such a fund, (c) developing a recruiting brochure that sets forth PDSC's commitment to equal opportunity and to increased diversity and cultural competence, (d) exploring the development of a training/mentoring program for new attorneys, and (e) administering a baseline survey of providers to determine the current level of diversity among Oregon providers.***

***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 a diversity training curriculum 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 a regular item on the agenda at PDSC's monthly meetings.***

# Attachment 6

LFO Revised Budget Form #107BF04c

**Public Defense Services Commission  
Annual Performance Progress Report (APPR)  
for Fiscal Year 2006-07**

Original Submission Date: September 25, 2007

| <b>2005-07<br/>KPM#</b> | <b>2005-07 Key Performance Measures (KPMs)</b>  | <b>Page #</b> |
|-------------------------|---|---------------|
| 1                       | APPELLATE CASE BACKLOG - Number of cases in the Legal Services Division backlog   | 4             |
| 2                       | FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing  | 6             |
| 3                       | PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days  | 7             |
| 4                       | REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days   | 8             |
| 5                       | EXPENSE COMPLAINTS – Percentage of complaints regarding payment of expenses determined to be founded  | 10            |
| 6                       | BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC’s site visit process and the process’s “360 degree” evaluations | 12            |
| 7                       | ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded  | 14            |
| 8                       | CUSTOMER SERVICE – Percent of customers rating their satisfaction with the agency’s customer service as “good” or “excellent”:<br>overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information                          | 16            |
| 9                       | BEST PRACTICES FOR BOARDS AND COMMISSIONS – Percentage of total best practices met by Commission  | 17            |

**PUBLIC DEFENSE SERVICES COMMISSION**

**I. EXECUTIVE SUMMARY**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

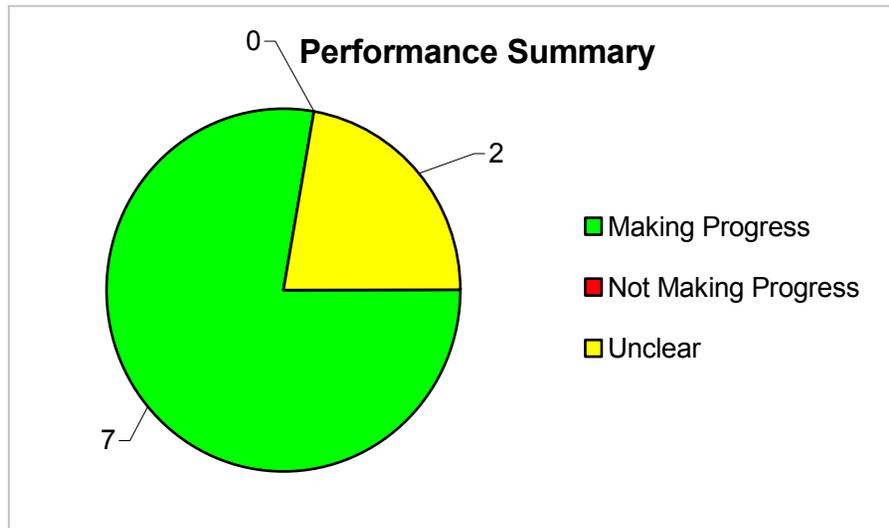
|                          |                       |
|--------------------------|-----------------------|
| Contact: Kathryn Aylward | Phone: (503) 378-2481 |
| Alternate: Peter Gartlan | Phone: (503) 378-2371 |

1. SCOPE OF REPORT

- Key performance measures address all agency programs.

2. THE OREGON CONTEXT

The Public Defense Services Commission is responsible for the provision of legal representation to financially eligible Oregonians who have a right to counsel under the US Constitution, Oregon’s Constitution and Oregon statutes. Legal representation is provided for individuals charged with a crime, for parents and children when the state has alleged abuse and neglect of children, and for people facing involuntary commitment due to mental health concerns. In addition, there is a right to counsel in a number of civil matters that could result in incarceration such as non-payment of child support, contempt of court, and violations of the Family Abuse Prevention Act. Finally, there is a statutory right to counsel for petitioners seeking post-conviction relief.



3. PERFORMANCE SUMMARY

The agency is making progress in seven of its nine Key Performance Measures. On KPM #8 and KPM #9 are new measures for which there is no data yet.

4. CHALLENGES

The primary challenge for the agency is that public defense in Oregon has been chronically underfunded. During fiscal year 2007, the hourly rate for an attorney appointed on a non-Aggravated Murder case was \$40 per hour (the rate established in 1991). Over time, the skills, abilities, and experience-level of the attorneys willing and able to work at that rate have steadily declined. Contractors who are paid a flat rate under a contract are assigning excessively high caseloads to their attorneys in order to cover operating expenses. This combination of being either over-worked or under-paid, and in most cases both, prevents attorneys in some cases from being able to provide an acceptable level of representation.

Another challenge for the agency is that workload is driven by a variety of factors outside the agency’s control. The enactment of laws that create new crimes or increase penalties for existing crimes impact the agency’s expenditures and workload. Federal requirements have shortened the timelines and increased the complexity of cases involving abuse and neglect of children. In 2004, the United States Supreme Court issued two landmark decisions

**PUBLIC DEFENSE SERVICES COMMISSION**

**I. EXECUTIVE SUMMARY**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

*(Crawford v. Washington and Blakely v. Washington)* that directly and dramatically impacted caseload. If additional funding is not provided to address such changes, the quality of representation is further eroded.

**5. RESOURCES USED AND EFFICIENCY**

The agency’s 2005-07 Legislatively Adopted Budget was \$176,246,017.

Two of our performance measures (KPM#3 and KPM#4) essentially measure how quickly the agency processes expense requests and fee statements. The agency was able to exceed targets for each of those measures due to technological improvements. Within existing resources, the agency has converted to electronic storage and retrieval of documents; has automated document production with “one click” database features; uses email instead of regular mail for over 70% of the attorney providers; and has developed efficient procedures for review of fee statements by multiple employees.

**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

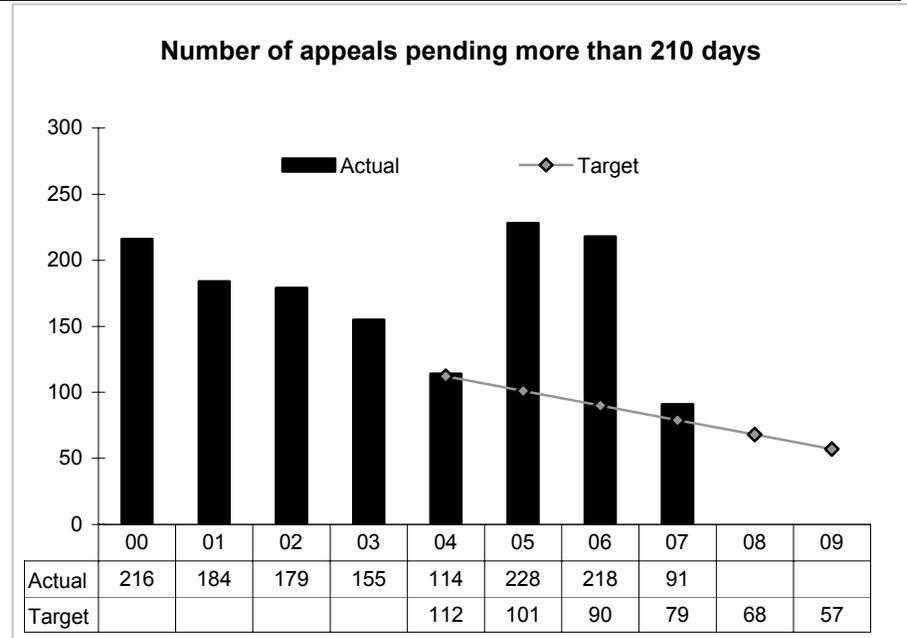
| KPM #1                | APPELLATE CASE BACKLOG<br>Number of cases in the Legal Services Division backlog | Measure since:<br>2004 |
|-----------------------|--|------------------------|
| <b>Goal</b>           | GOAL 1: Reduce delay in processing appeals.                                      |                        |
| <b>Oregon Context</b> | Mission Statement  |                        |
| <b>Data source</b>    | Case Management Database   |                        |
| <b>Owner</b>          | Legal Services Division, Peter Gartlan, (503) 378-2371                           |                        |

**1. OUR STRATEGY**

Our goal is to reduce the delay in processing appeals. If we are able to eliminate the current backlog of cases, then we will have significantly reduced the average time to file the opening brief. In addition, by reducing the number of open and active cases that Legal Services Division attorneys are currently responsible for, attorneys will be able to devote more time to addressing and resolving cases, instead of merely “managing” cases at the cost of case resolution.

**2. ABOUT THE TARGETS**

The Legal Services Division wants to file its opening brief in most cases within 210 days of record settlement. The 210-day target reflects several considerations. First, the agency considers it intolerable that an incarcerated individual must wait more than seven months before an appellate attorney is in a position to properly advise a client regarding the viability of an appellate challenge to his conviction and/or sentence. Second, past budget reductions in the Attorney General’s Office caused the Solicitor General to slow its briefing schedule in criminal cases. The Attorney General’s slowed pace meant additional delay in the appellate process, which means additional delay for the client. Third, federal courts have intervened in state appellate systems when the state system routinely takes two years to process criminal appeals. The 210-day target represents a reasonable attempt to meet the varying considerations.



**3. HOW WE ARE DOING**

The agency significantly reduced case backlog from June 2000 through June 2004, but the case backlog increased from June 2004 through June 2005, and remained high through June 2006. During fiscal year 2007, the agency reorganized its administration so that the Contract & Business Services Division would be responsible for all administrative functions of the agency. This allowed Legal Services Division managers and staff to concentrate their efforts on reducing the backlog. Although still not at target, fiscal year 2007 represents a significant improvement.

**4. HOW WE COMPARE**

The Legal Services Division compares extremely favorably with national standards for attorney productivity. In 2001, the US Department of Justice issued a report entitled “Keeping Defender Workloads Manageable” which contained national data indicating that an appellate attorney should be assigned a

## **PUBLIC DEFENSE SERVICES COMMISSION**

## **II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

maximum number of 25 appeals per year. By contrast, an agency attorney resolves an average of 37 cases per year, or approximately 50% more than the national average.

### **5. FACTORS AFFECTING RESULTS**

In 2004, the United States Supreme Court issued two landmark decisions (*Crawford v. Washington* and *Blakely v. Washington*) that directly impacted agency caseload. The *Blakely* decision rendered virtually every sentence imposed by state judges subject to challenge and dramatically increased the number of appeals statewide. These two court decisions account for the backlog “spike” in fiscal years 2005 and 2006, and therefore the agency was unable to meet its target for 2007.

### **6. WHAT NEEDS TO BE DONE**

The impact of the *Blakely* decision led to close cooperation among the Court of Appeals, the Attorney General, and the agency, resulting in the development of a streamlined appellate process for hundreds of cases. The parties identified “lead cases” whose resolution would control a category of cases, and developed a streamlined briefing format for the scores and hundreds of cases in each category. The same approach can be and has been used for similar issues.

The agency will continue to refine its evaluation system and performance measures to more closely measure attorney capacity and promote individual responsibility for case production.

For the 2007-09 biennium, the Legislature provided funding and position authority for eight additional attorneys to handle direct criminal appeals. After recruitment and training of these additional attorneys, the agency should be able to meet backlog reduction targets and keep up with the increasing caseload.

### **7. ABOUT THE DATA**

The data is derived from the agency’s case database. The strength of the data comes from historical comparison. Its weakness is attributable to the inherent difficulty in quantifying appellate caseloads. For example, one appellate case may have a 30-page record, while another case may have a record of several thousand pages. Or, one case with a 300-page record may present one simple issue, while another case with a 300-page record may present five novel or complex issues. Apart from the conventional method of estimating production (based on raw case numbers), the agency continues to refine an additional method to measure appellate workload, based on case type, transcript length, and issues presented.

**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #2                | FEE STATEMENTS REDUCED<br>Percentage of fee statements reduced due to incorrect billing | Measure since:<br>2004 |
|-----------------------|---|------------------------|
| <b>Goal</b>           | GOAL 2: Ensure cost-efficient service delivery  |                        |
| <b>Oregon Context</b> | Mission Statement   |                        |
| <b>Data source</b>    | Accounts Payable Database   |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481                |                        |

**1. OUR STRATEGY**

The agency carefully reviews all fee statements submitted to ensure that the correct amount is being paid for appropriate expenses.

**2. ABOUT THE TARGETS**

Because this was a new performance measure for which data had not previously been tracked, the agency estimated that 3% of the fee statements could be reduced through careful review. Reducing a higher percentage is better.

**3. HOW WE ARE DOING**

The agency exceeded the targets for all three years for which data is available.

**4. HOW WE COMPARE**

The agency has no data with which to compare these results.

**5. FACTORS AFFECTING RESULTS**

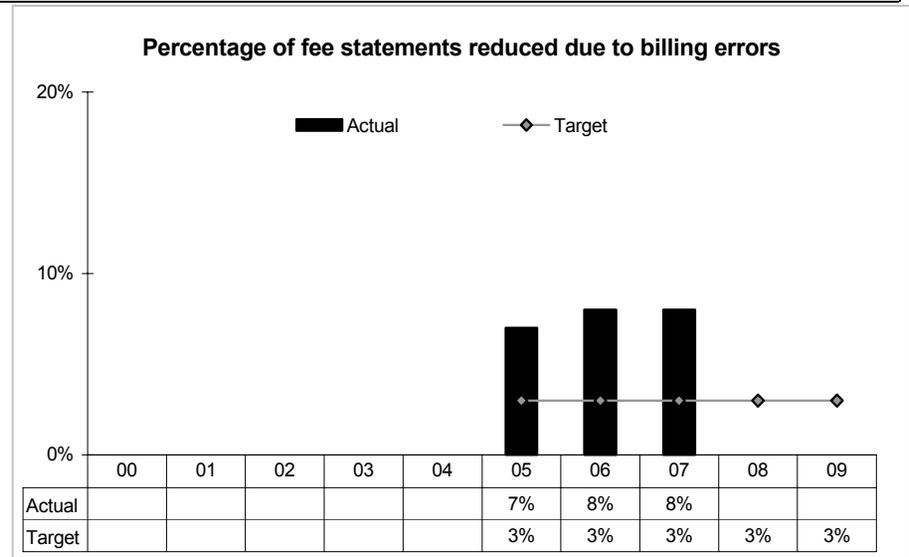
It appears that the initial targets are too low.

**6. WHAT NEEDS TO BE DONE**

The agency will work with the Progress Board and the Joint Legislative Audit Committee to determine whether this is a useful performance measure.

**7. ABOUT THE DATA**

The data is derived from the number of fee statements reduced as a percentage of the total number of fee statements received during the fiscal year (July 1 to June 30). Over time, the agency expects that the percentage will drop and then level off as service providers learn that the agency cannot pay for certain items or services and consequently know not to include such items in their fee statements.



**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #3                | PROCESSING FEE STATEMENTS<br>Percentage of fee statements processed within 10 business days | Measure since:<br>2004 |
|-----------------------|---|------------------------|
| <b>Goal</b>           | GOAL 2: Ensure cost-efficient service delivery  |                        |
| <b>Oregon Context</b> | Mission Statement   |                        |
| <b>Data source</b>    | Accounts Payable Database   |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481                    |                        |

**1. OUR STRATEGY**

The agency’s guideline rates paid to public defense providers are well below the rates many service providers normally charge. By assuring prompt and reliable payment, providers are more willing to work at reduced rates. This performance measure also sets an appropriate standard for employee performance as data is gathered for each employee as well as for the agency as a whole.

**2. ABOUT THE TARGETS**

The agency anticipated that as employees became more experienced and as the agency developed new procedures for processing fee statements, that there would be a gradual increase in processing speed.

**3. HOW WE ARE DOING**

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006 and 2007.

**4. HOW WE COMPARE**

The Oregon Department of Revenue averages 15 days to process an income tax refund which is comparable to the agency’s measure of 10 business days.

**5. FACTORS AFFECTING RESULTS**

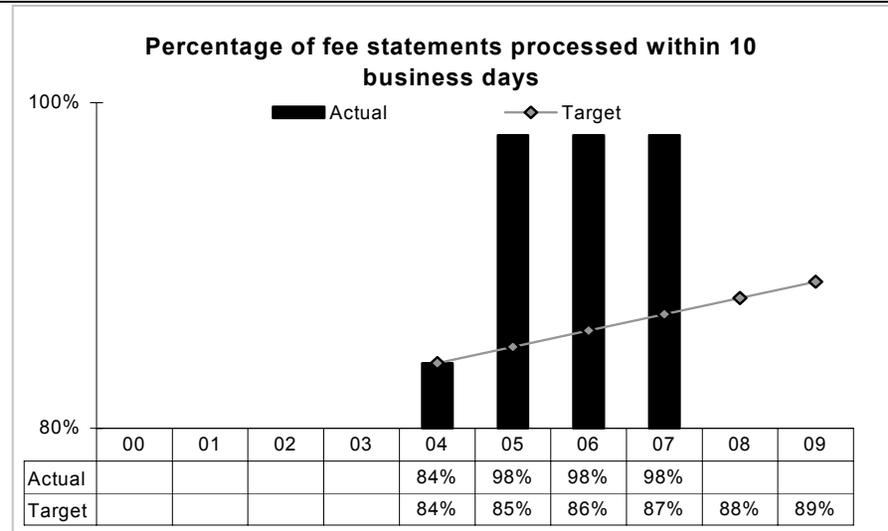
In late 2004, an agency employee developed a technological improvement that eliminated the need for duplicate data entry. Not only did this speed the processing of bills but it also eliminated the chance of error in the transfer of information between accounting systems. In 2007, the agency diverted staff time away from processing fee statements to assist the Legal Services Division in making better progress toward its performance measure (KPM #1). In spite of this reduction in staff time, the agency was still able to maintain the rate of fee statement processing.

**6. WHAT NEEDS TO BE DONE**

The agency will consider diverting further resources away from bill processing so that the agency can reach other Performance Measure targets.

**7. ABOUT THE DATA**

The data measures the number of business days between the date a fee statement is received by the agency to the date the payment is issued by R\*Stars (state accounting system).



Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #4                | REVIEWING EXPENSE REQUESTS<br>Percentage of non-routine expense requests reviewed within 5 business days | Measure since:<br>2004 |
|-----------------------|--|------------------------|
| <b>Goal</b>           | GOAL 2: Ensure cost-efficient service delivery; GOAL 3: Improve the quality of representation            |                        |
| <b>Oregon Context</b> | Mission Statement  |                        |
| <b>Data source</b>    | Non-Routine Expense Database   |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481                                 |                        |

**1. OUR STRATEGY**

This performance measure is designed to help the agency meet two of its goals: ensure cost-efficient service delivery, and improve the quality of representation. When a case requires the assistance of an investigator, forensic expert, or other expert service, the appointed attorney must receive pre-authorization from the agency to incur such expenses. In many instances, work begun as soon as possible after the alleged incident is more productive than if there is a delay in the approval process. For those requests that are denied, the attorney will have more time to pursue alternatives.

**2. ABOUT THE TARGETS**

Because the data had not previously been tracked, the agency did not have baseline data from which targets could be set. The agency assumed that there would be a gradual increase in the percentage of non-routine expense requests reviewed within 5 business days as we refined our procedures and as staff gained experience.

**3. HOW WE ARE DOING**

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006 and 2007.

**4. HOW WE COMPARE**

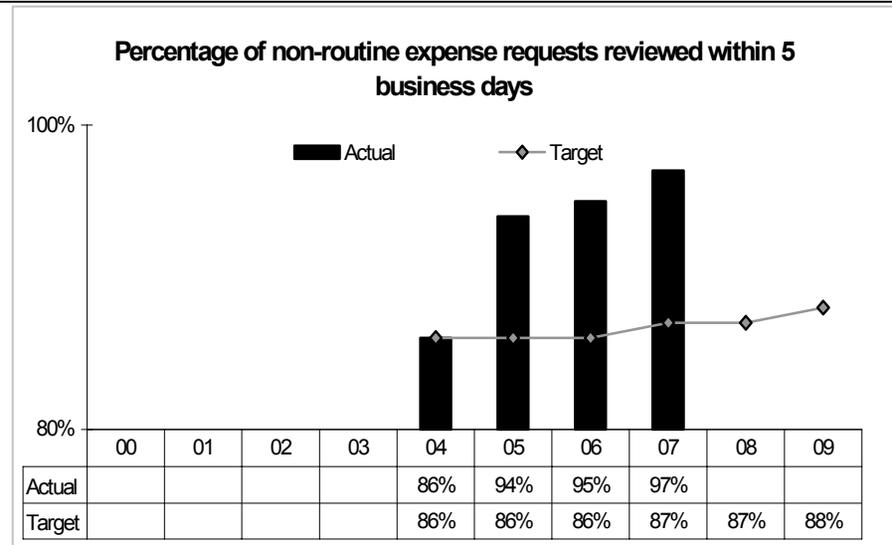
The agency is not aware of comparative data.

**5. FACTORS AFFECTING RESULTS**

The agency is fortunate to have dedicated employees, low absenteeism and a low turnover rate so that their expertise and familiarity with the process allows the agency to exceed targets.

**6. WHAT NEEDS TO BE DONE**

The agency will consider whether to set a “higher” goal, e.g. review 95% of the requests within *four* business days, or whether resources should be diverted to improve results in other areas.



**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

7. **ABOUT THE DATA**

The data measures the number of business days between the date a request is received by the agency to the date the response is issued (by email or regular mail).

**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #5                | EXPENSE COMPLAINTS<br>Percentage of complaints regarding payment of expenses determined to be founded | Measure since:<br>2004 |
|-----------------------|---|------------------------|
| <b>Goal</b>           | GOAL 2: Ensure cost-efficient service delivery  |                        |
| <b>Oregon Context</b> | Mission Statement   |                        |
| <b>Data source</b>    | Contact Database  |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481                              |                        |

**1. OUR STRATEGY**

The agency makes a determination as to whether an expense is “reasonable and necessary” for adequate legal representation of financially eligible Oregonians. The agency developed a complaint procedure and designed a database to track complaints from any source that questioned the agency’s decision to approve the expenditure.

**2. ABOUT THE TARGETS**

The assumption was that if a person made the effort to file a complaint, it was likely that the expenditure was of an unusual nature. Although the agency reviews and approves expenditure requests in advance, there may be times that in hindsight the agency would not have approved the expense. The agency hoped that fewer than 10% of the complaints would be founded.

**3. HOW WE ARE DOING**

Out of approximately 40,000 payments processed per year, the agency received three complaints regarding payment of expenses in fiscal year 2007. All were determined to be unfounded.

**4. HOW WE COMPARE**

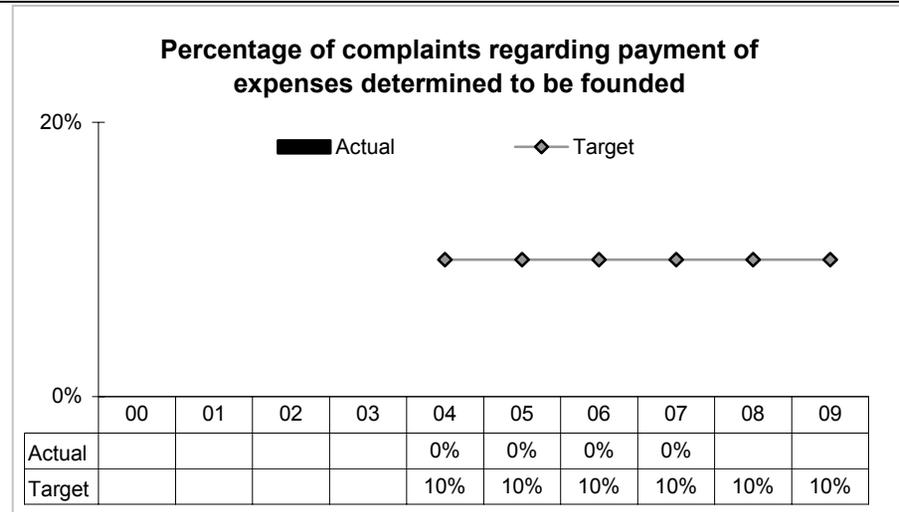
The agency is not aware of comparable data.

**5. FACTORS AFFECTING RESULTS**

Prior to July 1, 2003, expenditures were reviewed and processed by each circuit court. On July 1, 2003, the Public Defense Services Commission assumed responsibility for the entire public defense program. This centralization of expense approvals provides consistency and appropriate distribution of the agency’s limited resources, and likely accounts for the fact that so few complaints have been received.

**6. WHAT NEEDS TO BE DONE**

The agency may request that this performance measure be eliminated entirely or combined with performance measure #7 which addresses complaints about attorney performance.



Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

**7. ABOUT THE DATA**

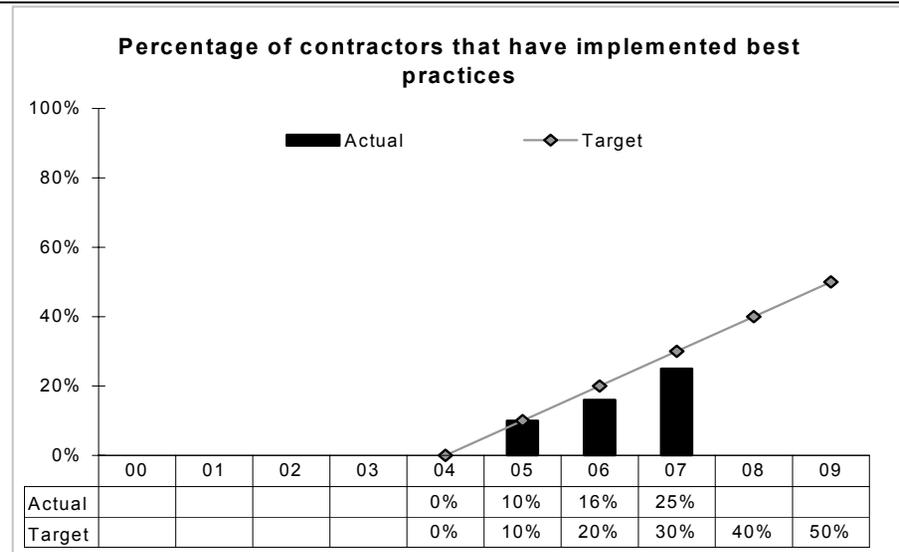
The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that there will likely always be a very small number of complaints and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. For example, if we receive one complaint during the year and it is founded, then our percentage would be 100%.

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

|                       |  |                            |
|-----------------------|--|----------------------------|
| <b>KPM #6</b>         | <b>BEST PRACTICES</b><br>Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their service, which are identified by PDSC’s site visit process and the process’s “360 degree” evaluations | <b>Measure since: 2004</b> |
| <b>Goal</b>           | GOAL 3: Improve the quality of representation  |                            |
| <b>Oregon Context</b> | Mission Statement  |                            |
| <b>Data source</b>    | Site Visit Reports and Contractor Follow-up Reports  |                            |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481   |                            |

**1. OUR STRATEGY**

The agency formed a Quality Assurance Task Force to assist in the development of a systematic process to review the organization, management and quality of services delivered by the agency’s contractors. This “contractor site visit process” 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 all relevant stakeholders in a 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 deliberations among the site visit team’s members, the team submits a report to the contractor and the agency outlining its observations and recommendations. In addition to improving the contractors subject to the site visits, the process is designed to improve the operations of public defense contractors in Oregon by identifying best practices for managing and delivering public defense services and by sharing that information with other contractors across the state.



**2. ABOUT THE TARGETS**

The targets were based on the agency conducting four site visits per year and on the assumption that most if not all contractors visited would adopt the recommended best practices.

**3. HOW WE ARE DOING**

Because the targets did not anticipate the time contractors would require for implementation, the straight-line projection over-simplifies what the agency would expect to see. Although we are not quite at target for 2007, the agency expects to meet or exceed targets in 2008 and 2009.

## **PUBLIC DEFENSE SERVICES COMMISSION**

## **II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

### **4. HOW WE COMPARE**

The agency is not aware of comparable data.

### **5. FACTORS AFFECTING RESULTS**

In many cases, contractors are unable to adopt a recommendation that involves additional cost or staff time for the contractor because the rates currently paid to contractors are so low that attorneys are burdened with excessive caseloads.

### **6. WHAT NEEDS TO BE DONE**

The agency will continue to conduct four site reviews per year. Although contractors are responding positively to the site review process, significant problems continue to exist; some have been addressed but many have not.

### **7. ABOUT THE DATA**

The agency initially planned to conduct site visits for contractors with ten or more attorneys. After the first three site visits, the agency realized that in some cases it was more efficient to gather information about all contractors within the county during the single visit. Therefore, the agency now plans to conduct site visits for all contractors other than sole practitioners. Contractors are asked to submit a report to the agency detailing the steps they have taken to implement the recommendations. The figures indicate the number of contractors who, as of June 30th of each year, have reported adoption of recommendations as a percentage of the total number of contractors.

**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #7                | ATTORNEY PERFORMANCE COMPLAINTS<br>Percentage of complaints regarding attorney performance determined to be founded | Measure since:<br>2004 |
|-----------------------|---|------------------------|
| <b>Goal</b>           | GOAL 3: Improve the quality of representation   |                        |
| <b>Oregon Context</b> | Mission Statement   |                        |
| <b>Data source</b>    | Contact Database  |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481  |                        |

**1. OUR STRATEGY**

The agency (through its small administrative office in Salem) funds the appointment of attorneys to over 170,000 cases per year all across Oregon. The information we receive through the complaint process allows the agency to know which attorneys may need additional training and/or resources, or whether to change the types of cases an attorney is allowed to accept, or to remove an attorney from court appointment lists altogether. As the agency works to improve the quality of representation through a variety of strategies, we would expect the number of founded complaints to decrease.

**2. ABOUT THE TARGETS**

Prior to July 1, 2003, no data was kept regarding complaints. The agency hoped that fewer than 10% of complaints regarding attorney performance would be founded.

**3. HOW WE ARE DOING**

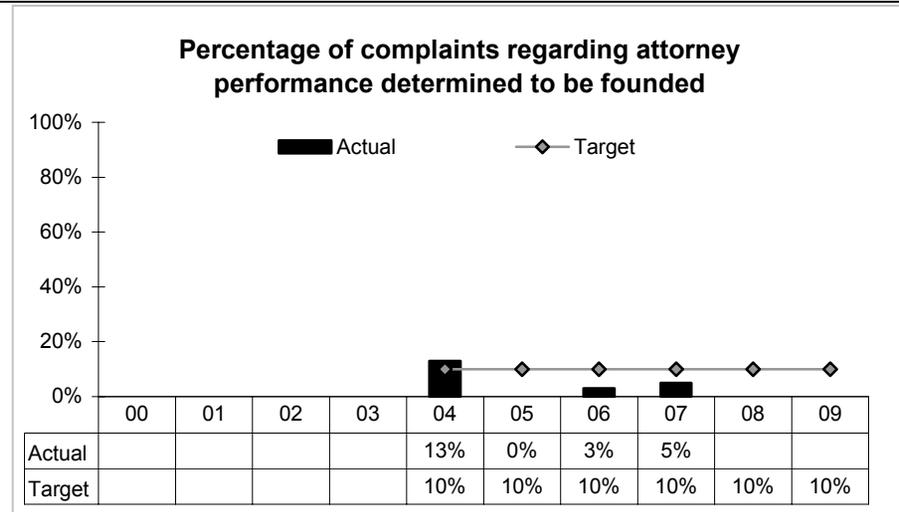
In fiscal year 2004 (the first year of operation for the agency), we did not meet the target; however, in 2005, 2006 and 2007, the agency exceeded expectations with fewer than 10% of the complaints received being founded.

**4. HOW WE COMPARE**

Most state agencies that receive complaints use a performance measure based on the average number of days to close a formal complaint and do not use the results of such investigations as a performance measure. Because our agency selects the attorneys who provide legal representation, the quality of their performance does provide feedback on our selection and oversight procedures.

**5. FACTORS AFFECTING RESULTS**

In 2004, the agency initiated a “site visit” process (see performance measure #6) in which volunteer teams of public defense attorneys and staff visit individual contractors to provide training, advice and management expertise. In early 2006, the agency required all public defense attorneys to re-apply for inclusion on hourly paid court appointment lists. Through that process, the agency attempted to select only the best-qualified attorneys.



Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

**6. WHAT NEEDS TO BE DONE**

The agency will continue to improve oversight and training of attorneys.

**7. ABOUT THE DATA**

The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that the total number of complaints received is quite small (59 in 2007) and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. Furthermore, the absence of complaints should not necessarily be seen as an indication that there are not problems with the quality of representation. In 2000, the Oregon State Bar Task Force on Indigent Defense concluded that representation in juvenile cases and post-conviction relief cases was inadequate. In 2005, the Secretary of State's Audits Division rated the quality of representation in those case types as "risk areas" for the agency.

**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #8                | CUSTOMER SERVICE<br>Percent of customers rating their satisfaction with the agency’s customer service as “good” or “excellent”: overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information | Measure since:<br>2007 |
|-----------------------|--|------------------------|
| <b>Goal</b>           | To provide greater accountability and results from government by delivering services that satisfy customers.   |                        |
| <b>Oregon Context</b> | To maintain and improve the following category ratings of agency service: overall quality of services, timeliness, accuracy, helpfulness, expertise and availability of information.   |                        |
| <b>Data source</b>    | Customer Service Surveys   |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481   |                        |

1. **OUR STRATEGY**  
The general strategy is to utilize feedback to address cited problems and improve the general level of service provided by the agency.
2. **ABOUT THE TARGETS**  
Targets were not set for 2007-09 as no baseline data was available upon which realistic targets could be based.
3. **HOW WE ARE DOING**  
Data not yet obtained.
4. **HOW WE COMPARE**  
No data for comparison.
5. **FACTORS AFFECTING RESULTS**  
No results yet.
6. **WHAT NEEDS TO BE DONE**  
Develop and administer survey.
7. **ABOUT OUR CUSTOMER SERVICE SURVEY**  
Not yet developed.



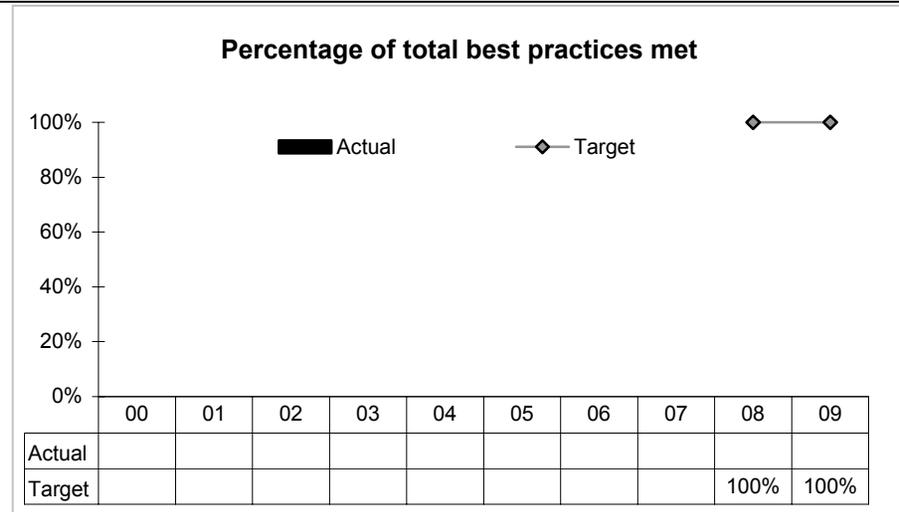
**PUBLIC DEFENSE SERVICES COMMISSION**

**II. KEY MEASURE ANALYSIS**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

| KPM #9                | BEST PRACTICES FOR BOARDS AND COMMISSIONS<br>Percentage of total best practices met by Commission | Measure since:<br>2007 |
|-----------------------|---|------------------------|
| <b>Goal</b>           | Best practices as a pathway to improved performance and accountability                            |                        |
| <b>Oregon Context</b> | Required KPM for all Oregon boards and commissions  |                        |
| <b>Data source</b>    | Commission agendas and minutes  |                        |
| <b>Owner</b>          | Contract and Business Services Division, Kathryn Aylward, (503) 378-2481                          |                        |

1. **OUR STRATEGY**  
The agency's commission currently follows most of the best practices and will implement the remainder during the next six months.
2. **ABOUT THE TARGETS**  
The agency anticipates meeting all of the best practices for boards and commissions by 2008.
3. **HOW WE ARE DOING**  
No data yet.
4. **HOW WE COMPARE**  
No data for comparison.
5. **FACTORS AFFECTING RESULTS**  
No results yet.
6. **WHAT NEEDS TO BE DONE**  
No data yet.
7. **ABOUT THE DATA**  
No data yet.



**PUBLIC DEFENSE SERVICES COMMISSION**

**III. USING PERFORMANCE DATA**

Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

|                          |                       |
|--------------------------|-----------------------|
| Contact: Kathryn Aylward | Phone: (503) 378-2481 |
| Alternate: Peter Gartlan | Phone: (503) 378-2371 |

| The following questions indicate how performance measures and data are used for management and accountability purposes.                                |  |
|--|--|
| <p><b>1 INCLUSIVITY</b><br/>Describe the involvement of the following groups in the development of the agency’s performance measures.</p>              | <ul style="list-style-type: none"> <li>• Staff: The agency’s Management Team drafted initial performance measures.</li> <li>• Elected Officials: The Joint Legislative Audit Committee and the interim Judiciary Committee assisted the agency in refining and finalizing its performance measures.</li> <li>• Stakeholders: Input was received from the agency’s Contractor Advisory Group comprised of public defense service providers.</li> <li>• Citizens: The agency developed, discussed and revised its performance measures during two public meetings.</li> </ul>  |
| <p><b>2 MANAGING FOR RESULTS</b><br/>How are performance measures used for management of the agency? What changes have been made in the past year?</p> | <p>KPM#1, KPM#3 and KPM#4 are used to measure an individual employee’s performance and indicate how workload should be redistributed.</p> <p>The agency re-allocated resources based on the results in order to make additional progress on KPM#1.</p>   |
| <p><b>3 STAFF TRAINING</b><br/>What training has staff had in the past year on the practical value and use of performance measures?</p>                | <p>The agency has advised staff of the goals outlined in the performance measures and staff is directly involved in the data collection and/or direct daily implementation of the measures. The performance measures serve as important tools for the agency’s managers as they identify and develop necessary staff skills as well as determine the best use of overall resources in order to attain the goals enumerated in the measures.</p>  |
| <p><b>4 COMMUNICATING RESULTS</b><br/>How does the agency communicate performance results to each of the following audiences and for what purpose?</p> | <ul style="list-style-type: none"> <li>• Staff: Graphs are posted on employee bulletin boards.</li> <li>• Elected Officials: The agency communicates results to the Legislature through the Progress Board reports and the Executive Director’s biennial report to the Legislature.</li> <li>• Stakeholders: Performance results are communicated through the agency’s website and the Progress Board’s website as well as being provided in the materials distributed at public meetings.</li> <li>• Citizens: Performance results are communicated to the public through the agency’s website and the Progress Board’s website.</li> </ul> |

# Attachment 7

## PDSC Procedure for Requesting Public Records

Effective January 1, 2008

1. All requests for public records must be in writing, and addressed to Lorrie Railey, Business Manager, Office of Public Defense Services, 1320 Capitol Street NE, Salem, OR 97301-7869.
2. The Office of Public Defense Services (OPDS) may charge fees for providing public records, and may require that fees be paid before public records are made available. When prepayment of fees is required, OPDS will provide an estimate of the cost for providing public records prior to processing a request.
3. Fees charged may reflect the actual costs of locating, compiling, redacting, making available for inspection, preparing a copy in paper or machine-readable format, and delivering public records.
4. In lieu of calculating the actual cost, OPDS may impose the following standard fees:
  - a. Making photocopies: \$0.25/ page;
  - b. Certification of Public Record, \$5.00/ record.
5. Requests for fee waivers must be in writing. OPDS will waive some or all of the cost of providing public records when:
  - a. It is more cost-effective for OPDS to waive fees, or
  - b. The requestor demonstrates that disclosure of the records is in the public interest because it affects the community or society as a whole and helps us meet our responsibilities to them.

# Attachment 8

## PROPOSED PDSC AGENDA FOR 2008

| <u>Meeting Date</u> | <u>Agenda Items</u>  | <u>Location</u>       |
|---------------------|--|-----------------------|
| January 10          | <ul style="list-style-type: none"> <li>•[Cancel meeting to prepare for February legislative session and February PDSC meeting]</li> </ul>  |                       |
| February 14         | <ul style="list-style-type: none"> <li>•Post conviction relief – service delivery review;</li> </ul>   | Salem                 |
| March 13            | <ul style="list-style-type: none"> <li>•Post conviction relief – continued review, development of service delivery plan</li> </ul>   | Salem                 |
| April 10            | <ul style="list-style-type: none"> <li>•Hold hearing on service delivery in Jackson and Josephine counties</li> </ul>  | Medford               |
| May 8               | <ul style="list-style-type: none"> <li>•Begin 09-11 budget discussions; review report on service delivery in Jackson and Josephine Counties; update on service delivery in Clatsop County and in juvenile cases</li> </ul> | Salem                 |
| June 12             | <ul style="list-style-type: none"> <li>•Meeting in conjunction with OCDLA annual conference. Discussion of budget priorities for 09-11 including testimony from contractors</li> </ul>                                     | Seventh Mt. Bend, Or. |
| July 10             | <ul style="list-style-type: none"> <li>•[Cancel meeting]</li> </ul>  |                       |
| August 14 - 15      | <ul style="list-style-type: none"> <li>•Hold hearing on service delivery in Harney/Malheur, Grant/Baker Counties; PDSC annual retreat</li> </ul>   | Baker City            |
| September 11        | <ul style="list-style-type: none"> <li>• Review draft report and discuss service delivery plan for Harney/Malheur Grant/Baker Counties; hold hearing on service delivery in dug court cases</li> </ul>                     | Salem                 |

|             |   |             |
|-------------|---|-------------|
| October 17  | <ul style="list-style-type: none"><li>• Continued hearing and discussion of service delivery in drug court cases.</li></ul>                                 | Welches     |
| November 13 | <ul style="list-style-type: none"><li>• Hold hearing on service delivery in Clackamas County; finalize service delivery plan for drug court cases</li></ul> | Oregon City |
| December 11 | <ul style="list-style-type: none"><li>• [Cancel to prepare for legislative session]</li></ul>   |             |